TRANSCRIPT OF RECORD

(30,416)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 451

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS, ET AL., APPELLANTS,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1923, of said Court, before the Honorable William S. Kenyon, Circuit Judge, and the Honorable Jacob Trieber and the Honorable David P. Dyer, District Judges.

Attest:
(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twentieth day of March, A. D. 1923, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of South Dakota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Chicago, Rock Island and Pacific Railway Company, a corporation, was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (Affidavit of service of Citation.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, Rock Island and Pacific Railway Company, a corporation, Plaintiff,
No. 98. vs. In Equity.
A. G. Risty, et al, Defendants,

And

Minnehaha National Bank of Sioux Falls, South Dakota, et al, Intervening Defendants.

State of South Dakota,
County of Minnehaha—ss.

E. O. Jones, being first duly sworn, on oath deposes and says: That he is a citizen and elector of the County of Minnehaha and State of South Dakota, and that upon the 10th day of December, A. D., 1922, in the City of Sioux Falls, in said County and State, he there served the hereunto attached Citation in the above entitled cause upon the above named plaintiff, by then and there handing to and leaving with A. B. Fairbank, its solicitor, a true and correct copy of said Citation, and he knows the person so served to be the solicitor of said plaintiff in said action.

E. O. JONES.

Subscribed and sworn to before me this 12 day of December, A. D., 1922.

(Notarial Seal) G. J. CLUTTERBUCK,
Notary Public, South Dakota.

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2 Citation.

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, Rock Island and Pacific Railway Company, a Corporation, Plaintiff,

No. 98. vs. In Equity.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, The Rowena State Bank of Rowena, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial & Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter, Intervening Defendants.

United States of America to the above named Plaintiff, Chicago, Rock Island and Pacific Railway Company—Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Chicago, Rock Island and Pacific Railway Company, a corporation, is complainant and A. G. Risty et al., as County Commissioners of Minnehaha County, South Dakota, are defendants, and Minnehaha National Bank of Sioux Falls, South Dakota,

3 et al. are intervening defendants, an appeal has been allowed the above named defendants and intervening defendants therein to the Circuit Court of Appeals, Eighth Judicial Circuit. You are hereby cited and admonished to be and appear at said Court at the City of St. Paul in the State of Minnesota sixty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected, and speedy justice done the parties in that behalf.

Witness the Honorable James D. Elliott, Judge of the United States District Court for the Southern Division, District of South Dakota, this 25 day of November, 1922.

JAS. D. ELLIOTT, Judge.

Service of the foregoing Citation, by receipt of copy, at Sioux Falls, South Dakota, is hereby admitted this ..... day of ....., A. D., 1922.

.....
Solicitor for Chicago, Rock Island & Pacific Railway Company, Plaintiff.

Endorsed: Filed in the District Court on Dec. 13, 1922, at 2 P. M.

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5 In the District Court of the United States of America, in and for the District of South Dakota, Southern Division.

Chicago, Rock Island & Pacific Railway Company, Plaintiff, No. 98 S. D. vs. In Equity.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris, Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants.

Be It Remembered, that on the 25th day of July, A. D. 1921, there was filed in the above entitled court, on behalf of the plaintiff, a Bill in Equity; which said Bill in Equity, excluding the verification and Exhibit A, is in words and figures the following, to-wit:

6 (Bill of Complaint.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

The Chicago, Rock Island and Pacific Railway Company, a Corporation, Plaintiff,
vs.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock as County Commissioners of Minnehaha County, South Dakota; Fred E. Ward

as Auditor of Minnehaha County, South Dakota; J. O. Anderson as Treasurer of Minnehaha County, South Dakota, Defendants.

The plaintiff, a corporation of the State of Illinois and a resident and citizen of said State of Illinois, brings this its bill of complaint against A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, C. T. Charnock and G. W. Tyler as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward as Auditor of Minnehaha County, South Dakota, and J. O. Anderson as Treasurer of Minnehaha County, South Dakota, all of whom are residents and citizens of the State of South Dakota, and of the Southern Division of the District of South Dakota, and respectfully shows unto the court,

I.

That the plaintiff is and was during all the times hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the State of Illinois and a resident and citizen of the said State of Illinois within the meaning and intent of the laws conferring jurisdiction upon District Courts of the United States.

7 II.

That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, C. T. Charnock and G. W. Tyler, Fred E. Ward and J. O. Anderson are each of them residents and citizens of the State of South Dakota and of the Southern Division of the District of South Dakota within the meaning and intent of the laws conferring jurisdiction upon the District Courts of the United States.

III.

That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson and C. T. Charnock are the duly elected, qualified and acting County Commissioners of the County of Minnehaha and State of South Dakota and constitute the Board of County Commissioners of said County of Minnehaha; that the defendant G. W. Tyler claims to be the duly elected County Commissioner of the County of Minnehaha in the place of Chris Olson who is not now acting; that the defendant Fred E. Ward is the duly elected, qualified and acting Auditor of the said County of Minnehaha and that the defendant J. O. Anderson is the duly elected, qualified and acting Treasurer of the County of Minnehaha.

IV.

That the Legislature of the State of South Dakota at the ninth session thereof enacted a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducted to the Public Health, Convenience or Welfare", which purported act was approved by the Governor of the State of South Dakota on March 7, 1905, and which purported act is commonly known as Chapter 98 of the Session Laws of South Dakota of 1905; that
8 [subseauently] and at its tenth session the Legislature of the State of South Dakota re-enacted said Chapter 98 of the Session Laws of 1905 by enacting a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties wherever Such Drainage Shall be Conducted to the Public Health, Convenience or Welfare or Whenever it Shall be Necessary or Practicable for Drainage of Agricultural Lands", which purported law was approved by the Governor of the State of South Dakota February 21, 1907, and which purported law is commonly known as Chapter 134 of the Session Laws of South Dakota of 1907; that by said Chapter 134 of the Session Laws of 1907 the Legislature of the State of South Dakota attempted to re-enact said purported law known as Chapter 98 of the Session Laws of 1905, together with amendments thereto; that subsequently the Legislature of the State of South Dakota at the Sixteenth Session thereof, re-enacted said Chapter 134 of the Session Laws of 1907 with amendments thereto and that such re-enactment is contained in the South Dakota Revised Code 1919, as Sections 8458 to 8491 inclusive thereof; that at the second special session of the Legislature of the State of South Dakota, held in the year 1920, the Legislature of said state enacted a purported law entitled: "An Act, to Amend Sections 8464, 8471, 8472 and 8473 of the South Dakota Revised Code of 1919, Relating to Drainage and Declaring an Emergency", said purported law being Chapter 46 of the Laws of the Second Special Session of the Legislature of the State of South Dakota; that copies of the purported law of the State of South Dakota known as Chapter 98 of the Session Laws of 1905 as amended and re-enacted as Chapter 134 of the Session Laws of 1907, and as amended and re-enacted as Sections 8458 to 8491 of the South Dakota Revised Code, 1919, and by the pur-
9 ported law known as Chapter 46 of the Laws of the Second Special Session are hereby attached, marked "Exhibit A", and made a part hereof.

V.

That prior to the year 1916 the Board of County Commissioners of the said County of Minnehaha established within said County a drainage ditch known as "Drainage Ditches No. 1 and No. 2", which drainage ditches were designed for the purpose of [graining] upwards of twenty thousand acres of agricultural land situated in Townships 101, 102, 103 and 104 North, of Range 49, West of the Fifth Principal Meridian, in the said County of Minnehaha; that said drainage ditches were established pursuant to and under the provisions of said purported Law known as Chapter 134 of the Session Laws of South Dakota of 1907, and was extended for a distance of several miles through said townships, and were fully completed prior to the year 1918; that an assessment for the cost of the construction of said drainage ditches No. 1 and No. 2 was prior to the year 1916, made upon said twenty thousand and upwards of acres of land, which assessment was paid by the owners of the land so assessed, and that all matters connected with the construction of said ditches and with the assessment of the costs thereof were fully completed prior to the year 1916; that in the proceedings above mentioned the land and property included within Drainage Districts No. 1 and No. 2 was determined by the Board of County Commissioners and the area and extent of said drainage districts was established and the land and property benefitted by said drainage ditches was finally and conclusively determined,

That none of the property of plaintiff described in the purported drainage ditch notice hereinafter referred to, of which "Exhibit C" is a copy, and none of its property or rights whatsoever was included in the property assessed as aforesaid for the construction of said drainage ditches No. 1 and No. 2; that in the equalization of benefits made by said Board of County Commissioners of the said County of Minnehaha prior to the making of said assessment no part of said property and none of plaintiff's property or right whatsoever was included or found to be benefitted; that no property or rights whatsoever of the plaintiff are within the drainage district of said drainage ditches No. 1 and No. 2, and that the said defendants, the county commissioners of the said County of Minnehaha, have no power or jurisdiction to include within said drainage district any property or rights whatsoever of plaintiff or [ti] find and determine that any such property or rights have been benefitted by the construc-

tion and maintenance of said drainage ditches No. 1 and No. 2, or to assess said property or rights for any sum or sums whatsoever.

VI.

That the land drained by said drainage ditches No. 1 and No. 2 is situated in the valley of the Big Sioux River north of the city limits of the city of Sioux Falls, which city is a municipality of upwards of twenty-five thousand inhabitants; that the Big Sioux River flows in a southerly direction through said townships 101, 102 and 103 north of said Range 49, West of the Fifth Principal Meridian, and that the City of Sioux Falls is situated in said Township 101; that after entering said township 101 at the northern boundary line thereof the said Big Sioux River flows in a southerly direction to the vicinity of the southern boundary line of said township and then flows in an easterly direction for a distance of some miles and then in a northerly direction
11 through the said City of Sioux Falls and towards the north line of said township and then continues in an easterly direction until it passes out of said township over the eastern line thereof; that in its course in a northerly direction through the City of Sioux Falls the said Big Sioux River passes over a series of falls aggregating approximately ninety feet; that the city water supply of the said City of Sioux Falls is situated in a graveled bed extending over a considerable area in said townships 101 and 102 north of the city of Sioux Falls; that the South Dakota State Penitentiary is situated north of the said City of Sioux Falls, and that said penitentiary and the lands belonging thereto are situated in said townships 101 and 102.

VII.

That the Big Sioux River has its source in Lake Pelican adjoining the City of Watertown in the County of Codington and State of South Dakota, which City of Watertown is situated approximately one hundred miles north of the City of Sioux Falls; that from the said City of Watertown the said Big Sioux River flows in a generally southerly direction but with many crooks and bends through the counties of Codington, Hamlin, Brookings and Moody to the City of Sioux Falls, in the County of Minnehaha, and that the said Big Sioux River during its southward course drains a large area of territory both eastward and westward of its channel.

VIII.

That the property of the plaintiff which is described in the notice and order to show cause, of which Exhibit "C" hereto attached is a copy, consists of a right-of-way, road bed.
12 bridges and tracks entering the City of Sioux Falls from the Southeast and crossing the Big Sioux River at a point from ten to fifteen miles below any land drained by drainage ditches No. 1 and No. 2; that the plaintiff has two bridges across the Big Sioux River, both of which have been in use for a number of years and were built long prior to the construction of drainage ditches No. 1 and No. 2 or any improvements or modification thereof; that none of the property of this plaintiff is at any time subject to overflow from the Big Sioux River and that it is in no way affected or in any way benefitted by the construction of drainage ditches No. 1 and No. 2 or by the construction of the spillway, dikes and dams and gates, for the building of which the County Commissioners of Minnehaha County are now seeking to assess this plaintiff's property with benefits.

IX.

That as originally constructed said drainage ditches No. 1 and No. 2 emptied into the Big Sioux River through a ditch constructed across the land immediately north of the City of Sioux Falls, which ditch was between the City of Sioux Falls and the graveled bed from which said city obtained its water supply, and emptied into the Big Sioux River in the Northeast portion of the City of Sioux Falls and north of the series of falls situated upon said river along its course through the said City of Sioux Falls; that subsequent to the construction of said drainage ditches No. 1 and No. 2 and about the years 1915 and 1916, the volumes of water passing through said drainage ditches caused the outlet of said drainage ditches into the Big Sioux River to wash out a channel upon the land through which said outlet was constructed to such an extent that there arose imminent danger that the course of the Big Sioux River would be changed so that all
13 of the water in the channel of said river would be diverted through said drainage ditches and the outlet thereof, and a new river channel formed by said ditches which would cause the water in said river to cease flowing through its proper and natural channels and over the series of falls in the City of Sioux Falls, and to flow instead through said drainage ditches and the outlet theerof into the Big Sioux River at a point north of the City of Sioux Falls; that

such diversion of the channel of the said Big Sioux River threatened to cause enormous damage to property in the said City of Sioux Falls situated along the channel of said river, and to destroy the power obtained from said river at the falls thereof, and also to destroy the municipal water supply of the said City of Sioux Falls by draining the water from the gravel bed from which said municipal water supply is obtained.

X.

That the Board of County Commissioners of the said County of Minnehaha, for the purpose of repairing and maintaining said drainage ditches No. 1 and No. 2 in such manner as to avoid the threatened change in the channel of the Big Sioux River and to prevent the drainage of the gravel bed from which the City of Sioux Falls obtains its municipal water supply, and to prevent the injury to the property owners of the City of Sioux Falls and the destruction of the water power at the falls of the Big Sioux River in the City of Sioux Falls, which would be caused by the threatened change in the channel, of the Big Sioux River caused to be constructed in the summer of the year 1916 various dams and gateways at various places along said drainage ditches No. 1 and No. 2, made changes in the channel of the Big Sioux River along the course of said
14 drainage ditches and to reconstruct the spillway at the outlet of said drainage ditches into the Big Sioux River; that said construction work was not done for the purpose of draining lands in addition to the lands theretofore found to be benefitted by and assessed for the cost of the installation and construction of said drainage ditches Nos. 1 and 2, but for the sole and only purpose of maintaining said drainage ditches No. 1 and No. 2 in such manner as to permit them to attempt to perform the function for which they were originally constructed without danger of damage to the property and rights theretofore threatened as hereinbefore pleaded.

XI.

That there has been expended by the Board of County Commissioners of said Minnehaha County upon the construction of ditches, dams, gate-ways and other work as aforesaid, and upon the reconstruction of said spillway upon the outlet of said Drainage Ditches No. 1 and No. 2 a sum in excess of Two Hundred Fifty-five Thousand Dollars ($255,000.00) for which said sum the said Board of County Commissioners has issued

drainage warrants, and that there is due for principal and interest upon said warrants a sum, as plaintiff is informed and believes, in excess of three hundrd thousand dollars ($300,000.00).

XII.

That before the construction of said spillway, dams, retaining gates, and other work, and straightening of the channel of the Big Sioux River, no petition therefor signed by one or more owners of land likely to be affected was ever made or presented to the Board of County Commissioners of the said County of Minnehaha, excepting that on or about the 3rd day of August, 1916, there was filed in the office of the County Auditor of the said County of Minnehaha a purported petition signed by F. L. Blackman and other persons, which said petition purported to be a petition "to reconstruct and improve Drainage Ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway and outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by assessment upon the property, persons and corporations benefitted thereby"; that Drainage Ditches No. 1 and 2 referred to in said purported drainage notice, of which "Exhibit C" is a copy, is a combination of and is the same as drainage Ditches No. 1 and No. 2 hereinbefore referred to; that the owners of some of the property included within the drainage area of drainage ditches No. 1 and No. 2 as theretofore established as aforesaid, objected to the repair of said ditches and to the assessment of their property for the cost of said repairs and of the maintenance of said ditches, and that on account of such objection and as a mere subterfuge and for the sole and only purpose of attempting to lay a foundation authorizing the Board of County Commissioners of said Minnehaha County to change the boundaries of the drainage area or district of said drainage ditches No. 1 and No. 2, and to assess property not included within the area of said drainage ditches and not benefitted by said ditches No. 1 and No. 2, for the cost of the necessary repairs and maintenance of said ditches theretofore established, constructed and accepted, the then Board of County Commissioners of said County of Minnehaha, caused the said purported petition hereinbefore in this paragraph referred to, to be filed, and that said Board of County Commissioners acquired by the filing of said petition no power or jurisdiction under and by virtue of the drainage laws of the State of South Dakota hereinbefore referred to, to proceed in any manner to include any of the property or rights of plaintiff within the drainage area or

district of said Ditches No. 1 and No. 2 or of said Ditch No. 1 and 2 and that said Board and the said defendants now constituting said Board never acquired and have no power
16 or jurisdiction to determine that any of the property or rights of plaintiff are benefitted by said drainage ditches Nos. 1 and 2, now attempted to be designated drainage ditch Nos. 1 and 2, or to assess said property or rights, or any portion thereof, for the cost of the necessary repairs and maintenance of said drainage ditches No. 1 and No. 2; that upon the filing of said purported petition the County Commissioners of said County of Minnehaha did not transmit a copy of the same to the State Engineer of the State of South Dakota; that the said Board of County Commissioners of the said County of Minnehaha did not inspect the proposed route of said drainage ditches and did not cause a survey of said drainage ditches to be made by a surveyor; that no survey of the same was ever made under the general supervision of the State Engineer of the State of South Dakota, or otherwise prior to the construction thereof; that no surveyor's report in writing was made to the said Board of County Commissioners; that no surveyor's report, or copy of any map or plan made or filed by said surveyor was furnished to the said State Engineer prior to the beginning of said work; that the said Board of County Commissioners of said Minnehaha County did not file with the said purported petition its determination of its costs, length and width of the drainage improvement furnished in said petition; that the said Board of County Commissioners did not fix a time and place for a hearing of said petition and did not give notice thereof in the manner provided by law; that none of the proceedings of the said Board of County Commissioners in the matter of the drainage petition has been recorded and indexed in any book kept for that purpose in the office of the Auditor of said County of Minnehaha; that no drainage district for the pur-
17 pose of the construction of said spillway, dams, retaining gates, ditches and other work has ever been constructed or established other than the drainage districts No. 1 and 2 set out in Paragraph Five of this bill, in which districts no property of the plaintiff was at any time included.

XIII.

That prior to the reconstruction of said spillway, dams, retaining gates, ditches and other work, the said Board of County Commissioners of Minnehaha County did not prepare plans and specifications therefor, and did not file plans or specifications therefor in the office of the County Auditor of

the said County of Minnehaha, and did not let contracts upon competitive bids for the construction of said spillway, dams, retaining gates, ditches and other work; that prior to the construction of said spillway the said Board of County Commissioners did advertise for competitive bids for the construction of the spillway in accordance with certain plans therefor; that bids were received by the said Board of County Commissioners for the construction of a spillway in accordance with such plans, and that the same were rejected by the said Board of County Commissioners, and subsequently the said Board of County Commissioners adopted a new and amended plan for the construction of an entirely different form of spillway, and without advertising for bids for such construction made a contract for the construction of said spillway in accordance with said new and amended plans with the Sioux Falls Construction Company, under which said contract the said Sioux Falls Construction Company constructed such spillway upon the cost plus plan; that under said contract the said Sioux
18 Falls Construction Company was paid the entire cost of the construction of said spillway, together with nine per cent (9%) of the total cost added; that the cost of the construction of said spillway under said cost plus plan was, as plaintiff is informed and believes, upwards of one hundred fifty thousand dollars ($150,000.00) for which said sum drainage ditch warrants upon said drainage ditches No. 1 and No. 2 were issued by the said Board of County Commissioners of Minnehaha County to the said Sioux Falls Construction Company, and to other persons.

XIV.

That on or about the 20th day of November, 1920, the Board of County Commissioners of said Minnehaha County entered into a certain contract with Albert J. Chenoweth and Herman Rettenhouse, co-partners as Chenoweth & Rettenhouse, whereby the said Board of County Commissioners employed the said Chenoweth & Rettenhouse to make a topographical survey showing the lands benefitted and subject to assessment for the payment of the cost of said spillway, dams, retaining gates, ditches and other work, and that by said contract the said Board of County Commissioners agreed to pay the said Chenoweth & Rettenhouse for said survey the sum of Seven thousand five hundred dollars ($7,500.00) to be paid in drainage ditch warrants drawn on drainage ditches No. 1 and No. 2; that the said Chenoweth & Rettenhouse thereupon proceeded to make the purported survey of the lands purported to be sub-

ject to assessment for the construction of said spillway, dams, retaining gates, ditches and other work; that the said Chenoweth & Rettenhouse made and filed a report with the said Board of County Commissioners, in which report they made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereunto annexed, marked "Exhibit B" and made a part hereof.

19 XV.

That on or about the 10th day of June 1921, the said Board of County Commissioners of the said County of Minnehaha adopted a purported notice of the time and place for equalizing the proportioning of benefits for the construction of said spillway, dams, retaining gates, ditches and other work, and caused the same to be published on July 13, 1921, and on July 20th, 1921, in the Sioux Falls Daily Argus Leader, the official newspaper of the said County of Minnehaha; that a copy of said drainage notice is hereunto annexed, marked "Exhibit C"; that the proportion of benefits assessed against the plaintiff is 839.45 units, out of a proposed total of 32,549.-63 units, and that upon the basis of such apportionment the assessment against plaintiff and its property will be in excess of the sum of Seven Thousand Nine Hundred Seventy-four Dollars ($7974.00); that the said Board of County Commissioners of said Minnehaha County are threatening to and will, as plaintiff is informed and believes, unless enjoined by this court make an apportionment of benefits upon plaintiff of 839.45 units, and will make an assessment thereon against plaintiff and its property in the sum in excess of Seven Thousand Nine Hundred Seventy-four Dollars ($7974.00) and that the defendant, Fred E. Ward, as County Auditor of the said County of Minnehaha, will spread such assessment upon the books of his office, and that the defendant, J. O. Anderson, as Treasurer of the said County of Minnehaha, will proceed to collect the same pursuant to the provisions of said purported statute, "Exhibit A".

XVI.

That the matter in controversy herein exceeds, exclusive of interest and cost, the sum or value of three thousand
20 dollars ($3,000.00), and is the amount of said proposed assessment, to-wit: the sum in excess of Seven Thousand Nine Hundred Seventy-four Dollars ($7974.00).

XVII.

That the costs of the Board of County Commissioners of said Minnehaha County in constructing said spillway, dams,

retaining gates, and ditches, were unauthorized under the Constitution and laws of the State of South Dakota, and that the same have never been approved by the State Engineer of the State of South Dakota; that no benefits have accrued to puaintiff or its property by the construction of said spillway, dams, retaining gates, and ditches, and by the other work done as aforesaid upon the property in the drainage area of said drainage ditches No. 1 and No. 2.

XVIII.

That the Board of County Commissioners of Minnehaha County under the drainage law and under the constitutional provisions of Sections 6, Article 21 of the State Constitution is wholly without authority, save and except to provide drainage for agricultural lands; that the improvements made and the work done were not for such purpose, nor did the plaintiff receive nor will the plaintiff receive any special benefit not shared in by the general public therefrom; that in the doing of the work and in the making of the improvements and incurring the indebtedness the Board of County Commissioners of Minnehaha County was wholly without jurisdiction and the obligations created, for the payment of which assessment is attempted to be made under the purported drainage law, are wholly void and that no assessment under the purported law of the State of South Dakota can lawfully be made or the proceeds thereof applied to the payment of said indebtedness.

21 Added to the bill of complaint by order of the court dated the 31st day of January, 1922.

That the equalization of benefits of 839.45 units out of a total number of units of 32,549.62, estimated in dollars and cents at approximately Eight Thousand Dollars ($8,000), fixed by the Board of County Commissioners of Minnehaha County, South Dakota, on the 10th day of June, 1921, against the property of the Chicago, Rock Island & Pacific Railway Company, as above set forth, is wholly speculative, arbitrary, unjust, illegal and disciminatory and was made by the Board of County Commissioners without any reasonable or rational basis therefor, and is not in proportion to any benefits which the property of the plaintiff has received or ever can receive by reason of the rebuilding of the spillway, the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and Drainage Ditch No. 2, as set forth herein; that the property of the plaintiff has not and never can be benefitted by the work performed by the Board of County

Commissioners as herein set forth, to the extent of Eight Thousand Dollars ($8,000), or to any extent whatever, and that the assessment sought to be collected from the plaintiff, as above set forth, is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the City of Sioux Falls. That the said equalization of benefits is so abritrary and discriminatory against the property of the plaintiff as to deprive the plaintiff of its property without due process of law and to deprive the plaintiff of the equal protection of the laws.

XIX.

That said purported statute of the State of South Dakota Exhibit "A" hereto attached, is unconsitutional and void in that the same is in violation of Section 2 of Article VI. of the Constitution of the State of South Dakota, and
22 in that the same is in violation of the fourteenth amendment of the Constitution of the United States; that said statute Exhibit "A" is further void and unconsitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies and other corporations and upon the property of municipal and quasi-municipal corporations and upon platted property in cities and villages, said purported law Exhibited "A" is further unconstitutional and void in that the same provides for an assessment against property without the right of the property owner to be heard thereon and without notice of any character to the property owner, that if said apportionment of benefits be made as threatened by the said Board of County Commissioners of said Minnehaha County and as is provided in said notice Exhibit "A" the same will constitute the taking of the property of plaintiff and of the other property owners affected by said notice without due process of law; that a cloud will be placed upon the title to the plaintiff's real property situated within said drainage [acre] affected by said notice Exhibited "C", and that there will result a multiplicity of suits and that plaintiff and other property owners affected will suffer irreparable injury.

Wherefore, plaintiff prays judgment that the defendants and each of them, their agents, servants, employes, attorneys and successors in office and each of them and every one

of them be forever restrained and enjoined from pro-
23 ceeding further in the making of an apportionment of benefits upon the property of plaintiff for the construction of said spillway, dams, retaining gates, ditches, and for the other work done, as aforesaid, by the Board of County Commisisoners in the area of said drainage ditches No. 1 and No. 2, and restrained and enjoined from making any assessment upon the property of plaintiff for the cost of the construction of said spillway, dams, retaining gates, ditches and other work or any part thereof, and from proceeding in any manner under said purported statute Exhibit "A" in in the construction of any work in the area of said drainage ditches No. 1 and No. 2 and from doing any act looking toward the apportionment of benefits for any work heretofore done in the area of said drainage ditches No. 1 and No. 2 and from doing any act tending towards the making of an assessment for the cost of any such work heretofore done and from in any manner proceeding under said purported law Exhibit "A" in the doing of any work heretofore done in the area of said drainage ditches No. 1 and No. 2; that the defendant, Fred E. Ward, as Auditor of the said County of Minnehaha, be forever restrained and enjoined from making any apportionment of benefits for work done, as aforesaid, in the area of said drainage ditches No. 1 and No. 2 and from making any assessment therefor, and from certifying any assessment therefor to the County Treasurer of the said County of Minnehaha; that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of the said County of Minnehaha, and their successors in office be forever restrained and enjoined from fixing a proportion of benefits for the construction of said spillway, [deams], retaining gates
and ditches upon the property of plaintiff and upon
24 the property of the other property owners named in said notice Exhibit "C" and forever restrained and enjoined from making any assessment against plaintiff, or its property or against the property of any other property owners in the area of said drainage ditches No. 1 and No. 2 for the cost of said work; that the defendant J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, and his successors in office be forever enjoined and restrained from filing any assessment and from collecting any assessment against the property of plaintiff or of the other property owners named in said notice Exhibit "C", upon any assessment for the construction of said spillway, dams, retaining gates and ditches; that the said purported statute of the

State of South Dakota, Exhibit "C" hereto, be adjudged and decreed to be unconstitutional and void; that all acts of the board of County Commissioners of the said County of Minnehaha and of the State Engineer of the State of Dakota heretofore done in connection with the construction of said spillway, dams, retaining gates and ditches be adjudged and decreed to be illegal and void; that it be adjudged and decreed that no benefits have resulteed to plaintiff from the construction of said spillway, dams, retaining gates and ditches, and that no apportionment of benefits or assessements of damages ever be made against plaintiff or its property therefor.

That pending the issuance of a perpetual injunction herein this Honorable Court grant an interlocutory injunction herein restraining the defendants herein, their agents, servants and employes and each and every of them from doing any of the above mentioned acts until the final hearing herein or until the further order of this court; that before the hearing and determination of plaintiff's application for an interlocutory injunction this Honorable Court grant a temporary restraining order restraining the said defendants, their agents and servants and each and every of them from doing any of the above mentioned acts until the hearing and determination of plaintiff's application for an interlocutory injunction herein.

Plaintiff further prays that a subpoena of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. R. Charnock, individually and as County Commissioners of the County of Minnehaha in the State of South Dakota, and to Fred E. Ward, individually and as auditor of the said County of Minnehaha, and to J. O. Anderson, individually and as Treasurer of the said County of Minnehaha, thereby commanding them and each of them on a day certain therein to be named to be and appear before this Honorable Court and then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular, the premises and to perform and abide by such order, direction or decree as may be made in the premises, and that on final hearing hereof said order of injunction may be made perpetual.

Plaintiff further prays for such other and further re-
26 lief as shall to [be] Court seem just and proper, and equitable and for its costs and disbursements herein.

O'BRIEN, STONE, HORNE & STRINGER,
BOYCE, WARREN, & FAIRBANK,
Solicitor for Plaintiff.

A. B. Fairbank,
of Counsel.

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27 Exhibit "BB"

Proposed Distribution of Proportional Benefits.

	District or Division	Acres	Units	Percent of total.	
1.	Farm lands north of City Limits and North of South Line of Sec. 12-101-50	13,271.09	10862.30	33.4%	$103,191.85
2.	City Lots and Town of Renner lying north of above line.	81.20	42.52	0.1%	403.94
3.	Farm land and tracts south of above line.	2,065.23	2958.45	9.1%	28,105.28
4.	City lots south of above line.	361.60	1372.52	4.2%	13,038.94
5.	City of Sioux Falls.		3147.95	9.7%	29,905.52
6.	Minnehaha County.		2518.36	7.7%	23,924.42
7.	Township roads.		1573.98	4.8%	14,952.81
8.	Railroads.		4721.91	14.5%	44,858.15
9.	Northern States Power Company.		5351.63	16.5%	50,840.49
	Totals.	15,722.12	32549.62	100.0%	$309,221.40

In the above calculation the Value of One Unit is taken at $9.50.

CHART

TOO

LARGE

FOR

FILMING

29 Endorsed: Filed in the District Court on Jul. 25, 1921, at 4:25 P. M.

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30 (Order granting leave to Minnehaha National Bank of Sioux Falls et al., to intervene and be made parties defendant.)

The matter of hearing the show cause order heretofore issued out of this Court at the instance of the Minnehaha National Bank of Sioux Falls, South Dakota, et al, to the above named plaintiff and defendants in the above entitled cause, coming on regularly for hearing before this Court, at the court room thereof, in the Federal Building, in the City of Sioux Falls, South Dakota, the said plaintiff appearing by its attorneys of record, and the defendants appearing by their attorney of record, said petitioning interveners appearing by their attorneys, Porter & Bartlet, and after hearing of said matter, it is hereby

Ordered and Adjudged that the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, said petitioning interveners, petition be granted, and the said Minnehaha Nation Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Hartford, South Da-
31 kota, The Colton State Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, the Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, H. E. Donahoe, W. G. Porter, be and they are hereby made parties defendant to this cause of action, and they are hereby given until the 25th day of August, 1921, at Ten o'clock A. M. thereof, within which time to file their answer to plaintiff's bill of complaint herein, and to make a return to plaintiff's show cause order herein.

And good cause appearing therefor, it is further likewise Ordered that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock as County Commissioners of Minnehaha County, South Da-

kota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, have and they are hereby granted until August 25th, 1921 at Ten o'clock A. M. to file their answers to plaintiff's bill herein, and to make a return to plaintiff's show cause order herein.

And it is further Ordered that the hearing of said show cause order be and the same is hereby adjourned to August 25th, 1921, at Ten O'clock A. M.

Dated this 11th day of August, A. D. 1921.

By The Court:

(Seal of Court) JAS. D. ELLIOTT,
Judge of the District Court.

Attest:
Jerry Carleton,
Clerk of the District Court.

Endorsed: Filed in the District Court on Aug. 19,
32 1921, at 2 P. M.

And afterwards, to-wit, on the 1st day of September A. D. 1921, there was filed in the office of the clerk of said court, Answer of Defendants; that the Title of the Case, Paragraphs A, B, C, D and F of defendants' Special Answer, Introduction and Paragraphs first to Nineteenth, inclusive, of defendants' General Answer, Paragraphs I, VI, VIII, XI, XII, XIII and XIV of the defendants' Affirmative Defense, the Prayer, Petition of F. L. Blackman and others to reconstruct and improve drainage ditches No. 1 and 2, the Order for filing said Petition, the Resolution for survey under said Petition, the Resolution fixing the exact line and width of the ditch and fixing the time and place for hearing said petition, and the Resolution establishing Drainage Ditch No. 1 and 2, all as contained in said Answer of Defendants, are in words and figures the following, to-wit:

33 (Answer.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

The Chicago, Rock Island and Pacific Railway Company, a Corporation, Plaintiff,

vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha, County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, W. G. Porter, Intervening Defendants.

Comes now the above name defendants, A. G. Risty, et al., and for their answer to plaintiff's bill of complaint in the above entitled action, admit, deny and allege as follows:

A.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint, allege that said bill does not state any matter of equity entitling plaintiff
34 to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against the said defendants in that said plaintiff has a plain, adequate and complete remedy at law.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

B.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint and the allegations contained in paragraph nineteen thereof, to-wit: "That

there will result a multiplicity of suits and that the owners affected will suffer irreparable injury", are not truly stated or alleged in good faith and are stated with the false and fraudulent purpose of imposing upon the jurisdiction of this court and they are therefore fictitious and fraudulent. And said defendants say there are no other actions at law or in equity pending or threatened against said plaintiff and that said plaintiff has a plain, adequate and complete remedy at law, all of which these defendants allege to be true and plead the same in bar to said bill.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

C.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint, allege that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this Court in that this suit is wholly based upon the alleged existence of a federal question and diversity of citizenship, and that the amount sued for and the value of the subject matter as alleged in said bill is not truly stated or alleged in good faith. That
35 the allegations of plaintiff's bill show it as being "a suit of a civil nature to resist and prevent as assessment upon the property of this plaintiff under the pretended authority of a purported act of the legislature of the State of South Dakota, claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00) and is the amount of the threatened assessment, to-wit: a sum in excess of Seven Thousand Nine Hundred Seventy-four Dollars ($7,974.00)", are false and stated with a false and fraudulent purpose of imposing upon the jurisdiction of this Court and are therefore fictitious and fraudulent. And said defendants say that the amount involved, or value of the subject matter in this suit, does not exceed the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs; that said bill of complaint upon its face shows that under the drainage law referred to in paragraph four thereof the amount of the assessment, or the amount in controversy herein, has not been, and cannot be, determined until after the equalization thereof provided for in such statute and until such equalization, the amount to be hereinafter assessed, if

any, by said Board of County Commissioners or by the Courts of the State of South Dakota, to which an appeal is taken, as provided for by said law is purely speculative, is uncertain and undeterminable at this time by said plaintiff, this court, or anyone at all, and is dependent entirely upon the showing made by this plaintiff at such hearings and determinations provided for by said law, as to the amount of benefits received by this plaintiff; and that no sum has been or can be assessed and determined against the plaintiff's property until such equalization of the proportion of benefits has
36 been had, and at which hearings this plaintiff is permitted to make his showing therein and the amount of benefits, if any, which plaintiff does receive are thereafter equalized and fixed by said Board or Court and the Amount so fixed is then extended and assessed against the property of said plaintiff, and not otherwise, all of which these defendants aver to be true and set up, the same in bar of plaintiff's bill of complaint herein.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

D.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint herein, allege that on or about December 4, 1920, an equity suit was instituted in the Circuit Court within and for Minnehaha County, in the State of South Dakota, the same being a Court of general jurisdiction and having jurisdiction over the subject matter there presented by one Oluf O. Gilseth, whose lands are affected by the construction of drainage ditch No. 1 & 2 and against which lands the proportion of benefits for the construction of said ditches has been proportioned upon the same basis and in like manner as the proportion of benefits upon the lands of this plaintiff as hereinafter set forth, which action was brought by the said Oluf O. Gilseth, for himself and as representing an informal organization of farmers and others who are similarly [stituated], against the defendants herein, the Board of County Commissioners of Minnehaha County, South Dakota, and other persons, which action was instituted with [fully] knowledge, approval, acquiescence and consent of the plaintiff herein, its officers, agents and attorneys, and in which said cause the same facts are alleged and relied on in plaintiff's bill of complaint as herein set forth, and which

said bill of complaint prayed that said defendants be
37 forever enjoined and restrained from making or attempting to make any proportion of benefits upon the property of the plaintiffs herein, or the property of other property owners within the drainage area of the drainage ditches No. 1 and No. 2 for the costs and construction of said spillway, dams, retaining gates or other work, and be forever restrained and enjoined from levying any assessment upon the property of the plaintiff or upon the property of other property owners in said drainage area for the payment of the costs of the construction of said spilllway, dams, retaining gates or other work, for the reason and upon the grounds that the law under which said drainage ditch was established and constructed was in controvention of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States, to which said bill of complaint said defendant Board of County Commissioners and these intervening defendants set up and relied upon the same facts and defense as are hereinafter set forth; that said action came on for trial before said Circuit Court of Minnehaha County, South Dakota, wtih the full knowledge, acquiescence, consent and approval of plaintiff and at which trial plaintiff was entitled to be heard and was represented by its attorneys on the 31st day of January 1921, evidence was introduced upon said hearing on behalf of said plaintiff and these defendants and after the taking of evidence therein was closed and thereafter upon the facts there presented, and in the trial of which the plaintiff could have and did participate, said Court made findings and conclusions and judgment thereon dismissing said action upon its merits. That a duly exemplified copy of said bill of complaint, answer, findings,
conclusions and Judgment are hereto attached, marked
38 "Exhibit B", and made a part hereof, all of which these defendants allege to be true and plead the same in bar.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

* * * * * * * * * * *

39 F.

Comes now the above named defendants, A. G. Risty, et al, and for answer to plaintiff's bill allege that this suit does not really and substantially, involve a controversy within the jurisdiction of this court, in that this suit involves the determination of facts and matters controlled and governed by

the drainage statute of South Dakota, mentioned in plaintiff's bill of complaint and which by its provisions creates and provides its own special tribunal with exclusive original jurisdiction to try and determine the questions necessarily involved therein, and which are attempted to be presented for litigation in this action, and that, until such determination by said special tribunal so provided for, this court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, and that said special tribunal has not fully determined the matters and things herein presented for determination. All of which these defendants allege to be true and plead the same to the jurisdiction of this Court.

Wherefore, defendants pray that plaintiffs' bill of complaint be dismissed with costs.

* * * * * * * *

40 G.

Comes now the above named defendants, A. G. Risty, et al, and for their further answer to the allegations contained in plaintiff's bill of complaint, admit, deny and allege as follows:

First.

That these defendants admit Paragraph I of said bill.

Second.

That these defendants admit Paragraph II of said bill.

Third.

That these defendants admit Paragraph III of said bill.

Fourth.

These defendants, answering said bill of complaint, admit that the Legislature of the State of South Dakota, at its Tenth Session, enacted a law entitled: "An Act for the Establishment, Construction and Maintenance of Drainage and Levies in Counties, Whenever such Drainage shall be Conducive to the Public Health, Convenience or Welfare, or Whenever it shall be Necessary or Practicable for the Drainage of Agricultural Lands", which law was approved by the Governor of the State of South Dakota on February 21st, 1907, said law being Chapter 134 of the Session Laws of South Dakota of 1907, and that subsequently thereto, the Legislature of the State of South Dakota, in the years 1909, 1911, 1915 and 1917, enacted laws amendatory thereto, and in 1919 re-enacted said law and amendments thereto, as Sections 8458, to 8491, inclusive, of

the South Dakota Revised Code for 1919, and thereafter in the years 1920 and 1921, enacted amendments thereto which law and amendments now constitute the drainage laws of the State of South Dakota, and specifically deny each and every other allegation of said paragraph.

Fifth.

These defendants answering the Fifth Paragraph of
41 complainant's bill, deny that the Board of County Commissioners of Minnehaha County, South Dakota, established a drainage ditch known as "Drainage Ditch No. 1 and No. 2, as therein alleged, but allege the fact to be that in the year 1907 the Board of County Commissioners of Minnehaha County, upon the petition of William H. Lyon, accompanied by a proper bond, approved by the County Auditor, and after due notice and other procedure pursuant to and under Chapter 134 of the Laws of 1907 of the State of South Dakota, established Drainage Ditch No. 1, commencing at a point named in the Southeast Quarter (SE¼) of Section Twenty-nine (29), Township One Hundred Two (102), Range Forty-nine (49), running thence about two (2) miles directly South, thence in a Southeasterly course about a mile, cutting through the rim of the natural ridge or bluff just North and East of the State Penitentiary in the City of Sioux Falls, and descending about one hundred (100) feet following the slope of the hill, and terminating in the Big Sioux River on the Northeast Quarter (NE¼) of Section Nine (9), Township One Hundred One (101), Range Forty-nine (49), which said drainage ditch was constructed so as to have a bottom width of forty (40) feet, except where the same cut through the bluff and descended into the Big Sioux River, where a thinly lined concrete gutter or spillway with sufficient capacity only to carry the water that was planned to come through the said ditch, was constructed, but the terminal thereof was never safely or securely anchored and established, and that thereafter and before the construction of said Drainage Ditch No. 1 had been completed, one Iver R. Peterson and numerous other persons, filed their petition in regular form, accompanied
42 by a proper bond duly approved by the County Auditor, with said Board of County Commissioners, asking and praying that the said Drainage Ditch No. 1 be extended Northward several miles through the Valley of the Big Sioux River, to drain other agricultural lands therein situated; the said petition was found sufficient in form, and was ordered filed and referred to the State Engineer, and a resolution for survey regularly adopted thereon, and thereafter,

upon the Engineer's written report of said survey, by resolution, the exact line and width of said ditch extension was fixed, and after due notice and hearing, said petition was allowed, and resolution adopted by the Board of County Commissioners establishing said drainage ditch, and designating it as "Drainage Ditch No. 2", extending from the North end of Drainage Ditch No. 1 hereinbefore described, Northward about twelve (12) miles to a point near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, and said drainage ditch was thereafter, constructed, which ditch so constructed, tapped the Big Sioux River in two places, and the assessment for the costs and expense of the construction thereof was duly spread upon the lands benefited within the territory embraced within the initial point in Dell Rapids Township, and the terminal point in Section Nine (9) of Sioux Falls Township; and further answering said Paragraph V, these defendants admit that prior to the year 1916 assessments were duly spread upon the lands determined to be benefited by the construction thereof, and such assessments collected, but deny each and every other allegation in said paragraph contained.

Sixth.

These defendants answering the sixth paragraph of complainant's bill, admit the allegation contained in said paragraph, but allege the fact to be that in addition to the lands drained lying North of the City of Sioux Falls, the said
43 Drainage Ditches No. 1 and No. 2 also drained, affected and benefited lands lying West and South of said City and also the lands adjacent to said River through and in said City of Sioux Falls were drained affected and benefited thereby.

Seventh.

These defendants answering the Seventh paragraph of the complainant's bill, allege that they are without knowledge as to the facts therein set out, and therefore deny the same.

Eighth.

These defendants answering Paragraph VIII of the complainant's bill, specifically deny that Drainage Ditches No. 1 and No. 2 were ever completed prior to the year 1916, or of sufficient capacity to drain the agricultural lands adjacent thereto, and as to the other allegations in said paragraph, these defendants allege that they are without knowledge of the facts therein stated, and therefore deny the same.

Ninth.

These defendants answering the Ninth paragraph of complainant's bill, admit the statements therein made, but in explanation thereof, allege the further facts to be that after the construction of said spillway, as above described, the capacity of said ditches were increased by the rapidly flowing waters therein, eroding the banks and widening said Ditch No. 1 to nearly twice its original width of forty feet; the natural barrier which originally prevented the waters of the Big Sioux River from flowing into said Ditch No. 1 near its initial point, except in flood times, eroded and wore away and permitted a large part of the water from the Big Sioux River to flow uncontrolled directly into said ditch and through the same
44 to said spillway, which said spillway did not have the capacity to safely carry all of the flood waters that came to it through said ditch; that by reason of the foregoing facts said ditches became out of repair, and filled with sand bars and mud, and other obstructions, and that, owing to the tortuous course of the Big Sioux River through the district drained by said Ditches No. 1 and No. 2, the said river and said ditches were inadequate to carry away the flood waters and properly drain the lands within the area of said drainage ditches during flood seasons; that on or about the 15th day of March, 1916, during a spring flood, said spillway and outlet for said drainage ditches, as above described, was washed out and destroyed, so that the waters passing through said ditches and outlet, were wholly uncontrolled; that at the place where said spillway had been constructed, the waters descended to the basin of the Big Sioux River over a steep bluff by a drop of approximately of the height of one hundred feet, and that after the washing out and destruction of said spillway and outlet, the waters from said ditches washed out a deep gorge in the bluff, and tore away and destroyed the adjacent land to the extent of several acres; that said outlet and spillway were located in the immediate vicinity of State lands belonging to the State of South Dakota, and in the immediate vicinity of the State Penitentiary, and also of the City Water Works of the City of Sioux Falls, by means of which water works the said City was supplied with water from the gravel beds immediately adjacent to said drainage ditches, and that by reason of the washing out of said spillway and of the uncontrolled waters of said ditches, the said lands of the State of South Dakota, the State Penitentiary and the water works and water supply of the said City of Sioux Falls,

as well as the properties of private citizens in the vicinity of said outlet and spillway, were greatly imperiled and
45 endangered; that there was imminent danger of the waters of the Big Sioux River being entirely diverted from their natural course into Drainage Ditch No. 1 and through the said spillway and outlet, and the water power of the Big Sioux River immediately above the mouth of said drainage ditches thereby destroyed, to the great and irreparable damage of many private property owners.

Tenth.

These defendants answering the Tenth paragraph of the complainant's bill, hereby specifically deny the same, and each and every allegation thereof, and in explanation of the facts attempted to be therein set out, allege that upon the occurrence of the destruction of the original spillway as hereinbefore set out in the Ninth paragraph hereof, that thereupon the Board of County Commissioners of said Minnehaha County took immediate steps to control the said waters coming through said drainage ditches, by means of dams across said drainage ditches above said spillway, and by driving piling therein, and were so employed when, on or about the 21st day of March, 1916, one Charles Kaufmann, and other persons owning property within the area of said Drainage Ditch No. 2 brought an action in the Circuit Court of Minnehaha County, South Dakota, to restrain said Board from so proceeding to control the waters of said drainage ditches, and obtained an order against said Board, requiring them to show cause why an injunction should not be granted, which said order came on for hearing before the said Court on the 25th day of March 1916, and the said Court thereupon denied said application for said temporary injunction, whereupon said action was dismissed, the same being Circuit Court File of Minnehaha County No. 15708, which is hereby referred to and made a part hereof.

That on or about April 1, 1916, and because of the con-
46 ditions above described, the plaintiff in the last mentioned suit and a large number of his neighbors, similarly situated and affected by said drainage ditches, perfected an informal organization and appointed a commitee of eight members to look after their interests with reference to repairing said drainage ditches, and to urge before the Board of County Commissioners, such improvements as seemed advisable.

That thereafter and on or about the 8th day of April, 1916, several persons representing said local organization or com-

mittee, including some of the said plaintiffs in said last mentioned suit, filed a petition and bond with the said Board of County Commissioners praying that the outlet and spillway to said drainage ditches as originally established and constructed, be closed up and abandoned, and that a new outlet for said ditches be provided by diverting the waters thereof at a point above said spillway, as originally constructed, in a Westerly direction through Covell's Lake, and thence back into the Big Sioux River above the said City of Sioux Falls, upon which said petition the said Board caused a survey to be made, with the approval of the State Engineer, and a surveyor's report to be filed, and a hearing had upon said petition after notice, as required by law upon which hearing numerous property owners within the territory affected thereby, appeared before said Board and filed objections to the said proposed proceedings, and filed numerous large claims for damages by reason of said proposed change of outlet, and that upon said hearing, on July 8th, 1916, said Board made an order allowing the prayer of said petition, and established said Covell's Lake outlet, and abandoned said outlet and spillway as originally established and constructed that thereupon numerous conferences were had between the petitioners in said proceeding last
47 above referred to, and the said objectors and property owners owning land within the area of said Drainage Ditches No. 1 and No. 2, and that it was agreed at said conferences that the proceedings upon said petition last above referred to should be abandoned, and the same were abandoned accordingly, and that a new petition should be filed and new proceedings instituted for the reestablishment of said Drainage Ditches No. 1 and No. 2 and the reconstruction and improvement thereof, and the re-establishment and the reconstruction of the outlet to said ditches, and for the establishment and construction of a new spillway to properly control and take care of the waters flowing through said drainage ditches, and for the enlargement of said drainage district so as to embrace all of the property benefited thereby, extending from the Northern end of said territory included in said Drainage Ditches No. 1 and No. 2, following the course of the Big Sioux River around the City of Sioux Falls, and extending as for down said river as the mouth of said spillway and outlet to said drainage ditches, where the waters thereof were discharged into the Big Sioux River, below the said City of Sioux Falls, and that thereafter, and in accordance with said agreement, and with the consent and acquiesence of this plaintiff, a new drainage petition and bond, ap-

proved by the County Auditor, were filed with the Board of County Commissioners, by the City of Sioux Falls, F. L. Blackman, and other persons who owned lands within the area of and that was assessed for the cost of construction of said Drainage Ditches No. 1 and No. 2, praying for the establishment and construction of a new drainage ditch in the exact location of said original ditches, and the re-establishment and construction of a substantial spillway and outlet therefor, together with several cut-offs or ditches, straightening and canalizing the channel of the Big Sioux River ad-
48 jacent thereto, so as to improve and increase its carrying capacity, and praying that the assessment area be increased to cover said new territory benefited, pursuant to said agreement, which said petition being found sufficient in form by said Board of County Commissioners, was, on August 3, 1916, ordered filed and referred to the State Engineer, who, with the said Board of County Commissioners, on August 4, 1916, inspected the route of said drainage, and had several conferences with the said persons interested as aforesaid, including this plaintiff, and authorized and ordered a survey to be made by Engineer L. E. Stevens, under supervision of the State Engineer, which said survey was accordingly made by said L. E. Stevens, who, on September 13, 1916, filed his written report with said petition, and thereupon the said Board of County Commissioners fixed the exact route and width of said drainage, and the time and place of hearing thereon, and caused notice of hearing to be given according to law and upon the return date fixed in said notice, after due hearing, and upon the approval and advice of the State Engineer, and without objection upon the part of the plaintiff herein, or any other person, upon October 3, 1916 found said proposed drainage, as petitioned for, to be conducive to the public health, convenience and welfare, and necessary and practicable for [drainage] agricultural lands, and thereupon, by resolution duly adopted, reestablished said drainage ditch in the exact location of the original ditches, and fixed the damages caused by the construction thereof, and designated it as "Drainage Ditch No. 1 & 2", and no appeal was taken from such order establishing said "Drainage Ditch No. 1 & 2", and said order so establishing said Drainage Ditch No. 1 & 2 is now in full force and effect.

Eleventh.

These defendants answering the Eleventh paragraph of the complainant's bill, admit that the Board of County Com-

missioners of Minnehaha County have expended ap-
49 proximately Two Hundred and Fifty-five Thousand Dollars ($255,000.00) in, payment for work done and material furnished in the construction of ditches, dams, gateways and the spillway upon said Drainage Ditch No. 1 and 2, for which drainage ditch warrants upon Drainage Ditch No. 1 and 2 Fund have been issued, payable only out of the assessments to be hereafter levied upon the lands and properties benefited by the construction of said ditch, and there is now due thereon, for principal and interest, about Two Hundred and Ninety Thousand Dollars ($290,000.00) and hereby specifically deny each and every other allegation in said paragraph contained, but further allege that the drainage warrants above referred to were issued, only upon duly verified claims, duly presented, audited and allowed by the County Commissioners, and report of the allowance of the same duly published in said Commissioners' proceedings, as provided by law.

Twelfth.

These defendants answering the Twelfth paragraph of complainant's bill, hereby admit that on or about the 3rd day of August, 1916, a petition was filed in the office of the County Auditor of the County of Minnehaha, duly signed by the City of Sioux Falls, by George W. Burnside, its Mayor, and duly attested by Walter C. Leyse, City Auditor, F. L. Blackman, and others, which petition was for the purpose of reconstructing and improving Drainage Ditches No. 1 and No. 2, in Minnehaha County, South Dakota, and to construct a new spillway and outlet to Drainage Ditches No. 1 and No. 2, and to pay therefor by assessments upon the property, persons and corporations benefited thereby, but these defendants specifically deny each and every other allegation, matter and thing contained in said Twelfth paragraph, but allege the facts to be as stated and set forth in the Tenth paragraph of this Answer, and further allege that all acts negatived in said paragraph Twelve, were duly taken, done
50 and performed, upon due notice, as required by the laws of the State of South Dakota.

Thirteenth:

These defendants answering the Thirteenth paragraph of complainant's bill, hereby specifically deny each and every allegation in said paragraph contained, as therein alleged, and allege the facts in relation thereto to be as follows: That

immediately after the establishment of "Drainage Ditch No. 1 & 2", as hereinbefore described, the said Board of County Commissioners, acting under said newly established Drainage Ditch No. 1 & 2, proceeded to dike, clean out, enlarge and re-construct original Drainage Ditches No. 1 and No. 2, and the additional river cut-offs were constructed, and the outlet and spillway of said drainage ditches re-built in a more substantial and permanent manner, upon plans approved by the State Engineer; that in the course of the construction of said spillway, plans were prepared under the supervision of the State Engineer, and approved by him on May 7, 1917, and bids for the construction thereof asked for by legal notice, and upon the opening of said bids and a consideration thereof, it was, by resolution of the Board, determined that the "spillway for which bids have been received for 'Drainage Ditch No. 1 & 2' can be constructed for less money than the amount of any bid submitted therefor", and it was "[Therefor] ordered that the Board of County Commissioners cause such spillway to be constructed, hire the necessary labor, machinery, tools and appliances, and a superintendent to oversee the construction thereof, and purchase all necessary material for such construction, without letting a contract for the entire construction thereof", and the Board thereupon proceeded to construct said spillway in accordance with said determination, ordered the necessary material for the construction thereof, and employed the Sioux Falls
51 Construction Company to furnish the necessary labor, superintendent and supervision of the construction thereof, and to furnish the necessary machinery, tools, etc, to be used in said construction.

From the determination of the Board that it would build said spillway without letting a contract therefor, and by buying the necessary material therefor, and employing the Sioux Falls Construction Company to furnish the necessary labor, machinery, tools, superintendent and supervision thereof, one William H. Lyon, being the original petitioner in the construction of original Drainage Ditch No. 1, appealed to the Circuit Court of Minnehaha County, South Dakota, which appeal came on for hearing before the Court on the 14th day of July, A. D. 1917, and the court, after full hearing and consideration of the evidence introduced on behalf of the appellant and the Board, dismissed said appeal, holding that it appeared that the "decision appealed from is one that rests in

the sound judgment of the Board of County Commissioners, and is not a proper subject for review by the Court"; that the proceedings upon said appeal are contained in File No. 16405 of the Circuit Court of Minnehaha County, South Dakota, which file and proceedings are hereby referred to and made a part hereof.

That thereupon the said spillway and outlet to said Drainage Ditch No. 1 & 2 was immediately re-constructed in a more substantial manner in accordance with the determination of said Board of County Commissioners, under the supervision of the State Engineer of the State of South Dakota, at a cost of more than One Hundred Thousand Dollars ($100,000.00); that the soil at the place where said outlet and spillway are constructed is of peculiar formation; that beneath the
52 surface at said point are found deep quicksands, the extent of which was at said time unknown to said Board of County Commissioners; that by reason of the necessity for immediate action in the construction of said spillway, and on account of the difficulties to be encountered in the construction thereof, it was impossible to prepare fully completed wroking plans at the time said work was commenced, but that the working plans had to be modified and adapted to the difficulties encountered as the work progressed, and that thereupon and by reason thereof, and with the approval and under the supervision of the State Engineer, the said Board of County Commissioners employed one F. C. Shenehon, a competent civil and [hydralic] engineer, to prepare working plans and to superintend the construction of said spillway as the work progressed, and that said working plans were so prepared by said Shenehon, and said spillway re-constructed under his immediate supervision and the supervision and approval of the State Engineer, in a substantial and adequate manner, and that the same, as so constructed, has ever since said time been in operation, and for the past three years has safely controlled and cared for the waters flowing through said drainage ditches, and protected the properties adjacent thereto, as aforesaid, from injury and damage by reason of the said waters, and the same is now in successful operation.

These defendants further allege that the records and proceedings in the establishment and construction of Drainage Ditch No. 1 & 2, on the petition of F. L. Blackman, the city of Sioux Falls, and other persons, referred to in Paragraph Fifth hereof, except the lengthy notices, are hereunto annexed, marked Exhibit "A", and made a part hereof, and

that all of said proceedings were taken and had after due and legal notice, as required by law, which notice specifically named the plaintiffs herein, and cited it to show cause why said drainage ditch should not be constructed as petitioned for.

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Fourteenth.

These defendants answering the Fourteenth paragraph of complainant's bill, hereby specifically admit the facts therein set out, except the allegations that said "Chenoweth & Rettinghouse were to be paid in Drainage ditch warrants drawn on Drainage Ditch No. 1 and No. 2", and except the further allegation that they "made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereto annexed, marked Exhibit 'B', and made a part hereof", which allegations are hereby specifically denied, and the facts are alleged to be that the said Chenoweth Rettinghouse were paid in drainage warrants drawn on Drainage Ditch No. 1 & 2 Fund, and that said Exhibit "B" referred to, is merely an analysis or resume or deduction drawn from the facts set out in the report, merely for the purpose of showing the results shown by the proportion of benefits recommended.

Fifteenth.

These defendants answering the Fifteenth paragraph of complainant's bill, deny that said Board of County Commissioners, on the 10th day of June, 1921, adopted a purported notice of time and place of equalizing the proportioning of benefits for the construction of said spillway, etc., as therein alleged, but allege the fact to be that for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum of about

54 Two Hundred and Fifty-five Thousand Dollars ($255,000.00), in payment of the labor, material, etc, used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commis-

sioners, did, on the 10th day of June, 192.., by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and indirect benefits that accrue by the construction of said drainage, taking a particular tract as a, unit for comparison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law, to this plaintiff, at which time and place, the apportionment fixed as to the plaintiff's property and other property, will be equalized, and the assessment will be later extended and spread on said equalization, but the defendants have no knowledge of the total number of Units or sum in dollars that will finally be equalized and assessed against said plaintiff's property. The defendants further allege that the notice, in addition to being published, as stated, was also posted according to law, and deny the balance of said paragraph.

55 Sixteenth.

These defendants answering the Sixteenth paragraph of complainant's bill, specifically deny the same.

Seventeenth.

These defendants answering the Seventeenth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

Eighteenth.

These defendants answering the Eighteenth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

Nineteenth.

These defendants answering the Nineteenth paragraph of complainant's bill, specifically deny the same and each and every allegation thereof.

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I.

That said proceedings of the said Board of County Commissioners so taken and had in the establishment and construction of said Drainage Ditches No. 1 and No. 2, and in the assessment and equalization of the proportion of benefits, and in the assessment of the cost thereof upon the lands benefitted thereby, were taken and had after due and legal notice as required by law, and that said ditches were so established and constructed in accordance with said proceedings.

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VI.

These defendants further allege that the records and proceedings in the establishment and construction of Drainage Ditch No. 1 & 2, on the petition of F. L. Blackman, the City of Sioux Falls, and other persons, referred to in Paragraph III hereof, except the lengthy notices, are hereunto annexed, marked Exhibit "A", and made a part hereof, and that all of said proceedings were taken and had after due and legal notice, as required by law, which notice specifically named the plaintiff herein, and cited it to show cause why said drainage ditch should not be established and constructed as petitioned for.

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VIII.

And the defendants, further answering complainant's bill, admit that they entered into a contract with Chenoweth & Rettinghouse, civil engineers, to make and perfect a topograhical survey of all the lands lying between the City of Dell Rapids and the outlet to said spillway and drainage ditch, lying within the alley of the Big Sioux River, and that said survey was necessary and was made in order that said defendant Board might advisedly make an apportionment of and fix the benefits to the lands and properties affected by reason of the benefits derived by said plaintiff and others like situated, by reason of the diking, cleaning out, reconstruction and improvement made upon said drainage ditch, the river cut-offs and new spillway and outlet to said ditches; and further allege that the original petition for said drainage ditch, river cut-offs and spillway, hereinbefore mentioned, was a compromise between the said petitioners therefor and others affected thereby, as hereinbefore set forth, and that the making and filing of said petition, accompanied by a bond, as provided by law, which was duly approved by the County Auditor of Minnehaha County, South Dakota, trans-

misssion of a copy thereof to the State Engineer, the inspection of the proposed route of said drainage project, the causing and ordering of a survey thereof to be made by a competent surveyor under the supervision of said State Engineer, the surveyor's report thereon, the filing of the same by the Board with said petition, said Board's determination of the exact length and line and width of said drainage improvement, and the order and resolution of said Board fixing
59 a time and place for hearing said petition, and the giving of notice thereof, the establishment of said drainage district and project by resolution and order of said Board upon said hearing, and the subsequent notice given to all parties interested, of the establishment of the cut-off ditches, including the plaintiff herein, and the final establishment thereof, and all work done and performed upon said ditches and river cut-offs ditches, and the establishment and construction of said spillway and work done thereon, and the manner of doing the same, and all other work done and performed upon said drainage ditch, cut-offs and spillway, were done and performed by said defendant Board, with the notice, actual knowledge, acquiescence, approval and consent of the plaintiff herein, its officers, agents and servants, and all others like situated, and said plaintiff and all others like situated during all the time said ditch, river cut-offs and spillway were being established, layed out and constructed, had notice and actual knowledge that payment therefor was to be made by special assessments against the lands and properties of said plaintiff affected thereby, and the lands of others like situated, and that there was no other provision of law or method of making such payment, and said plaintiff and none other of said parties took any legal steps to stop or prevent the establishment of, or work performed upon said ditches, river cut-offs or spillway, or the issuance of certificates of indebtedness or drainage warrants therefor, which said parties had notice and actual knowledge, of, were to be taken up and paid only by said special assessments as aforesaid; and that said plaintiff and others like situated are now,
and since 1918 have been receiving large and continu-
60 ing benefits to their lands and properties affected, by reason of said reconstruction and construction of said drainage ditch, river cut-offs and spillway, under the said re-establishment as Drainage Ditch No. 1 & 2.

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61 XI.

That by reason of each and all of the foregoing facts, acts and resolutions and orders done, passed and performed

as hereinbefore set forth, the said plaintiff and all others like situated are now estopped and forever barred from in any manner claiming or asserting any right or relief herein, or at all.

XII.

That in pursuance of said resolutions and orders hereinbefore referred to and set forth, and for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum of about Two Hundred and Fifty-five Thousand Dollars ($255,000.00), in payment of the labor, material, etc, used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commissioners, did, on the 10th day of June, 1921 by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and in-
62 direct benefits that accrue by the construction of said drainage, taking a particular tract as a unit for comparison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law.

XIII.

The above named defendants, A. G. Risty, et al, further answering plaintiff's bill of complaint allege that heretofore and on and prior to October 3, 1916, due and legal notice was given to the plaintiff herein of the time and place appointed by the

Board of County Commissioners of Minnehaha County, South Dakota, for claiming any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2 and that the plaintiff herein wholly failed and neglected to present the said Board of County Commissioners at said time and place, to-wit: October 3, 1916, any claim for damages therein, and that by reason thereof this plaintiff is now estopped and debarred from claiming or asserting herein any right, or claim to any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2.

XIV.

The above named defendants, A. G. Risty, et al, for further answer to plaintiff's bill of complaint, allege that the plaintiff is not entitled to the aid of a court of equity herein, for
63 the reason that said plaintiff has failed, neglected and refused to tender or offer to tender herein the amount of the actual benefits received by it by reason of the establishment, construction and reconstruction of Drainage Ditch No. 1 and 2.

Wherefore, the defendants, above named, pray that the plaintiff's bill of complaint in said action be dismissed, with costs.

E. O. JONES,
L. E. WAGNER,
Solicitors for Defendants.

B. C. Matthews,
Of Counsel.

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64 Exhibit "A"

Petition.

To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefitted Thereby.

To The Honorable Board of County Commissioners of Minnehaha County, South Dakota:

1. The undersigned petitioners respectively represent and show that they are all residents of Minnehaha County, South

Dakota and that each of them is the owner of certain lands and real property situate and lying in said county in the valley of the Big Sioux River and within the territory to be drained, protected and benefitted by the reconstruction and improvement of drainage ditches One and Two in said Minnehaha County, South Dakota, and by the construction of a new spillway or outlet to said drainage ditches numbers One and Two.

2. Your petitioners further represent and show that said drainage ditches Numbers One and Two were established for the purpose of draining agricultural lands in 1907 and 1910 respectively as appears from records of said proceedings in the office of the County Auditor of Minnehaha County, South Dakota, which are hereby referred to and made a part hereof.

3. Your petitioners further represent and show that the said Drainage Ditches Numbers One and Two and the outlet thereto as constructed were and are insufficient to accomplish the purpose for which they were constructed and were
65 and are insufficient to properly drain the agricultural lands within the districts or territory supposed to be drained thereby and insufficient for the drainage of other agricultural lands lying within the valley of the Big Sioux River above the mouth of the outlet to said Drainage Ditches Numbers One and Two and between the mouth of said outlet and the lands heretofore included within the assessment districts upon which the cost of the construction of said drainage ditches One and Two was imposed and insufficient as constructed to improve, promote and conserve the public health and welfare within said territory hereinbefore described above the mouth of the outlet to said ditches Numbers One and Two lying partly within the City of Sioux Falls, South Dakota, all of which said lands and property would be benefitted, drained and protected by a proper reconstruction and improvement of said Ditches One and Two and by the construction of a new and proper spillway or outlet to the same by means whereof the public health and welfare within the area hereinbefore described and referred to above the mouth of the outlet to said ditches would be conserved and improved.

4. Your petitioners further represent that it is necessary for the drainage of agricultural lands within said drainage districts Numbers One and Two and also agricultural lands lying above the mouth of the spillway or outlet to said ditches and between the mouth thereof and the present boundaries of said drainage Ditches Numbers One and Two to reconstruct, deepen, widen and improve said drainage ditches

One and Two and to construct a new outlet or spillway thereto and that the construction of such new outlet or spillway and the reconstruction and improvement of said Ditches One and Two would also be conducive to the public health, convenience and welfare of the
66 City of Sioux Falls, South Dakota, and also of the County of Minnehaha, South Dakota and people resident within the said area hereinbefore described lying between the present boundaries of said drainage districts One and Two and the mouth of the outlet to said ditches and within the valley of the Big Sioux River, partly within the corporate limits of the City of Sioux Falls, and that in the reconstruction of the said ditches One and Two, it will be necessary that the same be cleaned, deepened, widened and that certain levees, dikes, flood gates and barriers thereto be constructd to such extent as may be necessary to carry out the surplus or flood waters and to properly drain and protect the lands within said drainage districts and within the area hereinbefore described and within the city of Sioux Falls and to properly conserve and promote the public health and welfare within the said area as aforesaid.

5. Your petitioners further represent that there should be constructed and installed in the said Drainage Ditches Numbers One and Two and at the head of the said Spillway or outlet of said Drainage Ditches, controlling gates for the purpose of regulating and controlling the amount of water flowing through the said ditches and over the said Spillway, the number and location of said gates and the manner in which they should be installed should be determined by the County Commissioners upon the advice of their engineers.

6. Your petitioners further represent that the present spillway or outlet to said Drainage Ditches Numbers One and Two where the same empties into the Big Sioux River in Section Nine (9) Township One Hundred and one (101) of Range forty-nine (49) is wholly insufficient and has been prac-
67 tically destroyed by the action of the water thereon, so that the same has become inefficient as a means of disposing of the waters flowing in said drainage Ditches Numbers One and Two and to such an extent that it has become dangerous to abutting property and to persons living within the vicinity thereof and that it is necessary to entirely abandon said present spillway or outlet and to construct an entirely new outlet or spillway in place thereof in accordance with a new and different plan therefor, the new spillway to be located at or near the present location of the present spillway.

7. Your petitioners further represent that the said drainage ditch or drainage system should consist of the following ditches: First a ditch having its initial point at the beginning of Section Two, (2) of Drainage Ditch Number Two (2) of Minnehaha County as now established at the creek near the Northeast corner of Section thirty-one (31) Township One hundred four (104) of Range Forty-nine (49) and should then run Southwesterly to near the center of said Section thirty-one (31) and then south near the center line through said Section Thirty-one (31) and through Sections Six (6) and Seven (7) of Township one hundred three (103) of Range forty-nine (49) into Section eighteen (18) and then in a Southeasterly direction having its terminal point upon the Big Sioux River Sixteen hundred forty feet (1640) east of the said center of Section Eighteen (18), Township One hundred three (103) of Range forty-nine (49) following the present location of the said Section Two (2) of Drainage Ditch Number Two of Minnehaha County as now located.

Also a ditch having its initial point at the present beginning of Section One of Drainage Ditch Number Two of Minnehaha County, at the high water channel of the Big Sioux
68 River in the Southeast quarter of Section Twenty (20) Township One hundred three (103) of Range forty-nine (49) thence running in a general southerly direction through the Southeast quarter of Section Twenty (20) Township one hundred three (103) of Range forty-nine (49) and the Northeast quarter of Section twenty-nine (29), The Southwest quarter of Section twenty-eight (28) the west half of Section thirty-three (33) all in Township one hundred three (103) of Range forty-nine (49) and the west half of Section four (4) the northwest quarter of section nine (9) the Southeast quarter of Section eight (8) the east half of Section seventeen (17), the east half of section twenty (20) and the east half of Section twenty-nine (29) all in Township one hundred and two (102) of Range Forty-nine (49) with its terminal point at the southern end of said Section One of Drainage Ditch Number Two in the Southeast quarter of Section twenty-nine (29), Township One hundred two (102) of Range forty-nine (49) following the line of the said Section One of Drainage Ditch Number Two as now established in Minnehaha County.

Also a ditch having its initial point at the present beginning of Drainage Ditch Number One of Minnehaha County at or near the Northeast quarter of the Southeast quarter of the Southeast quarter of Section twenty-nine (29) Township one

hundred and two (102) of Range forty-nine (49) thence running south across the East half of the East half of Section Thirty-two (32) in Township one hundred two (102) of range forty-nine (49) and the East half of the Northeast quarter of Section Five (5) Township one hundred one (101) of Range forty-nine (49) and the Northeast quarter of the Southeast quarter of Section five (5) Township one hundred one (101) of Range forty-nine (49) thence across the West half of the Southwest quarter of Section four (4) in Township one hundred one (101) Range forty-nine (49), thence across
69 the northwest quarter of Section Nine (9) Township One hundred one (101) of Range forty-nine (49) and the Southwest quarter of the Northeast quarter of Section nine (9) township one hundred one (101) of Range forty-nine (49) where it empties into the Big Sioux River having its initial point and terminal point the same as and following the line of Drainage Ditch Number One as now established in Minnehaha County. With also, a branch drain or second part beginning at the point near the center of the Northeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49) running thence in a southeasterly direction across the Southeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two, (102) of Range forty-nine (49) to where it connects with the main ditch of Drainage Ditch Number One as now established in Minnehaha County.

8. Your petitioners further represent that in order to make the foregoing drainage system complete and adequate for the purposes for which it is designed, that it will be necessary to straighten, clear out and deepen the channel of the Big Sioux River at a number of places within the said Drainage District and especially to straighten the channel, of the said River upon Section thirty-two (32) Township one hundred three (103) of Range forty-nine (49) by a ditch cutting off the bend in said river on said Section. 'Also to straighten the said River upon section Eight (8) Seventeen (17), Twenty (20) and Twenty-nine (29) in Township one hundred two (102) of Range forty-nine (49) by cutting off bends of the said Sioux River situated upon those Sections, the exact location of the said ditches for straightening, clearing out and deepen-
70 ing the channel of the said Sioux River to be determined by the County Commissioners upon advice of their engineers.

9. Your petitioners further represent and show that the lands and territory likely to be affected by the construction of such new spillway or outlet and by the reconstruction and improvement of said drainage ditches One and Two and which will be drained, benefitted and protected thereby and within which territory the public health and welfare will be promoted includes all of the lands lying in the valley of the Big Sioux River and included within the present boundaries of said Drainage Districts Numbers One and Two as well as all of the lands in said valley, of the Big Sioux River between the mouth of said spillway or outlet to said ditches and the City of Dell Rapids, South Dakota, that subject to overflow by the waters of the Big Sioux River and that will be subject to overflow and damage by the waters of said River if the said outlet to said Drainage Ditches Numbers One and Two be abandoned and said outlet thereto closed ond that the said District should be so extended and enlarged as to include all lands and property benefitted thereby as far down the valley of the Big Sioux River as the mouth of said outlet or spillway and including therein the corporation of the City of Sioux Falls as well as the corporation of the County of Minnehaha, South Dakota, which said corporations your petitioners further represent are and will be largely benefitted by the reconstruction and improvement of said ditches and construction of said new outlet or spillway thereto to their highways, bridges and other corporate properties owned by them respectively.

Dated this 15th day of July, A. D. 1916 .

Attest: WALTER G. LEYSE,
City Auditor.

(Seal of the City of Sioux Falls)

CITY OF SIOUX FALLS
By Geo. W. Burnside,
Mayor.

F. L. BLACKMAN,

W. BRALEY,

DEN DONAHOE

DAN A. DONAHOE,

W. M. DONAHOE

CATHERINE PECK

PORTER P. PECK

MARY C. BRACE

JOHN P. BLEEG

FRANCES G. CARPENTER

M. RUSSELL, By Louis Caille, Agt.

McKINNEY & ALLEN

E. D. CLARK

C. C. BRATRUD

L. P. CALDWELL

Filed in the office of the Auditor of Minnehaha County, South Dakota this 3 day of Aug. 1916

HARRY H. HOWE,
County Auditor.

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72 Order for Filing Petition for Drainage

State of South Dakota,
County of Minnehaha—ss.

In re Drainage Ditch Numbers 1 and 2 Minnehaha County, South Dakota.

Whereas F. L. Blackman and others of the County of Minnehaha, State of South Dakota, have this day presented to this Board a petition for the construction of a drainage ditch conducive to public health, convenience and welfare and for the purpose of draining agricultural lands in the Big Sioux River Valley which lands have heretofore been drained and protected from overflow by ditches Number 1 and 2 of Minnehaha County as heretofore established and constructed, in which petition it is represented that it is necessary to re-construct, improve and extend said drainage ditches Number 1 and 2 and to construct a new spillway or outlet where said drainage ditch number one empties into the Big Sioux River in Section Nine (9), Township One Hundred and One (101), Range Forty-nine (49) by reason of the fact that the spillway or outlet of said drainage ditch number 1 is inadequate for its purpose and has been destroyed by action of the water; also that the drainage ditches number 1 and 2 are not adequate for the purpose of which they are constructed and that they should be cleaned, deepened and widened and levees, dikes, and barriers remodeled, re-constructed and improved in such places and to such extent as may be necessary to carry

off the surplus or flood water and properly drain the land to be drained thereby and protect other land subject to overflow; also that there should be constructed and installed in said drainage ditches 1 and 2 necessary flood gates for the purpose of regulating the amount of water flowing
73 through; also that it is necessary in order to make such drainage system complete and adequate for the purpose for which it is designated to straighten, clear out and deepen the channel of the Big Sioux River at different places within the drainage district of said drainage ditches number 1 and 2, and said petition having been by this board examined and found sufficient in form and being accompanied by bond with sureties approved by the County Auditor.

Now Therefore it is hereby ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that the said petition be forthwith filed with the County Auditor of this County and that a copy thereof be transmitted by the said County Auditor to the State Engineer.

A. G. RISTY,
Chairman of County Board.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of Aug. 1916.

HARRY H. HOWE
County Auditor.

* * * * * * * * *

74 Resolution for Survey.

Whereas on the 3rd day of August, A. D. 1916, the City of Sioux Falls, F. L. Blackman and others of Sioux Falls, Minnehaha County, South Dakota, presented to this board a petition for the drainage of lands in the Big Sioux River Valley for the establishment of a drain chiefly to carry off the overflow water of the Big Sioux River, such drain to begin at the beginning of Section two (2) of drainage ditch number 2 of Minnehaha County, as now established at the creek near the northeast corner of Section 31, Township 104, Range 49, and should end at a point on the said river near the center of Section 9, in Township 101, Range 49, where drainage ditch number 1 as now established in Minnehaha County, empties into the Big Sioux River, which position was accompanied by a proper bond with sureties approved by the County Auditor of said County; and

Whereas said petition was by this board examined and found sufficient in form and was ordered filed with the County Auditor of said County, and was so filed on the 3rd day of August A. D. 1916; and

Whereas this board together with the State Engineer did on the 14th day of August, A. D. 1916, inspect the proposed route of such daainage; and

Whereas this board deems it necessary that a survey of the proposed drainage be made by a competent surveyor.

Now Therefore it is Ordered that a survey be made of the lands in the Big Sioux River Valley between the City of Dell Rapids and the terminus of said proposed drainage for the purpose of determining the exact line of said drainage and the most practicable method of draining the entire section of the country of which the lands proposed to be drained are a part. Such surveyor shall include in his report to this board a description of the exact line of said drainage ditch or ditches as suggested in said petition, the size and [sidth] thereof [of] such survey to be made under the supervision of the State Engineer and report filed with the County Auditor with all convenient speed.

And the chairman of this board is hereby authorized to employ such surveyors and his assistants and purchase such material as may be necessary for such survey.

Approved this 14th day of Aug. 1916.

A. G. RISTY.

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Resolution Fixing the Exact Line and Width of Ditches and Fixing the Time and Place for Hearing Petition.

(Commissioners Proceedings, September 13, 1916)

Whereas, on September 13, 1916, Mr. L. E. Stevens, Civil Engineer employed by this Board for the making of a survey for a proposed drainage ditch, in the valley of the Big Sioux River, in Minnehaha County, South Dakota, in the territory previously partially drained by Drainage Ditches Numbered One and Two, as heretofore established, pursuant to the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, did file his report of such survey, together with maps and profiles; and

Whereas, this Board has personally inspected the route of said proposed drainage, as described in said petition and as described in the engineer's said report;

Wherefore, be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of said proposed drainage, be and the same is hereby fixed as described in said Engineer's report, and that the [requisit] right-of-way for said drainage ditch and dump space be as described in said engineer's report; and

Be it further resolved that Monday, the 2 day of October, 1916, at 2 o'clock, P. M. at the Office of the County Auditor of said County be and it is hereby fixed as the time and place for hearing of said petition and that notice thereof be given in accordance with the provisions of Section Four (4) of Chapter 134, of Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota, the same to be signed by the Chairman of this Board and Attested by the County Auditor, by publication once in each week
77 for two consecutive weeks in the Sioux Falls Daily Press, and by posting copies of said notice in at least three of the most public places near the route of said proposed drainage ditch, such posting to be made at least ten days prior to the time of said hearing.

Approved:

A. G. RISTY,
Chm. Co. Bd.

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78 Resolution Establishing Drainage Ditch No. 1 and 2.

In the matter of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on August, 3, 1916, coming on to be heard by the Board of County Commissioners of said county at a regularly adjourned meeting, on Monday, the 2 day of October, A. D. 1916, pursuant to notice heretofore given, the said Board having heard and considered said petition and all matters in support of the same, and in opposition thereto, and being fully advised by the state engineer with reference thereto, now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said principal

drainage ditch as hereinafter described and set forth, is conducive to the public health, convenience and welfare and it is necessary and practicable for the drainage of agricultural land and it is so found;

Be It Further Resolved that the said drainage ditch as hereinafter described be, and it is hereby named and designated as "Drainage Ditch No. 1 and 2";

Be It Further Resolved that the said Drainage Ditch No. 1 and 2 be and the same is hereby established in accordance with the resolution adopted by this Board on September 13, 1916, in so far as the same is set out and described in Sections One, Two, and Three of the engineer's report of preliminary survey, filed herein on September 13, 1916, and particularly described as follows:

79 Section One.

Commencing at a point Fifty-eight (58) feet west and Ten Hundred and Thirty-five (1035) feet north of the Southeast corner of Section Twenty-nine (29), Township One Hundred and Two (102), Range Forty-nine (49) west of the 5 P. M. running thence South parallel to the adjacent highway Two Thousand and Eighty-five (2085) feet to Station One Hundred and Fourteen (114); also commencing at a point Six Hundred and Seventy-four (674) feet north and about Thirty-five (35) degrees west of said Station number One Hundred and Fourteen (114) thence southeasterly Six Hundred and Seventy-four (674) feet to said Station number One Hundred and Fourteen (114), thence south and parallel to said highway Seventy-seven Hundred (7700) feet to station number Thirty-seven (37) thence south forty-five (45 degrees east Three Thousand Seven Hundred (3700) feet to station number zero (0) the same being on high water line, thence South Fifty-nine (59) degrees and Thirty-six (36) minutes east, Four Hundred and Fifty (450) feet, thence south Thirty-one (31) degrees east to the Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point Ten Hundred and Thirty-five (1035) feet north and Fifty-eight (58) feet west of the Southeast corner of Section Twenty-nine (29) in Township One Hundred and Two (102) of Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore de-

scribed, running thence north Five Hundred and Forty-seven (547) feet; thence north Twenty-three (23) degrees west Thirty-three Hundred and Eighteen (3318) feet to a point Fifty-eight (58) feet west of the quarter quarter line in 80 the northeast quarter of Section Twenty-nine (29) in said Township; thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17) and a part of Section Eight (8), Twelve Thousand Nine Hundred and Thirty-five (12,935) feet; thence north Fifty (50) degrees east Twenty-seven Hundred and Thirty-two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way of the Chicago, Milwaukee & St. Paul Railway Company, in the Northwest quarter of Section Nine (9) in said Township; thence Northerly parallel with and Thirty-three (33) feet west, of said right of way line Nineteen Thousand Three Hundred and Sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the Southeast Quarter of, Section Twenty (20) in Township One Hundred and Three (103) North of Range Forty-nine (49).

Section Three.

Commencing at a point Sixteen Hundred and Forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103), Range Forty-nine 49); running thence north Thirty-three (33) degrees west Thirty-one Hundred and Fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line in Sections Seven (7) and Six (6) in said Township and in Section Thirty-one (31) n Township One Hundred and Four (104) North of Range Forty-nine (49) to the center line running east and west through said Section Thirty-one (31); thence north- 61 easterly to the creek near the Northeast corner of said Section Thirty-one (31), the said line being the center ine of said proposed drainage.

That in addition thereto the Big Sioux River is to be traightened in Sections Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred and Three (103), North of Range Forty-nine (49) in order to afford better neans of communication between the lower end of [of] Section Three (3) of said ditch and the upper end of Section Two hereof; the same being intended to cover the exact location f drainage ditch Number Two (2) as now established and onstructed.

Be It Further Resolved that the consideration and determination of the question of the straightening of the Big Sioux River at the several points recommended in said engineer's report, be deferred, without passing upon the merits thereof, to some later date, when said straightening of the Big Sioux River may be given more complete consideration. covering the points recommended and other points requested and suggested at the hearing.

Be It Further Resolved that in the construction of the said Drainage Ditch, the rights of flowage of the owner of the mill at or near Baltic, South Dakota, will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch where the same joins with creek near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, that it will not diminish or interfere with said rights of flowage and that the headgate or other protection now established, be maintained to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

82 Be It Further Resolved that headgates or controlling gates be established in said drainage ditch, on Section Twenty (20) of Sverdrup Township and on Section Twenty-nine (29) or Thirty-two (32) in Mapleton Township at such place and of such size and material as the state engineer may direct;

Be It Further Resolved that a good substantial adequate spillway be constructed, under the supervsion of the state engineer, in said ditch on Section Nine (9) of Sioux Falls Township and that an efficient, substantial controlling gate be constructed at the upper end of said spillway in such manner that the same can be closed and all water be prevented from entering said spillway;

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same may be made a special order for Friday, October 6, A. D. 1916, at ten o'clock A. M.

A. G. RISTY,
Chairman of Board of County Commissioners of Minnehaha County, South Dakota.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of October 1916.

HARRY H. HOWE
County Auditor.

Endorsed: Filed in the District Court on Sept. 1, 1921, at 9:30 A. M.

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83 And afterwards, to-wit, on the 28th day of November, A. D. 1921, there was filed in the office of the clerk of said court, stipulation as to certain Drainage Ditch Notice and that same be considered as a part of the answer and returns of the defendants and intervening defendant; that attached to said Stipulation is a "Drainage Ditch Notice" which said Drainage Ditch Notice is in words and figures the following, to-wit:

84 Drainage Ditch Notice.

Notice is hereby given that Monday, October 2, 1916, at 2 o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others filed August 3rd, 1916, for the establishment and construction of a drainage ditch, pursuant to the provisions of chapter 134 of the laws of 1907 of the State of South Dakota, as amended by chapter 102 of the laws of 1909, the exact line and width of said drainage ditch has determined by action of said board on September 13, 1916, to be as follows:

Section One.

Commencing at a point fifty-eight (58)feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of section twenty-nine (29) township one hundred and two (102) range forty-nine (49) west of the 5th P. M. runnnig thence south parallel to the adjacent highway two thousand eighty-five (2085) feet to station one hundred fourteen (114); also commencing at a point six hundred and seventy-four (674) feet north and about thirty-five (35) degrees west of said station number one hundred fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south 45 degrees east thirty-seven hundred feet (3700) to station number

zero (0), the same being on high water line, thence south fifty-nine (59) degrees thirty-six (36) minutes east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to the Big Sioux River, the said line being the
85 center line of said drainage ditch and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five feet (1035) north and fifty-eight (58) feet west of the southeast corner of section twenty-nine (29), in township one hundred and two (102) of range forty-nine (49), the same being the commencement point of section one (1), hereinbefore described running thence north five hundred and forty-seven (547) feet; thence north twenty-three (23) degrees west three thousand three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the northeast quarter of section [twenty-none] (29) in said township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through sections twenty-nine (29), twenty (20), seventeen (17) and a part of section eight (8), twelve thousand nine hundred and thirty-five (12,935) feet; thence north fifty (50) degrees east twenty-seven hundred and thirty two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way to the Chicago, Milwaukee & St. Paul Railway Company in the northwest quarter of section (9), in said township; thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368 feet to a connection with a high water channel of the Big Sioux River in the southeast quarter of section twenty (20) in township one hundred and three (103) north of range forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of section eighteen (18) in town-
86 ship one hundred and three (103), range forty-nine (49) runnnig thence north thirty-three (33) degrees west thirty-one hundred and fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between sections seven (7) and eight (8) in said township; thence north parallel with and sixty (60) feet west of the quarter line in sections seven (7) and six (6) in said township and in section thirty-one (31) in township one hundred and four (104) north

of range forty-nine (49) to the center line running east and west through said section thirty-one (31); thence northeasterly to the creek near the northeast corner of said section thirty-one (31). The said line being the center line of said proposed drainage ditch.

That in addition thereto the Big Sioux river is to be straightened in sections seventeen (17), eighteen (18) and twenty (20) in township one hundred and three (103) north of range forty-nine (49) in order to afford better means of communication between the lower end of section three (3) of said ditch and the upper end of section two (2) thereof; the same being intended to cover the exact location of drainage ditch number 2 as now established and constructed.

I further recommend that the Big Sioux river be straightened on section thirty-two (32), township one hundred and three (103) north of range forty-nine (49) west by the construction of a cut off beginning at the intersection of the center line of the highway bridge across the Big Sioux river, on the town line between sctions thirty-two (32), township one hundred and three (103), range forty-nine (49) and section five (5), township one hundred and two (102), range forty-nine (49) and the center line of said river; thence northerly at right angles to said bridge two hundred (200) feet; thence
87 northwesterly at an angle of twenty (20) degrees to the west, nine hundred and fifty (950) feet; thence northerly at an angle of nineteen (19) degrees to the east twenty-eight hundred and fifty (2850) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8), township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at a point in the center line of the Big Sioux river, twenty-one hundred and seventy (2170) feet easterly and seven hundred and eighty-five (785) feet southerly from the northwest corner of section eight (8) township one hundred and two (102), range forty-nine (49); thence easterly parallel with the north line of said section eight (8) three hundred feet; thence northeasterly at an angle of twenty degrees (20) to the north, four hundred (400) feet, to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8) township one hundred and two (102) range forty-nine by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the east and west quarter line of section eight (8), township

one hundred and two (102), range forty-nine (49); thence northerly at an angle of forty-one (41) degrees and thirty (30) minutes to the north eight hundred (800) feet; thence northwesterly at an angle of seventy-five (75) degrees to the west five hundred and fifty (550) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section seventeen (17), township one hundred and two (102), range forty-nine (49) by the construction of a cut off beginning at a point in the center of the Big Sioux river seven hundred and twenty (720) feet southerly and six hundred and twenty (620) feet easterly from the west quarter post
88 of section seventeen (17) township one hundred and two (102), range forty-nine (49); thence northerly parallel with the westerly line of said section seventeen (17) six hundred (600) feet; thence northwesterly at an angle of twenty-nine (29) degrees to the west fourteen hundred and ten (1410) feet; thence northerly at an angle of twenty-nine (29) degreees to the east fifteen hundred and sixty (1560) feet; thence northeasterly at an angle of fifty-five degrees (55) to the east eight hundred and seventy (870) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section twenty (20), township one hundred and two (102) range forty-nine (49), by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty (20), township one hundred and two (102), range forty-nine (49), thence southeasterly at an angle of one hundred and thirteen (113) degrees to the east six hundred and ten (610) feet; thence southwesterly at an angle of thirty-one (31) degrees to the west ten hundred and eighty (1080) feet; thence southwesterly at an angle of twenty-one (21) degrees to the west thirteen hundred and eighty (1380) feet to the center of said river.

Also in said section twenty (20) beginning at the intersection of the center line of Big Sioux river and the south line of section twenty (20), township one hundred and two (102) range forty-nine (49); thence northwesterly at an angle of sixty-two and one-half (62½) degrees to the north twenty-one hundred and ten (2110) feet; thence northerly at an angle of twenty-eight (28) degrees to the east five hundred (500)
89 feet to the center of said river.

I further recommend that the Big Sioux River be straightened on section twenty-nine (29) township one hundred and two (102) range forty-nine (49) by the construction

of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty-nine (29) township one hundred and two (102), range forty-nine (49); thence southerly at an angle of 81 degrees to the south twenty-nine hundred and ninety (2990) feet; thence southeasterly at an angle of thirty-five (35) degrees to the east ten hundred and ninety (1090) feet; thence southerly at an angle of thirty-seven and one-half (37½) degrees to the west eleven hundred (1100) feet, to the center of said river.

All of the above cut-offs to have a bottom width of sixty (60) feet and side slopes of one and one-half (1½) to one (1). A right of way one hundred (100) feet in width, one-half each side of the above described center lines will be required.

The tract of country likely to be affected by the establishment and construction of the said proposed drainage is in general terms described as follows: Sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty-two (22), twenty-seven (27), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), in township one hundred and one (101) of range forty-nine (49); sections thirteen (13), twenty-four (24) and twenty-five (25) in township one hundred and one (101), range fifty (50); sections three (3), four (4), five (5), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20, twenty-one (21), twenty-eight (28), twenty-nine (29), thirty-one (31), thirty-two (32) and thirty-three (33) in township one hundred
90 and two (102), range forty-nine (49); sections five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), twenty (20), twenty-one (21), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty-two (32), thirty-three (33) and thirty-four (34) in township one hundred and three (103), range forty-nine (49); sections twenty-nine (29), thirty-one (31) and thirty-two (32) in township one hundred and four (104), range forty-nine (49), including also the mill property at or near the town of Baltic and the tracts of country covered by the right of flowage belonging to said mill property. Also the following additions to the City of Sioux Falls, Minnehaha County, South Dakota; North Boulevard addition, Carpenter's addition, Central Park addition, Meredith's First Addition, Meredith's Second addition, Harrison's addition, Lincoln Park addition, Englewood addition, West Lawn addition, Sioux Falls Improvements Company's addition, North Park Addition, North Park

Second addition, Brooks' addition, Bunker's addition, Lake View addition, Brookings addition, Berwick addition, Summit addition, McClellan's Second addition, West Park addition, Pettigrew & Tate's Eighth addition, Glendale addition, Scott's Second addition, Morningside addition, Van Eps' addition, Millspaugh's addition, Daniels' addition, Morse's addition, Gale's addition, Gale's Sioux Falls, Phillips' addition, Syndicate addition, Central addition and W. R. Green addition.

The separate tracts of land through which said proposed ditch will pass and parts of which will be required therefore and for dump space, and the names of the owners of said tracts as appears from the records in the office of the
91 register of deeds of said county on August 3rd, 1916, that being the date of filing said petition, are as follows:

Owner	Description		Township	Range
Lars Simonson	NW¼ of NW¼	Sec. 32		
Lars Simonson	NE¼ of NE¼	" 31	104	49
Lars Simonson	SE¼ NE¼	" 31	104	49
Gustava Nelson	SW¼ of NE¼	" 31	104	49
P. G. Thompson	E½ of SW¼	" 31	104	49
Julia L. Moe	NW¼ of SE¼	" 31	104	49
Even O. Fossum	NE¼ of NW¼	" 6	104	49
Gunerius Thompson	All that part of SE¼		103	49
	of NW¼ Sec.	6	103	49
	lying south of a certain slough running West of Northwest to end of drain ditch			
E. P. Sorkilmo	All that Part of SE¼ of NW¼ Sec. 6 located & lying on the north side of a certain intermittent water-course or slough running through the center of said section in a northwesterly course to ditch on the west line of said "40" except the N½ of N½ of said SE¼,		103	49
Lina Hanson,	N½ N½ SE¼ NW¼ Sec. 6,		103	49
Gunerius Thompson	E½ of SW¼ Sec. 6		103	49
Ole J. Ustrud	E½ of NW¼ Sec. 7		103	49
Magnhild Floren, Olaf Berthum Floren, Mabel Floren & Ovida Mathilda Floren	E½ of SW¼ Sec. 7		103	49
Andrew Swenson Aas	E½ of NW¼ Sec. 18		103	49
John O. Aasen	S½ of NE¼ Section 18		103	49
B. G. Flamoe	NE¼ of NW¼ Sec. 20		103	49
Bernt G. Flamoe	SE¼ of NW¼ Sec. 20		103	49
Peter Paulson,	E½ of SE¼ Sec. 20		103	49

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Owner	Description		Township	Range
Olymphious S. Thompson	Tract 3 of County Auditor's Subdivision of the NE¼ of Sec. 29		103	49
Olymphious S. Thompson	SE¼ of NW¼ and W½ of SW¼ of Sec. 28		103	49
Bertha Peterson, Alice, Christina Thompson, John Oscar Thompson, William Henry Thompson, Fred Raymond Thompson, Reuben Victor Thompson, Mabel Josephine Thompson, Carl Melvin Thompson	SW¼ of NW¼	Sec. 33	103	49
Andrew J. Aason	NW¼ of NW¼	" 33	103	49
Joseph C. Thompson	NW¼ of SW¼	" 33	103	49
Thomas Hendrickson	SW¼ of SW¼	" 33	103	49
Ole Thompson Aspass	W½ of NW¼	" 4	102	49
Martin H. Oyen and Cleopatra H. Oyen	W½ of SW¼	" 4	102	49
Martin Oien	W½ of NW¼	" 9	102	49
Martin H. Oien	SE¼ of NW¼	" 8	102	49
Ole Gunderson	W½ of SE¼	" 8	102	49
Leonard Renner	E½ of SE¼	" 8	102	49
Ingeberg Peterson Peter R. Peterson Iver R. Peterson Gertie R. Peterson,	W½ of NE¼	" 17	102	49
Christian J. Orstad	W½ of SE¼	" 17	102	49
Albert N. Allis	W½ of NE¼	" 20	102	49
Robert J. Huston	W½ of SE¼	" 20	102	49
Charles E. Kaufmann,	NE¼ & NE¼ of SE¼ of Section 29		102	49
State of South Dakota	SE¼ of SE¼	Sec. 29	102	49
State of South Dakota	E½ of NE¼ & NE¼ of SE¼	" 32	102	49
Hans Ruvald	SE¼ of SE¼	" 32	102	49

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Owners	Description		Township	Range
Hans Ruvald	E½ of NE¼ & NE¼ of SE¼	" 5	101	49
City of Sioux Falls	Starting at Southwest corner of Section 4, running thence east along Sec. line to the center line of County Ditch #1 as shown on Map #3 of the recorded plat of said ditch, thence in a northwesterly direction along the center line of said ditch to the west line of Sec. 4 thence south along said section line to the place of beginning		101	49

State of South Dakota	SW¼ of Sec. 4, except above described tract	101	49
Southern Minnesota Railway Extension Company (Now Chicago Milwaukee & St. Paul Railway Company.	Right of way across the SW¼ of SW¼ Sec. 4	101	49
Watertown & Sioux Falls Railway Company	Right of Way across the SW¼ of SW¼ Sec. 4	101	49
Watertown & Sioux Falls Railway Company	Right of Way across the East ½ of SE¼ Sec. 5,	101	49
Chicago, Milwaukee & St. Paul Railway Company	Right of Way of Madison Branch, on Sections 8 and 9,	102	49
Mapleton Township	Interest in Highway adjacent to the line of the proposed ditch in Sections 4, 8, 9, 17, 20 and 29	102	49
Sverdrup Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 6, 7, 18, 20, 28, 29 and 33.	103	49
Dell Rapids Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 29, 30, 31 and 32,	104	49
Sioux Falls Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 4 and 5 and 9	101	49

94 Berwick Addition to Sioux Falls

	Lot No.	Block No.
Elwin L. Potter	1, 2 and 3	5
Arthur D. Horton	5, 6, 7, 8, 9, 10 and 11	4
State of South Dakota	1, 2 and 3	13
Grant Lines	5, 6, 10 and 11 lying east of Drainage Ditch	14
State of South Dakota	7, 8, and 9	14
State of South Dakota	1, 2 and 3	19
Sophia Krull,	4	18
Sophia Krull, Emma Buchholz, Mary Toepfer, Charles Krull, William F. Krull and Otto R. Krull	5 and 6	18
Sophia Krull	7, 8, 10, 11	18
George W. Hanson (Fee) Security Savings Bank (Tax title)	9	18

Moses M. Robinson	1	31
Security Savings Bank	2 & 8	31
James Kennedy	3	31
Security Savings Bank	All of Block	32

* * * * * * * * *

The Kittery Realty Company—Tract 2 of NE¼ Section 9, Twp. 101, Rge. 49.

The Kittery Realty Company—Tract 3 of NE¼ Sec. 9 Twp. 101 Rge. 49.

State of South Dakota: Tract 3 of NW¼ Sec. 9, Twp. 101 Rge. 49.

95 The separate tracts of land wherein the Big Sioux River is proposed to be constructed and which will likely be affected thereby and the names of the owners of said tracts as appear from the records of the office of the Register of deeds of said County on August 3rd, 1916, that being the date of the filing of said petition, are as follows:

Name of Owner.	Description	Township	Range
Andrew J. Aasen,	W½ NE¼ Section 32	103	49
Andrew J. Aasen	NE¼ of NE¼ Sec. 32	103	49
Joseph O. Thompson,	S½ of SE¼ of NE¼ Section 32,	103	49
Gus S. Thompson,	N½ of SE¼ of NE¼ Section 32.	103	49
Jonas L. Finnegan,	N½ of SE¼ of Sec. 32,	103	49
Margaret Finnegan,	SE¼ of SE¼ Sec. 32,	103	49
John Finnegan,	SW¼ of SE¼ Sec. 32	103	49
Ole Gunderson,	NW¼ Sec. 8	102	49
Iver Nelson,	NW¼ of SW¼ Sec. 8,	102	49
Jonas Olson,	SW¼ of SW¼ Sec. 8,	102	49
Ole Gunderson,	E½ of SW¼ Sec. 8,	102	49
Iver R. and Palma Peterson,	NW¼ of NW¼ of Sec. 17	102	49
Bernt Mekvold,	SW¼ of NW¼ Sec. 17	102	49
C. C. Fleischer,	NW¼ of SW¼ Sec. 17,	102	49
Iver R. and Palma Peterson,	East 26 acres of NE¼ of NE¼ Sec. 18	102	49
Bernt Mekvold,	SE¼ of NE¼ Sec. 18	102	49
W. O. Quincy,	W½ of NW¼ Sec. 20	102	49

Albert N. Allis,	E½ of NW¼ Sec. 20,	102	49
Robert J. Huston	N½ of SW¼ Sec. 20,	102	49
Charles Kaufmann,	S½ SW¼ Sec. 20,	102	49
Charles Kaufmann,	W½ of NE¼ Sec. 29	102	49

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Name of Owner	Description	Township	Range
Charles Kaufmann,	NE¼ of NW¼ Sec. 29	102	49
Ole P. and Maria Schjodt	W½ of SE¼ Sec. 29	102	49
Berit Johnson,	NE¼ of SW¼ Sec. 29	102	49

In addition to the above, notice is also given to Minnehaha County, Townships of Sioux Falls, Mapleton, Sverdrup, and Dell Rapids in said County and the City of Sioux Falls in said County on account of benefits to highways, bridges, parks and city waterworks plant in the said drainage area and notice is also given to the Chicago, Milwaukee & St. Paul Railway Company, also to the Watertown & Sioux Falls Railway Company on account of the benefits to their rights of way within said drainage area;

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have why the said drainage should not be established and constructed;

And all persons deeming themselves damaged by said proposed drainage or claiming compensation for the lands proposed to be taken for said drainage are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 15th day of September A. D. 1916.

THE BOARD OF COUNTY COMMISSIONERS,
By: A. G. Risty, Chairman.

Attest:
(Seal) Harry H. Howe, County Auditor
By E. H. Shenkle Deputy.

Filed in the office of the Auditor of Minnehaha County, S. D., this 15 day of Sept., 1916.

HARRY H. HOWE, County Auditor,
By E. H. Shenkle, Deputy.

98 (Order directed to defendants to show cause why plaintiff should not be permitted to amend bill of complaint.)

A motion having been made in this court by the plaintiff in the above entitled action, to be allowed to make an amendment to its original bill in equity herein by adding thereto a paragraph to be numbered 18½ fully set out in said motion, in order to make the bill conform to the facts proven upon the trial of the said action, and the plaintiff having petitioned this court for an order to show cause upon the defendants and their attorneys and the interveners and their attorneys, why the amendment should not be allowed and paragraph 18½ added to the bill of complaint of the plaintiff herein; and it appearing to the satisfaction of the court that a large amount of evidence was offered and received upon the trial of the said action along the line of the proposed amendment
99 upon the understanding of all parties at the time that the matters set out in the amendment were sufficiently pleaded in the original bill.

It is Therefore Ordered that the defendants and each of them and the interveners and each of them and their attorneys, E. O. Jones and Porter & Bartlett, show cause before this court at the City of Sioux Falls, Minnehaha County, South Dakota, on the 31 day of January, 1922, at the hour of ten o'clock in the forenoon, why the proposed amendment to the bill of the plaintiff herein should not be allowed.

It Is Further Ordered that this order to show cause, the motion to amend, the proposed amendment and the affidavits filed herein be served upon attorneys for defendants and interveners forthwith.

Done this 28 day of January, 1922.

By the Court:

JAS. D. ELLIOTT,
Judge.

(Seal of Court)

Attest:
Jerry Carlton,
Clerk.

Due service of the within order this 28th day of Jan., 1922 is hereby admitted.—E. O. Jones, Attorney for Defendants. —Due service of the within order this 28 day of Jan., 1922

is hereby admitted.—Porter & Bartlett, Attorney for Interveners.

100 Endorsed: Filed in the District Court Jan. 28, 1922, at 4:30 P. M.

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101 (Affidavit of A. B. Fairbank in support of order to show cause.)

State of South Dakota,
County of Minnehaha—ss.

A. B. Fairbank, being duly sworn, on oath says that he is one of the attorneys for the plaintiff in the above entitled action and that he prepared the bill in equity in the said action and had charge of the trial thereof. That upon the trial of the said action a large amount of evidence was offered both by the plaintiff and by the defendants, which showed that the equalization of benefits which was made by the Board of County Commissioners of Minnehaha County, South Dakota, on the 10th day of June, 1921, against
102 the property of the Chicago, Rock Island & Pacific Railway Company was made without any reasonable or rational methods for determining benefits against the railroad property. That it was purely speculative, arbitrary, unjust to the railroad company and discriminatory against the railroad company.

That when this evidence was offered by the plaintiff it was objected to by the defendants and was admitted over their objection. That the court was of the opinion at the time and so were the attorneys for the plaintiff that the bill of complaint filed herein sufficiently alleged the facts to admit of the introduction of this evidence. That the bills are very voluminous and were not thoroughly examined either by the court or the attorneys for the plaintiff and defendants at the time, but that it was assumed that they were sufficient in their allegations to cover this line of evidence. That after the trial was completed the bill was thoroughly examined by affiant in preparing brief and that affiant discovered that the allegations upon this proposition were somewhat vague and not clear and specific and that there was some doubt as to their sufficiency to admit of the receipt of the evidence which had been offered and received. That the allegations now sought to be added to the bill were left out bu this affiant by mistake and inadvertence in the proportion of the said bill and that it was the opinion of the plaintiff and of all the other attorneys in the case at the

time the case was tried that the allegations now sought to be made were in substance alleged in the complaint and the evidence was offered and received upon that understanding. That affiant believes that the evidence was competent and material and that the plaintiffs are clearly entitled to such proof and that in order to remove any doubt as to the sufficiency of the allegations of the bill to admit such evidence affiant now asks that he be allowed to make an amendment to his original
103 bill in equity herein by adding one paragraph numbered 18½, which is set forth in full in plaintiff's motion.

Affiant further says that the defendants in this case offered full and complete evidence upon the issue thus raised and that all the evidence upon the issue is now before the court, and that the said amendment would not deprive the defendants of any right or call for the introduction of any further evidence by either party.

Wherefore, plaintiff prays that an order to show cause issue out of this court directing the defendants and their attorneys to appear before the court and show cause at a time and place to be fixed by the court why the plaintiff should not be allowed to make an amendment to his bill in equity in this action by adding thereto paragraph 18½ as set forth in the motion.

Dated this 28th day of January, 1922.

A. B. FAIRBANK.

Subscribed and sworn to before me this 28th day of January, 1922.

(Notarial Seal)

F. G. WARREN,
Notary Public.

Due service of the within motion this 28th day of Jan. 1922 is hereby admitted,

PORTER & BARTLETT,
Attorneys for Interveners.

104 Service of the within order this 28th day of Jan. 1922 is hereby admitted.

E. O. JONES,
Attorney for Defendants.

Endorsed: Filed in the District Court on Jan. 28, 1922, at 4:30 P. M.

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106 (Return of defendants to order to show cause why plaintiff should not be permitted to amend bill of complaint.)

Come now the defendants and intervening defendants, in the above entitled action and for return to the plaintiff's Order to Show Cause, issued hereon, on January 28, 1922, say that the plaintiffs said Motion should be denied and the prayer of the plaintiff to amend its bill be denied for the following reasons:

1. That said offer to amend comes too late, and after the entire case has been tried, argued and brief submitted.

2. That the same injects an entirely new cause of action into the bill of complaint which will require a new trial and additional evidence upon the hearing upon the same; the only evidence heretofore introduced going only to the application of the rule for the apportionment of benefits, and that the statute furnishes a determinable basis for the apportionment of benefits upon railroad and other property.

3. That the proposed amendment does not conform to the facts proven in the following particulars:

(a) That the proposed amendment assumes that the board of county commissioners were acting under jurisdiction obtained in the establishment of old Drainage Ditches No. 1 and No. 2, instead of the new drainage proceedings designated as Drainage Ditch No. 1 and 2.

107 (b) That the proposed amendment further assumes that "the equalization of the proportion of benefits" has been made, whereas, the proof shows that merely the tentative fixing of the apportionment of benefits has been made and that no equalization has been made on bearing upon equalization had.

(c) The proposed amendment assumes that the plaintiffs property "has not been and can never be benefited", etc, by old drainage ditches No. 1 and No. 2, while the evidence shows a substantial benefit under Drainage Ditch No. 1 and 2.

(d) The proposed amendment assumes "that the said assessment is so arbitrary, etc., as to deprive the plaintiff of its property without due process of law" while the evidence shows that no "assessment" or "equalization of benefits" has been made or attempted, and under the drainage law no such assessment can be made until after the proportion of benefits has been equalized and finally fixed.

(e) The proposed amendment assumes that the board of county commissioners will act arbitrarily in this matter, and not according to the proofs submitted.

4. That the amendment does not attack the drainage law as arbitrary or the unit provided by the law as arbitrary, but alleges that the acts of the board in fixing the proportion of benefits is abritrary, speculative and unjust, whereas the proof shows the board, with its engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received, and the undisputed evidence further shows that some benefits [was] received. And where there are disputable grounds of discretion or disputable degrees of benefit it cannot be said that such proof establishes arbitrary action.

5. Under the drainage law the board of county com-
108 missioners are created the initial tribunal with exclusive jurisdiction to determine the questions presented by the proposed amendment and an appeal to the state courts is provided from such determination by anyone deeming themselves aggrieved, which provides due process of law and gives the plaintiffs equal protection of the laws.

For all of which reason the defendants insist that the Motion of the plaintiff be dismissed.

E. O. JONES
Attorneys for Defendants.

PORTER & BARTLETT
Attorneys for Intervening Defendants..

Endorsed: Filed in the District Court on Jan. 31, 1922.

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109 (Affidavit of E. O. Jones, and N. B. Bartlett in support of return to order to show cause.)

State of South Dakota,
County of Minnehaha—ss.

E. O. JONES and N. B. BARTLETT, being first duly sworn on oath, depose and say: That they are the solicitors for the defendants and intervening defendants above named and that they as such, draw the answers for said defendants to plaintiff's bill of complaint herein, and have had charge of the preparation and trial of the issues in the above matter; that the bill of complaint herein was filed in the above named

court on July 25, 1921, and that the answers of the above named defendants and intervening defendants were filed in the above named court on September 1, 1921. That upon the hearing of plaintiff's order to show cause why an interlocutory injunction should not be granted, heard before three judges in this court on or about November 28, 1921, affiants, in presence of plaintiff's attorneys, read to said court a part of plaintiff's bill of complaint herein, wherein plaintiff attempted to set forth its jurisdictional grounds and its purported constitutional question raised by said pleadings and at that time affiants stated in open court, in the presence of plaintiff's attorneys, that the bill of complaint herein did not allege fraud or arbitrary action on the part of the defendant Board of County Commissioners; that notwithstanding said
110 statement in open court, said plaintiff offered no amendment to its bill of complaint, nor did it contradict the statement of affiant nor call the court's attention to any allegation in its complaint wherein the same contained allegations of fraud or arbitrary action on the part of said Board of County Commissioners, nor did they at said time, or at all, state to said court that they were of the opinion that said bill contained any such averments, or that they were relying thereon in this cause of action, nor is there any showing before this Court now that plaintiff ever intended at any time prior to this motion, to raise by its bill the question of arbitrary action by the Board.

That on December 15, 1921, said matter came on for final determination before the above named court, and upon the first day of said hearing, affiants objected to the evidence offered by plaintiffs purporting to show that the plaintiff was not benefited by Drainage Ditch No. 1 and 2, and, among other grounds, stated at said objection, objected to said testimony for the reason that neither fraud nor arbitrary action was alleged in the bills of complaint, which objections are hereto attached, hereby referred to and made a part hereof. That at said time, the Honorable James D. Elliott, presiding judge, overruled said objection pro forma and stated in open court that after the trial of said cause, he would take said objections and decide them in the order in which they were presented, and at said time stated in substance to plaintiff's counsel that he assumed that they had alleged that the action of the Board in fixing the apportionment was arbitrary and asked plaintiff's counsel if that were true, but that plaintiff's counsel, to the best of your affiants knowledge and belief, did not reply to said question, although plaintiff's counsel at said time

did examine its bill of complaint and attempted to find such allegations therein. That said trial proceeded upon the
111 15th, 16th and 17th of December, and all of which evidence on behalf of the plaintiff was received over the foregoing objections of the defendants as hereinbefore set forth, and during all of said time, plaintiff's counsel had due notice of, and was informed of the state of its pleadings. That thereafter, and on December 20, 1921, said matter was orally argued before Honorable James D. Elliott, presiding judge of the above named court, at which time affiant again read to said court the allegations in plaintiff's bill of complaint, setting forth its jurisdictional grounds and the constitutional questions raised, and again stated in open court that said bill of complaint contained no allegation of fraud or arbitrary or confiscatory action on behalf of the defendant Board of County Commissioners. That said plaintiff again neglected, failed and refused to offer an amendment to its bill of complaint, although duly informed of the contents thereof. That at said time, affiants dinstinctly called to the court's attention the allegations of plaintiff's bill, wherein it is alleged: "That said statute Exhibit "A" is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property holders situated within the drainage area and furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies" and stated to said court that said allegations did not constitute an averment of arbitrary action on the part of the Board of County Commissioners. That notwithstanding these statements in open court at the time of said argument on December 20, 1921, said plaintiff failed and neglected to offer an amendment and failed and neglected to state to the court at said time, or to contend orally at said time that said bill of complaint contained any allegations of arbitrary action on the part of said defendant Board of Commis-
112 sioners. That said plaintiff's brief herein was filed on or prior to December 30, 1921, and that more than thirty days elapsed after the filing of said brief before said plaintiff complained that said bill of complaint was deficient and moved to amend the same. And affiants verily believe that the plaintiff never intended to allege that the actions of the Board of County Commissioners herein, were arbitrary, nor has he at any time stated in any manner, prior to the present time, that he ever intended to raise the issues presented by his proposed amendment by said bill of complaint herein.

Affiant further says that no evidence has been offered herein showing or tending to show that the equalization of benefits has ever been made by the Board of County Commissioners. That the evidence offered on the part of the plaintiff to show that the plaintiff was not benefited thereon was objected to by the defendants at the time the offer was made, which objections are hereto attached and made a part hereof, and said objections gave notice to the plaintiff that his bill did not contain any averment of arbitrary action on the part of said Board of County Commissioners, and said plaintiff neglected and failed to immediately offer an amendment to his said bill when the same was thereby objected to.

That the evidence offered by the plaintiff and by which the said plaintiff is bound does not support the proposed amendment and is substantially as follows: That the taking of the water out of the river into the ditch at a place known as Thompsons, about twelve miles north of Sioux Falls, and by-passing the same through the ditch, again returning it to the river at the spillway, is of benefit to all land and property affected adjacent to the river in that stretch of the river; that the ditch carries and by-passes from one-third to one-half of the flood water in the Sioux valley and therefore relieves the valley and the lands therein of flood water in
from one-third to one-half less time than it would
113 otherwise take to relieve said land from said flood
waters along that stretch of the river.

That the plaintiff herein is the owner of a right of way commonly known as acreage land within the stretch of the river so benefited which is adjacent to other acreage land in the benefited district, and is like affected and benefited and like apportioned as such other acreage land. That the Board of County Commissioners had a topographical survey made of the property affected by this drainage ditch included in which is the plaintiff's property. That thereafter, the Board of County Commissioners and its engineer made a personal careful inspection of plaintiff's property and found that the acreage land owned by plaintiff was benefited to the same extent and in the same manner that adjoining acreage property was benefited, and apportioned its benefit accordingly, and found further and it was their judgment that the embankments, bridges and culverts on plaintiff's property were also benefited. That the same unit of benefit that was used and applied to acreage land in general was applied to this plaintiff's acreage land and also applied to the capitalized benefits to the embankment, bridges and culverts of this plain-

tiff in the same manner as it was applied to other like property within the drainage area. That Drainage Ditch No. 1 and Drainage Ditch No. 2 have been entirely completed and abandoned and are not a part of the present ditch project and that Drainage Ditch No. 1 and 2, now in controversy is an entire separate and distinct drainage project from Drainage Ditch No. 1 and Drainage Ditch No. 2.

There being no allegation of arbitrary action on the part of said Board of County Commissioners, the defendants herein did not prepare and try said case upon said issues and it such be now made a part of the bill of complaint herein, it will be necessary to introduce additional evidence to justify the proportionment made by the Board. That the defendants will be compelled to and are prepared to show by competent evidence that the right-of-way of the plaintiff company upon which the apportionment was fixed herein has been flooded in the past and prior to the completion of Drain-
114 age Ditch No. 1 and 2 and grade weakened to such an extent by reason of said waters along the same, that the action of said waters thereon increased the maintenance thereof, and that since the completion of said present drainage project, they have not suffered by reason of waters along their right-of-way, or upon their grades, and that the same has lessened the maintenance and upkeep of said grade and said railroad tracks. That since the establishment and construction of said drainage project plaintiff's bridges which it has over the river within said drainage area can be shortened and the approaches filled in, and that the plaintiff has already taken steps to shorten some of said bridges, and that the shortening of said bridges and the filling in of the approaches is a direct benefit to said plaintiff and is a resultant action of the taking away of from one-third to one-half of the flood waters by said drainage ditch project. That the defendants will be compelled to and will be prepared to establish by competent evidence that the Milwaukee Railroad bridge over the Sioux River in the City of Sioux Falls is only 205 feet long in the clear, and permits all the water now flowing in said river to pass thereunder; that the plaintiffs bridge within said city is not over 2000 above said Milwaukee bridge, is 615 feet in length and can safely be shortened to 268 feet and the approaches thereto filled thereby making a substantial saving to the plaintiff, all as a result of by-passing from one-third to one-half of the flood waters by this drainage project, away from said properties. That the only evidence that defendant offered in the trial of said case under

the pleadings was that the plaintiff enjoyed some benefit but that the defendants did not attempt to show the amount of benefit, and, therefore, the amount of apportionment of benefit which the plaintiff enjoyed to any particular part of its property. That if the amendments herein are allowed, it will be necessary for the defendants to make such a showing
115 and to justify the apportionment of benefits as tentatively made by the Board of County Commissioners, and that in order to do this it will be necessary to open up said case and to have an entirely new and additional hearing. That the attempted amendment is an injection of an entirely new cause of action, and the same is not germaine to the cause of action as stated in the bill, and changes the entire character of said cause of action and would be a gross abuse of this court's discretion.

That the return of the defendants hereto attached, is hereby referred to and made a part hereof.

E. O. JONES
N. B. BARTLETT

Subscribed and sworn to before me this 31st day of January, 1922.

(Notarial Seal)

R. A. BIELSKI,
Notary Public, South Dakota.

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116 Exhibit "A"

F. E. WARD, being called as a witness on behalf of the plaintiffs and being duly sworn, testified as follows:

Direct Examination

By Mr. Judge:

Mr. Bartlett: The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set aside for the reasons that said bills of complaint fail to state any matter of equity entitling the plaintiff to the relief prayed for. Nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this Court has no jurisdiction over these matters because the plaintiff's bills of complaint herein do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this Court can infer or

assume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that plaintiffs have a plain, adequate and complete remedy at law.

For the further reason that it affirmatively appears from the face of the bills of complaint and record that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits assessment or tax chargeable against the property of
117 the plaintiffs if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multiplicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determination of the State Tribunal upon questions of fact before them, are conclusive upon this Court in this action, this Court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings.

The Court: I am disposed to, allow you to proceed and make your records and overrule the motion at this time, pro forma, but with the understanding that the Court will take the questions of the case up in the order in which they are presented and determine them in future. I think it will be conducive to the interests of all parties to have your record perfected. The motion by the defendants is therefore denied at this time with an exception to the defendants.

Q. State your name.

Mr. Bartlett: At this time we object to the introduction of any testimony for the reasons and on the grounds urged in the motion to dismiss.

The Court: Same ruling.

118 Exhibit "B"

Mr. Bartlett: To the offer of those proceedings under this last stipulation starting with petition of Blackman concerning Drainage Ditch Nos. 1 and 2, the defendants offer no objection. As to the offer of the proceedings of Drainage Ditch No. 1 and Drainage Ditch No. 2, the defendants object to the offer for the reason the proceedings are incompetent and irrelevant to the issues in this case. The same touching and concerning a project not here in controversy, the controversy here being an attempt to enjoin further proceedings of the Board of County Commissioners relative to Drainage Ditch Nos. 1 and 2. For the further reason that the offer does not present a federal question nor a matter subject to inquiry before this court in these proceedings, and all offers of instruments up to the establishment of the ditch not being the best evidence.

The Court: It will be received subject to objection.

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119 Exhibit "C"

C. M. Bassett, Assistant Engineer of the Great Northern, on the stand, examined by Mr. Judge.

Mr. Judge: State the substance of that conversation.

Mr. Bartlett: Objected to as not binding on the defendant Commissioners.

The Court: Objection overruled.

A. We have two bridges within the area and he said Bridge 150.7 that that bridge was about the right size. The bridge 146.0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures. He figured on the amount saved by the shortening of the bridge.

Mr. Bartlett: At this time, if the Court please, the defendant objects and asks that the question be stricken, and objects to the testimony of this witness on behalf of the plaintiff, going to the proposition as to whether or not the plaintiffs are benefited or not by the drainage project, for the reason the same is incompetent, irrelevant and immaterial to the issues in the case, for the further reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction of the subject matter in these proceedings and proceeded with the construction reconstruction and the

repair of the ditch in question. For the further reason that this Court has no original jurisdiction of the bill in equity to reject the method pursued by the Board of County Commissioners of Minnehaha County in the construction, reconstruction and repair of this ditch, and that the plaintiffs on the complaints herein have a plain, adequate and speedy remedy at law by appeal from the equalization arising from
120 proceedings taken by the Board of County Commissioners.

For the further reason that it calls for evidence of the facts the determination of which is in the exclusive jurisdiction of the Board of County Commissioners and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action without any allegation or proof of fraud or arbitrary action on the part of that tribunal. Is not within the issues of the case and not a proper subject of inquiry by these collateral proceedings and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these proceedings attacking the question of whether or not they are or are not benefited by the ditch proceedings?

The Court: Yes. The motion is denied. The testimony is received subject to objection.

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121 Exhibit "D"

(At the close of plaintiff's case)

Mr. Bartlett: At this time, Your Honor, at the close of plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these cases and set aside the restraining order heretofore issued, for all the reasons and upon all the grounds urged in the motion made by the defendants at the beginning of these cases.

And for the further reason that the record now shows that notice of opportunity to be heard upon the amount or proportion of benefits these plaintiffs have received and the amount or proportion of assessment that will be made against their property for such benefits has been given, and that all the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessments to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases based upon their judgment of values and benefits conferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment, which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason that the record now shows the Board of County Commissioners of Minnehaha County charged by the law of this state with the execution of
122 the drainage ditch law has jurisdiction to proceed in respect to the property within such drainage area, including the property of these plaintiffs in these actions. And if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs and others, and the record does not indicate upon its face any departure from the requirements of the statute. Therefore this Court cannot inquire into these collateral proceedings and the same are not issues presenting federal questions.

The Court: The motion is denied pro forma, without prejudice to its renewal at the close of all the testimony.

Endorsed: Filed in the District Court on Jan. 31, 1922, at 10 A. M.

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124 (Order permitting amendment to bill of complaint.)

The above entitled matter coming on for hearing on this 31st day of January, 1922, at ten o'clock A. M., upon the order heretofore issued to defendants and the intervening defendants to show cause why plaintiff should not be permitted to amend the bill herein to conform to the proof by adding an additional paragraph to the original bill, to be known as Paragraph 18½, as follows:

125 18½

That the equalization of benefits of 839.45 units out of a total number of units of 32,549.62, estimated in dollars and

cents at approximately Eight Thousand Dollars ($8,000.00) fixed by the Board of County Commissioners of Minnehaha County, South Dakota, on the 10th day of June, 1921, against the property of the Chicago, Rock Island & Pacific Railway Company, as above set forth, is wholly speculative, arbitrary, unjust, illegal and discriminatory and was made by the Board of County Commissioners without any reasonable or rational basis therefor, and is not in proportion to any benefit which the property of the plaintiff has received or ever can receive by reason of the rebuilding of the spillway, the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and Drainage Ditch No. 2, as set forth herein; that the property of the plaintiff has not and never can be benefitted by the work performed by the Board of County Commissioners as herein set forth, to the extent of Eight Thousand Dollars ($8,000.00) or to any extent whatever, and that the assessment sought to be collected from the plaintiff, as above set forth, is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the City of Sioux Falls. That the said equalization of benefits is so arbitrary and discriminatory against the property of the plaintiff as to deprive plaintiff of its property without due process of law and to deprive the plaintiff of the equal protection of the laws."

The plaintiff appearing by its solicitor, A. B. Fairbank, and defendants appearing by their solicitor, E. O. Jones, and the intervening defendants appearing by their attorneys, Porter & Bartlett, and the Court being fully advised in the premises, and it appearing to the court that upon the trial
126 of the said action evidence was offered and received by and from all parties to the said action relevant to the issues proposed to be raised by said amendment and that in the furtherance of justice the said amendment should be permitted;

Now Therefore, It Is Hereby Ordered: That the motion to amend the plaintiff's original bill of complaint be and the same is hereby allowed; and it is Further Ordered that the amendment be made and filed nunc pro tunc as of the date of the trial of the said action on the 15th day of December, 1921.

It Is Further Ordered: That the amendment be made by attaching to the original bill of complaint a copy of the amendment and making it a part of the original bill, and that the bill as amended need not be written in full; and it is Further Ordered: That the answers of the defendants and intervening defendants now on file in this action shall stand as aswers to the bill as amended.

And the defendants and intervening defendants having asked permission to submit further evidence upon the issue set out in the amendment, It Is Further Ordered; That they may do so at any time within 10 days from the date hereof upon two days' notice to attorneys for plaintiff.

Done at Sioux Falls, South Dakota, this 31st day of January, 1922.

By the Court:
(Seal of Court)

JAS. D. ELLIOTT,
Judge of the District Court.

Attest:
Jerry Carleton,
Clerk of the District Court.

Endorsed: Filed in the District Court on Jan. 31, 1922, at 2 P. M.

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129 (Exception of defendants to order allowing amendment to bill of complaint.)

January 31, 1922.

Come now the defendants, by their attorney, E. O. Jones, Esq., and the Intervening Defendants, by their attorney, N. B. Bartlett, Esq., and except to the Order permitting the amendment to the Bill to conform to the proof, which exception is allowed by the Court.

Added to the bill of complaint by order of the court dated the 31st day of January, 1922.

That the equalization of benefits of 839.45 units out of a total number of units of 32,549.62, estimated in dollars and cents at approximately Eight Thousand Dollars ($8,000), fixed by the Board of County Commissioners of Minnehaha County, South Dakota, on the 10th day of June, 1921, against the property of the Chicago, Rock Island & Pacific Railway Company, as above set forth is wholly speculative, arbitrary, unjust, illegal and discriminatory and was made by the Board of County Commissioners without any reasonable or rational basis therefor, and is not in proportion to any benefit which the property of the plaintiff has received or even can receive by reason of the rebuilding of the spillway, the cleaning out, repairing and maintaining of Drainage Ditch No. 1 1 and Drainage Ditch No. 2, as set forth herein; that the property of the plaintiff has not and never can be benefited

by the work performed by the Board of County Commissioners as herein set forth, to the extent of Eight Thousand Dollars ($8,000) or to any extent whatever, and that the assessment sought to be collected from the plaintiff, as above set forth is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the City of Sioux Falls. That the said equalization of benefits is so arbitrary and discriminatory against the property of the plaintiff as to deprive the plaintiff of its property without due process of law and to deprive the plaintiff of the equal protection of the laws.

(Endorsed)—Filed January 31, 1922, nunc pro tunc as of December 15, 1921.

JERRY CARLETON, Clerk.

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133 (Opinion of the District Court.)

James D. Elliott, District Judge.

United States District Court, District of South Dakota.
Sioux Falls, S. Dak., Feb. 17th, 1922.

Chicago, Rock Island & Pacific Railway Company, a corporation, Plaintiff,
No. 98 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., Intervening, Defendants.

Chicago, Milwaukee & St. Paul Railway Company, a corporation, Plaintiff,
No. 99 S. D. vs. In Equity
A. G. Risty, Et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation, Plaintiff,
No. 100 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Northern States Power Company, a Corporation, Plaintiff,
No. 101 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

City of Sioux Falls, a Municipal Corporation, Plaintiff,
134 No. 102 S. D. vs. In Equity
A. G. Risty, et al., Defendants

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Great Northern Railway Company, a Corporation, Plaintiff,
No. 103 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

C. O. Bailey, Esq., Sioux Falls, S. D. and others, Counsel for Plaintiffs.

Messrs. Porter & Bartlett, and C. O. Jones, Esq., Sioux Falls, S. D., Counsel for Defendants.

Gentlemen:—

I have finally disposed of the questions presented in the various drainage ditch cases, consolidated for the purpose of trial, and which were tried and submitted upon single record.

The question of the constitutionality of the South Dakota drainage statute is pleaded by each plaintiff, and upon this issue, the interests of the plaintiffs in all these suits are identical. It is urged by the plaintiffs in the various suits that the entire South Dakota drainage statute is unconstitutional for the reason that it is in conflict with the Fourteenth Amendment of the Constitution of the United States.
135 Plaintiffs call the Court's attention to the provision of the Fourteenth Amendment that prevents the taking of property "Without the due process of law."

If the South Dakota statute does not give the person whose land is to be assessed for the drainage of agricultural lands

his "day in court", then there is no "Due process of law." I find upon investigation of the various drainage ditch statutes that almost universally the provision is made for the organization at the inception of the proceeding of a drainage district, with boundaries defined organized after notice to all property owners within the district, and endowed by statute with certain powers consistent with the purpose for which the district is organized. I also note that ordinarily, where no provision is made for the formation of a drainage district, as is the case in this state, provisions are usually made for the notification of the property owners whose interests are supposed to be included in the drainage district, and for the giving to them of an opportunity to be heard in respect to the question of the practicability or feasibility of the drainage proposition, and whether or not the benefits will exceed the cost, and whether or not the particular lands of the owner, shall be included within the drainage district and assessed its pro-rata share of the benefits.

It is urged by the plaintiffs, and must be conceded, that in this regard the South Dakota statute differs from the drainage statutes of most other states. Section 8459, Revised Statutes of South Dakota, provides that a petition for proposed drainage may be filed with the Board of County Commissioners. This is the first step in the proceeding.
136 This petition is only required to set forth the necessity for the drainage, a description of the route, its initial and terminal points, and its general course, or of its exact course in whole or in part, and a general statement of the territory likely to be affected thereby.

Under this statute petitioners are not required to describe the specific tracts of land to be included within the drainage area, or which will be affected thereby or assessed therefor. Neither is it necessary to give the names of the owners of the property. The statute requires only a "general statement" as to the extent of the territory affected.

Section 8461 of said Revised Statutes, provides that the Board shall fix a time and place for the hearing of the petition and shall give notice by publication at least once each week for two consecutive weeks in a newspaper in the county, and by posting notices near the route of the proposed drainage. It also provides that such notice shall describe the route of the proposed drainage, and the tract of country likely to be affected thereby, in general terms, the separate tracts of

land through which the proposed drainage will pass, and give the names of the owners thereof as appears from the records in the office of the Register of Deeds on the date of the filing of the petition. It is further provided that such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed.

Plaintiffs note that this statute, except as to property
137 owners through whose property the proposed drainage will pass, provides only this general notice, and especially complain that it gives no property owner any notice that his particular tracts of land is included among the lands affected by the proposed drainage, and insist that the notice is broad enough to take in each and every tract of land included within the boundaries of the county in which the drainage project is situated.

It is true that, other than this general notice, there is no notice whatever given to the property owner that his particular land is affected by the drainage proposition, or that he has any interest in it, or will be mulcted in assessment for benefits by reason thereof. He receives no summons or other notice, either by personal service or by mail. He has, however, the general notice given in the published summons by the Commissioners to "All persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed."

By Section 8461 of the said Revised Statutes, the County commissioners pass upon the petition at the time named in the summons and notice, and if they find it feasible to establish the drainage, no provision is made for any other notice to any property owner, unless it should be found necessary to change the initial or terminal points so that the drainage will pass through other lands than those described in the original notice, or to increase the width of the lands to be taken for the proposed drainage, in which case the Board must give the owners of such lands notice. There is
138 no provision, however, for any notice to any property owner after the drainage ditch is established.

The Board may then proceed without further notice, to its construction. It may incur construction expense before taking any proceedings towards making an assessment for the payment of the costs, or it may before doing the work,

estimate the costs and make an apportionment of benefits upon which the assessment may subsequently be spread by the County Auditor.

Section 8463 of said Revised Statutes authorizes the said County Commissioners, after establishing the drainage to fix the proportion of benefits of the proposed drainage among the lands affected, and also appoint a time and place for equalizing the same. It is then provided that notice of such equalization of proportion of benefits shall be given by publication for two weeks. It is provided that this notice must give a description of each tract of land affected by the proposed drainage, and the names of the owners as appears from the records of the office of the Register of Deeds. It is further provided that the lands to be charged with benefits include all pieces of property that, in the judgment of the Board of County Commissioners are benefitted by the drainage proposition. At this hearing the Board fixes the proportion of benefits for each tract of land, taking any particular tract as a unit, and also fixes the benefit which any railroad company may obtain for its property by such construction and equalizes it together with the proportion of the bene-
139 fits to tracts of land. This statute seems to provide for this hearing for fixing the proportion of the benefits before the ditch is constructed and before it is known what will be the actual amount of money expended. This hearing may be delayed until after the ditch has been built. It also provides that in event there is further expense incurred, or if for any reason, parties assessed do not pay the tax, a new proportion of benefits shall be fixed and new assessments made.

At this hearing the owners of the lands alleged to be benefitted have notice, have the right to appear and contest the amount of the benefits upon their lands, and may even urge that no benefits are derived. From this assessment there is a provision granting an appeal to the Circuit Court of the County in which the lands are situated, in which the proportional benefit may be an issue, and the owner of the land, upon such appeal, may contest the fact that there are any benefits to the land in question. The law further provides for an appeal from the determination of such issue in the Circuit Court to the Supreme Court of the State.

After such proportional benefits are determined the County Auditor spreads the tax and it then becomes a lien upon the property benefitted.

This brief statement of the provisions of the statute, not at all complete, but in a general way outlines the general powers of the Board and the method of the establishment of the ditch, and the various steps up to the spreading of the tax against the lands benefitted.

140 These proceedings are peculiarly limited to the drainage of agricultural lands, because the Constitution of the State of South Dakota provides that:

"The drainage of agricultural lands is especially declared to be a public purpose and the Legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest corporate authorities thereof and the corporate authorities of counties, townships and municipalities, with powers to constitute levees, drains and ditches * * * * * by special assessments upon the property benefitted thereby according to the benefits received."

Pursuant to this provision of the Constitution, the Legislature of the State has provided for the drainage of agricultural lands, but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands "for any public use". Without repetition, and calling attention now to the reasons urged by the plaintiffs sustaining the unconstitutionality of this statute enacted for the purpose of draining agricultural lands, and considering the objections urged in various forms by the different plaintiffs, we find that all of the objections center about the criticism that no notice is provided the owners of lands affected by the drainage ditch, except the general notice, and in fact, no personal notice until the date fixed by the Board for the equalization of proportional assessments for the various tracts of land

141 benefitted by the drainage. It will be noted that the Legislature has provided that no tax can become effective, no assessment can be made, until the benefits have been ascertained and proportioned, and before this can be done a definite day must be named by the Board and the various land owners are given notice.

The question resolves itself into one of whether or not this hearing after notice, with the right of appeal, constitutes "a day in Court" to the various land owners. I have reviewed the authorities submitted by plaintiffs and I am frank to confess that the statutes of this state do not provide for the description of the lands alleged to be benefitted by the ditch, or the owners of the lands, or that notice shall be given to such

owners, or that the owners shall appear and show cause, if any they have, why the ditch is not practicable or should not be established, or have the opportunity to show that the cost would be greater than the benefits, or would be confiscatory, and yet, I am satisfied that the courts of the various states and the Supreme Court of the United States have recognized the power of the Legislature to provide the method of the levying of this tax against the lands benefitted by a drainage ditch, and have held that a law that provides for notice and an appearance and the right to contest the amount of the tax, and to contest the right to tax at all, with the right of appeal therefrom, if given to the land owner prior to the time that a tax is levied and becomes effective, is "due process of law."

142 I was impressed upon the oral argument with counsel's reference to the decision in the North Dakota case, Soliah vs. Heskin, etc., 222 U. S. 522. Counsel urged that the law of North Dakota, very similar to ours, was sustained because it provided for a notice at the time of the establishment of the ditch. Reference to this opinion demonstrates that the Court held as follows:

"Neither does that Amendment invalidate an act authorizing an appointed Board to determine whether a proposed drain will be a public benefit and create a drainage district consisting of land which it decides will be benefitted by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property.

(Underscoring is mine.)

Under the South Dakota statute, applying this rule as announced in the North Dakota case, clearly, the notice is provided and an opportunity to be heard is afforded the land owner before the assessment becomes a lien upon his property, in the drainage of agricultural lands.

Louisiana has held that:

"Whenever by the rules of the state or by state authority, a tax assessment, servitude or other burden is imposed upon property for the public use, * * * * * * * * and those
143 laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person of such proceedings in regard

to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without 'due process of law.' " Davidson vs. New Orleans, 96 U. S. 97.

Massachusetts has held that:

"If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." Spencer vs. Merchant, 125 U. S. 578.

Construing the statutes of the State of Missouri, it was held that:

"It is granted that the land owners were not afforded an opportunity to be heard in respect to the value of their land. While no hearing is given when the lands are appraised a hearing is given when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice when owners aggrieved by the valuation may have a full hearing upon that question. This is due process of law." Embree vs. K. C. & L. Road Dist. 240 U. S. 242.

The drainage statute of Michigan was considered in re Roberts vs. Smith, 72 N. W. ....., and also in Gillette vs. McLaughlin, 37 N. W. 551, and in Smith vs. Carlo, 72 N. W. 22. In these cases the same objections were made to
144 the constitutionality of the law that are urged by the plaintiffs here, and especially that the persons who did not own lands traversed by the drain, but who are within the assessment district, have no opportunity to be heard upon the necessity for laying the drain. And, further, that persons within the assessment district are entitled, under the constitution, to a hearing upon the question of the public necessity for the drain. These contentions were denied in these cases, the law held constitutional, and a full discussion of the questions is to be found in these cases and the cases therein cited.

The Michigan statute is construed again in re Voight vs. Detroit, 82 N. W. 253, and on appeal, 184 U. S. 115, in which it was urged that no provision is made for a notice to property owners of the time and place of hearing upon either the question of fixing the taxing district or the amount of the award to be spread thereon. This, it is claimed, leads to taking property without due process of law, and therefore the law is unconstitutional. It was claimed in this case, by counsel, that the complainant was entitled to notice of the hear-

ing relating to the establishment of the assessment district, and of the amount of the total assessment, and because the statute did not provide for these notices it was unconstitutional. It was held in this case that this position could not be maintained.

"The provision of law by which, when the proceeding has reached the stage where it is proposed to levy the tax, a notice must be served on the property owner, was held sufficient to avoid the constitutional objection, notwithstanding no
145 notice is required in respect to the creation of the district or the determination of the aggregate amount of the tax to be collected.

In re Paulson vs. Portland, 149 U. S. 30 it is held:

"It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question, What proportion of tax shall be assessed upon his land, there is no taking of his property without due process of law."

I repeat that under the South Dakota statute there is ample provision for notice to every land owner, and an opportunity given to be present at the hearing, at which time and place he may assert all objections against the validity and justice of the proposed charge upon his property before the tax is levied, and carried by the County Auditor as such on the books of his office and made a lien upon the property. It follows that, in my judgment, the South Dakota [statutes], enacted in the light of that provision of the Constitution of the State providing for the drainage of agricultural lands, is constitutional.

The case made by the bills filed by the plaintiffs in these various actions involve a real and substantial question under the Constitution of the United States. The amount involved in each case is greatly in excess of Three Thousand Dollars, exclusive of interest and costs. On the question of the jurisdiction of this Court, I am of the opinion that each
146 plaintiff states a case in his bill plainly cognizable in this court. All of the plaintiffs except the City of Sioux Falls allege diversity of citizenship, in addition to the Constitutional question, and the proper amount involved. I repeat that there can be no question as to the bills involving a real and substantial question under the Constitution of the United States, and in such a case the jurisdiction of this Court extends to every question involved, whether of Federal or

State law, and enables the Court to rest its judgment or decree on the decision of such of the questions as in its opinion effectually dispose of the cases. Davis et al. vs. Wallace et al. (Opinion Jan. 9, 1922,.... U. S. .... with cases there cited)

It conclusively appears on the face of these pleadings that there is no speedy or adequate remedy at law. The remedy at law must be a remedy on the law side of the Federal Court, not a remedy in the State Courts of South Dakota. In each of the cases where there is a diversity of citizenship, this Court of Equity will not deny the plaintiff relief because there may be a remedy in the courts of the state, for the reason that the non-resident is not required to subject himself to jurisdiction of the Courts of the State in order to obtain relief. U. S. Life Ins. Co. vs. Cable, 95 Fed. 761.

In neither of the cases at bar is there a remedy at law on the law side of the Federal Court. If plaintiffs, or either of them are compelled to pay this tax, no action would lie on the law side of the Court that would give them relief.
147 No action on the law side of the Court would protect them, or either of them, from future assessments and future responsibilities.

There is the further issue presented on the face of the bills, that for the reasons therein stated, no Drainage Ditch No. 1 and 2, under which it is pretended this assessment is made, was ever established. That this is simply a pretense for the maintenance and repair of the ditches that had been theretofore established, and that the steps that have been taken by the County Commissioners are without authority of law. In substance, that the Board of County Commissioners are trespassers, acting with no right or color of right. That insofar as there is an attempt to assess benefits to the property of the plaintiffs, or other property in the City of Sioux Falls, the proceedings are entirely void. That as to each of the plaintiffs the assessment of benefits made is arbitrary, unjust, illegal and void. This is the basis of the claim that the assessment is such as to result in the property of the plaintiffs bearing more than its share of the burden of improvements while such property is in no wise benefitted thereby. That the alleged benefits from this improvement have not been estimated upon these properties with the farm lands according to any standard which will produce approximately correct general results. That the taxes upon the plaintiff's property are upon

some fanciful view of future benefits, while the farm
148 property is assessed wholly according to its area and
position. That the property of the respective plaintiffs is sought to be burdened for this improvement upon a basis so wholly different from that used for ascertaining the contribution demanded from individual owners of agricultural lands adjacent to the drain, as necessarily to produce manifest inequality. That the plaintiffs are therefore deprived of the protection of the law which must be extended to all.

The determination of these various issues necessarily requires a consideration of the facts as they appear in the record. Fortunately there is practically no dispute as to the facts. The only dispute is as to the legal effect of the acts of the Board of County Commissioners.

What, then, was the situation at and prior to the time that the said Board assumed authority to require the plaintiffs and others in the City of Sioux Falls, to pay for the building of this new spillway, and the repair of the ditches hereinafter referred to? The Sioux River flows from the north, in a southerly direction, west of the City of Sioux Falls, then flows in an easterly direction, south of the main portion of the city, then flows north through the city of Sioux Falls, flowing a distance of some ten miles from a point north of the city where the drainage ditch hereinafter referred to leaves the river, to a point where the drainage ditch empties its waters into the river. The river thus describes a large [horse-show], the drainage ditch cutting across the open end,
practicably from the river on one side to the river on the
149 other. Dell Rapids is situated in the Sioux Valley more than twenty miles north of Sioux Falls.

At first there was established Drainage Ditch No. 1, and then Drainage Ditch No. 2. These two ditches extended from a point north of the City of Sioux Falls some distance to a point some fifteen miles north of Sioux Falls, at which point Drainage Ditch No. 2 was intended to take the flood water from the Sioux River and conduct it down its length into and through Drainage Ditch No. 1, to the river north of Sioux Falls, cutting through the hills adjacent to the river, and necessitating the conduct of the water down a fall of more than one hundred feet into the river. Drainage Ditch No. 1 and Drainage Ditch No. 2 were duly constructed under the provisions of the Constitution and laws of the state for the drainage of agricultural lands and were operated

for the purpose for which they were constructed. The first petition for said Drainage Ditch No. 1 was filed in 1907, and the petition for Drainage Ditch No. 2 was filed in 1910. Such proceedings were had that these two ditches were constructed down the valley in a southerly direction, near the Sioux River until a point was reached north of the City of Sioux Falls, when the ditch was turned in an easterly direction across to the Sioux River at a point north and east of the City of Sioux Falls. Benefits were assessed and paid by the owners of adjacent lands under the provisions of the statutes of the State of South Dakota to which I have referred. In
150 1915 the force of the waters conducted by these two drainage ditches was so great as to wash out what is called the spillway, through the bluff adjacent to the point where the waters from the ditches entered the river. The ditches in the meantime also became out of repair, and at one point several miles above the City where the ditch approached the river, the water was cutting from the river into the ditch, threatening to turn the entire course of the Sioux River at this point into the ditch, and through the ditch back into the river, leaving the Sioux River from that point and for about twelve miles around to where the ditch flowed into the river, without water. The spillway from the ditch through the bluff down into the river was so unskilfully, inefficiently and unscientifically constructed that it would not stand the force of the water with a fall of one hundred feet into the river. It was washed out, and the bluff being of soil and sand, washed out of the entire depth of the river and began washing back through the bluffs, threatening to cut clear back to a point where the water cut through from the river to the ditch, thus taking away from the City of Sioux Falls the benefits of the river, its sewer system and the advantages of the stream, and take the water from the plaintiff, The Northern States Power Company, that naturally flowed down the river except for the interference by this drainage ditch. And in the cutting into this bluff also threatened to cut into the gravel bed in which the water supply of the City is located, a few miles west of it, and thus drain and destroy and take away from the City of Sioux Falls, its water supply. This was the situation in 1916. This situation presented no ques-
151 tion of the drainage of agricultural lands. The people who had been responsible for the establishment of these two drainage ditches and the conduct of the water down through the hills to the river below, because of the inefficient manner in which the spillway had been constructed, had causedall of the trouble. The thing that confronted the Board

of County Commissioners at that time, having charge of these two drainage districts, was the maintenance of the ditches and of the spillway which was a part of the ditch that had already been constructed. In the construction of these ditches no suggestion had ever been made that the City of Sioux Falls, all lying entirely south of the districts drained, was in any manner interested in the drainage, or that there could be any benefits assessed to such city or any property owner thereof. The situation that confronted them was not drainage of agricultural lands, it was the maintenance of the ditches that had been established by them, and the prevention of the dangers threatened by the water that they were conducting down through these ditches, through this hill, into the river. They might have taken their chances upon damages that their acts were responsible for, and let the river cut down through the ditch that they had constructed and turned the course of the river there and taken the water away from the City of Sioux Falls entirely, and exhausted and destroyed the City's water supply, and destroyed the power of the plaintiff, the Northern States Power Company, by taking the water from the stream at the point where the power plant is located, without in any way endangering the agricultural lands
along this ditch, except so much of it as would be
152 washed away in forming this new bed of the river. I apprehended that we may reasonably find from the evidence here that such a cut-off in the river would be to the advantage of the land owners and prevent floods, so that it was not the drainage of the lands that was bothering the Commissioners, it was not the purpose to drain agricultural lands that impelled the Commissioners to act; the thing that impelled them to give this situation any consideration was the dangers that were threatened by reason of their having constructer these two ditches, and an effort to stop the ravages of the water they were conducting down there, by the construction of a substantial, adequate spillway. It was also necessary for them, in order to stop this threatened danger, to stop the ravages of the water at the point where it was cutting into their ditch. Certainly, this condition never could have existed if they had never built the ditch. They were responsible for it and it was their duty to maintain the ditch and to stop the ravages of the water cutting into it and through it.

This was one of the questions that they had before them, one of the problems that they had to solve, and they did proceed to construct this spillway in a substantial way and to dike and with cement to hold the water in the stream at the

place where it was cutting into the ditch. The statutes of the State of South Dakota specifically provide the duty and the method for the maintenance of these ditches. Section 8470 of the said Revised Statutes, provides as follows:

"Assessments for maintenance. For the cleaning and
153 maintenance of any drainage ditch established under the provisions of this article, assessments may be made upon the land owners affected, in the proportion determined for such drainage, at any time, upon the petition of any person setting forth the necessity therefor, and after due inspection by the Board of County Commissioners."

When this river cut through into the ditch, when the ditch became clogged in places and was not wide enough in others, when the spillway washed out by the force of the water they were conducting down the ditch, and the cutting of the bluff began and large areas of land were being washed away, and the other dangers were threatened, there was only one proposition presented to the Commissioners, and that was one of maistenance; was one of taking care of the water that they were conducting down these two ditches, No. 1 and No. 2.

Instead of proceeding frankly to maintain the ditches they had established in the manner provided by statute; instead of carrying out the obligations they had assumed when they brought the water down through these ditches, and attempted to deliver it through this bluff into the river; instead of proceeding regularly under this statute to do that which it was their duty to do; instead of performing the obligation that they had assumed when they established the ditches, that of maintaining them, they proceeded to act upon the assumption that because they had conducted the water down into these ditches, and because of the inefficient manner in which
154 they had constructed the ditches and built the spillway, and all of these dangers were threatened, therefore, the plaintiffs, and others in Sioux Falls, were necessarily to be damaged. And, although a proper maintenence of these two ditches, No. 1 and No. 2, would stop the damage, would prevent the danger, the Commissioners evidently reasoned that because the plaintiffs and others in Sioux Falls were in danger, they must pay for the repair of these ditches. That could not be done by simply saying the ditches shall be repaired and the City of Sioux Falls, the plaintiffs, and others, shall pay for it, or pay a part of it, and therefore, they proceeded to do indirectly what it was conceded they could not do directly. In other words, they then began to

look around and see what they would do in the way of taking care of the water and stopping these dangers.

A first it was proposed to change the spillway and conduct the water down a southerly direction, through a slough or lake, into the river west of the City, and save the great fall that is involved at the point where the water enters the river from the spillway northeast of the city. This was abandoned and they finally then pretended to act under a statute authorizing the abandonment of ditches. As a matter of fact there was no abandonment in good faith. No attempt to abandon the ditches. In fact, the reading of the resolution shows it was simply that they abandoned the spillway. That they filed a petition which was headed, "To reconstruct and improve Drainage Ditches No. 1 and No. 2, Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay
155 therefor by assessment upon the property, persons and corporations benefitted thereby."

This petition was filed in July, 1916, with the Board of County Commissioners. There had never been an abandonment of Ditch No. 1 and Ditch No. 2. There had been a pretended abandonment of the spillway. But the Commissioners proceeded then to construct a proper spillway on the identical location of the old one. In other words, no change whatever was made in the two ditches, No. 1 and No. 2, except to properly construct an efficient, adequate, substantial spillway, and prevent the river cutting from its bed into the ditch, cleaning out the ditch and repairing it, changing the gates at the head of the ditch where the flood waters were taken from the river.

Upon this petition, for this purpose, the Board of Commissioners assumed authority and power to re-christen this Ditch No. and Ditch No. 2, and call it Ditch No. 1 and 2, and for the purpose of making these repairs and maintaining the old ditches under the new name, proceeded as if no ditch had been established, and as if the Ditches No. 1 and No. 2 were not in existence, and as if no obligation had been assumed by the drainage districts when they diverted the water down the bluffs to the river, and proceeded to make the repairs and to reach out and say that the various plaintiffs were benefitted. Instead of charging the repairs and maintainence of the ditches to those who were responsible for their construction under the provisions of the statutes above

referred to, the Commissioners proceeded to assume
156 the right and authority to constitute a new drainage ditch without the abandonment of the old ditches, with no thought of using new or different drainage in any way, except to maintain them and to perfect that which had been inefficiently constructed, with no thought or purpose except to repair the damage that had already been done, and prevent future damage.

Under these circumstances, I am of the opinion that the Commissioners were acting entirely without authority of law. There is no provision in the statutes of the State of South Dakota for the taking in of any other lands and assessing them, for the maintaining of a ditch after it has been constructed, and the benefits of its building have been assessed.

I am of the opinion that the forming of this new ditch was simply a pretense, and that the plaintiffs' pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed.

I am of the opinion that Section 8489 of said Revised Statutes, in regard to invalid and abandoned proceedings is not applicable to any situation such as exist here. That section provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expenses paid has reference to the abandonment of a ditch that has been enjoined, vacated, set aside or declared void, and specifically on the old ditch, and give credit for any payment made upon the old ditch by the people benefitted. No such proceeding was attempted to be followed in this case.
157 The proceedings establishing old ditches No. 1 and No. 2, have never been hld void, never been set aside, never been abandoned. They are in force today and are responsible for the manner in which the ditches were constructed and for any damages that result from their negligence.

Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and maintainence of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage Ditch No. 1 and 2 was ever establised and has no existence.

I am of opinion that the proceedings of the Board of Commissioners in the repair and maintainence of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the City of Sioux Falls, are void. Entertaining this view it follows that plaintiffs' prayer for an injunction should be granted.

I may suggest in conclusion, however, that even if the Court had found that Drainage District No. 1 and 2, was legally constituted, and that the Board of County Commissioners had the right to extend the benefits to property within the City of Sioux Falls, the proofs overwhelmingly bring the plaintiffs within the rule recently expressed in re Thomas et al. v. Kansas City Southern Railway Co., et al. (De-
158 cember term A. D. 1921,....Fed.....) in that the taxation that is imposed upon each of the plaintiffs is a much higher rate, and upon a different basis, than the tax upon land lying within the district. As a matter of fact no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiffs' property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. Taking, for instance, the tax upon one of the plaintiffs, the City of Sioux Falls, for its miles of streets in the City of Sioux Falls, with no pretense that there is any method of taxation or measuring a benefit or a gain, that would produce even approximately correct general results, when considered with benefits to the lands in the district. Simply a vague, indefinite generality, indulged in by the engineer and adopted by the Board. Benefits purely fanciful, with no substantial basis. Take the railroads, different plaintiffs, there is no pretense that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all.

Referring to the testimony showing the manner of making assessments and the amount, in a general way: I think it fair-

ly appears from the record in the case that the conten-
159 tion of the plaintiffs that the attempt to assess the property of these plaintiffs was an afterthought. It, in my judgment, is established that they could not be benefitted, even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the Board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands. The plaintiff, Chicago, Rock Island & Pacific Railway Company, is simply arbitrarily assessed Eight Thousand Dollars, in raising a total of Three Hundred Thousand Dollars. The Northern States Power Company was assessed Fifty Thousand Dollars, one fifth of the entire expense although there is included in the pretended district agricultural lands something like twenty miles in length and several miles in width. The injustice of this is apparent when it is noted that the record disclosed that it was located upon the rapids of the Sioux River, in the City of Sioux Falls, had been located there for many years. It was, therefore, entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business.

The injury that was to be remedied by this improvement was one that had been caused by Drainage Ditch No. 1 and
160 Drainage Ditch No. 2, one that could not have existed but for the establishment of those ditches. The duty to maintain these ditches involved the duty to repair the break from the banks of the river, and the duty to prevent the taking of the water from the river, that would, or should, naturally flow therein to plaintiff's benefit.

Even if there had been a valid establishment of a drainage ditch at the time and place in controversy, and even if the Board of County Commissioners had jurisdiction, there was an entire failure to present any evidence upon which any benefit could possibly be predicated against this plaintiff. The engineer who pretended to work out the hypothetical benefit admitted that he was not a hydro-electric engineer, and therefore, not able to analyze and state the result of the different conditions of the water in the river. The suggestion ap-

plies with special force to the status of this plaintiff that the amount of benefits were fanciful, exorbitant and arbitrary, with no possible appreciation in the value of its property as a result of this improvement, and it is self-evident that upon no basis that can be used and applied to all of the property tributary to this ditch, could Thirty Thousand Dollars be ascertained as the reasonable contribution to be demanded of this particular plaintiff.

These suggestions are applicable in a general way to the attempted assessment of the property of all of the plaintiffs, and I am of the opinion that the plaintiffs have all properly invoked the aid of this Court from an arbitrary, unwar-
161 ranted exercise of power by the Board of County Commissioners of Minnehaha County, who, without due process of law or compensation, threatened to deprive them, and each of them, of their property. What I have said, I think, should apply with equal force to all property in the City of Sioux Falls attempted to be assessed by the Board of Commissioners for the maintenance of this ditch under the name of a new ditch. The responsibility for the maintenance of this ditch, for the repair of the break from the river into the ditch, and the change of the head gates, and the cleaning out of the ditch, and the repair and reconstruction of the spillway, was, and is, upon the two drainage districts responsible for their construction and maintenance, and the amount expended, some $250,000.00, which, with interest, now amounts to $300,000.00 or more, is a charge upon those districts to be assessed and made a lien upon the property within the districts, assessed in the proportion and collected in the manner, provided by the statutes of the State of South Dakota for the maintenance of drainage ditches.

There is another and further suggestion. I am of the opinion that this reconstruction of the old spillway with-out change of location, the repair of the break from the river into the ditch, the cleaning of the ditch, the change of the head gates where the flood waters are taken from the river, everything that was done under this pretended establishment of a new ditch, could not be viewed in the same light or as serving the same purpose as the construction of the original
162 ditches, because the thing that caused the Board of Commissioners to take any action with reference to the condition that then existed was the danger that existed because of the conduct of the water down

down through these two drainage ditches to and through this spillway. The danger that was threatened was not that the agricultural lands would not be drained, but that immense damage was threatened, that the course of the river was to be diverted to this cut-off, that great areas of land were threatened to be cut away by this river one hundred feet deep, that the water supply of the City was threatened to be taken away because of this drainage ditch and this imperfect spillway. Because the water was to be taken from the river and all of the benefits of the river for several miles, through and around the City of Sioux Falls would be destroyed. The power of the Northern States Power Company would be destroyed by taking the water from the river. If it had not been for those conditions, for these threatened dangers, no action would have been taken, the ditches would have continued to function as they had functioned before. If the spillway had been properly constructed originally, and if it had not proven inadequate, there would have been no cause for any action by the Board in the year 1916. Every consideration that impelled action by the Board was some phase of the threatened danger by reason of the inadequate and imperfect construction and [maintainence] of these two ditches. Neither of these considerations that influenced the action of the Board had anything to
163 do with draining agricultural lands.

It may be said that to remedy these wrongs constituted a public use, as referred to in the Constitution of the State of South Dakota. Admitting that that is true, we are confronted with the proposition that there has been no legislation conforming with the provisions of the Constitution, authorizing the Legislature to provide for the establishment of drainage ditch districts, and the naming of officers with the powers therein referred to. If, therefore, any claim were made that the Commissioners were acting under this authority, independent of the provision of law with reference to the drainage of agricultural lands, the answer is that the provision of the Constitution is not self-executing, and that no legislation has been provided carrying this provision of the Constitution into effect.

You may prepare proper orders in each case granting plaintiff an injunction as to all property located in the city of Sioux Falls and all Property not within the old Drainage District No. 1 and Drainage District No. 2. Provide an exception in behalf of the plaintiffs to the order of the Court denying the plea of the unconstitutionality of the drainage statute as

applied to agricultural lands and the defendants a general exception to each order.

Yours truly,

JAS. D. ELLIOTT
U. S. District Judge.

Endorsed: Filed in the District Court on Feb. 1922, at 4:15 P. M.

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165 (Decree, February 28, 1922.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, Rock Island and Pacific Railway Company, a corporation, Plaintiff,

vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter Intervening Defendants.

This cause came on to be heard on the 15th day of December, 1921, at Sioux Falls, South Dakota, by agreement of counsel. The evidence of plaintiff and defendants and intervening defendants was introduced and argument of counsel heard, and thereupon upon consideration thereof;

It Is Hereby Ordered, Adjudged And Decreed that the defendants A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of the County of Minnehaha and State of South Dakota, and each of them, their agents, servants, employees, attorneys and successors in office be, and they are forever restrained and enjoined from making any apportionment of benefits upon the property of the plaintiff Chicago, Rock Island
166 and Pacific Railway Company hereinafter described for the construction of the spillway, dams, retaining gates, ditches, and for all other work done or hereafter to be done, under the supervision of the Board of County Commissioners of Minnehaha County, South Dakota, in the matter of the construction or re-construction, repair and maintenance of Drainage Ditch No. 1 and Drainage Ditch No. 2, otherwise designated by said County Commissioners as Drainage Ditch No. 1 and 2, of Minnehaha County, South Dakota, and they and each of them are hereby perpetually restrained and enjoined from making and levying any assessment upon the property of the plaintiff, hereinafter described for the cost and construction and maintenance of the said spillway, dams, retaining gates, ditches and other work heretofore done, or which may be [hereinafter] done upon the said drainage ditches above set forth, or any of them, and from in any manner including any of the property of the Chicago, Rock Island and Pacific Railway Company, hereinafter described within the territory benefitted by said drainage ditches, or any of them.

And the defendant, Fred E. Ward, as Auditor of the County of Minnehaha and State of South Dakota, his agents, servants, employees, attorneys and successors in office are hereby forever restrained and enjoined from making any apportionment of benefits upon the property of the Chicago, Rock Island and Pacific Railway Company hereinafter described for any work done or performed in the construction or maintenance of said drainage ditches, or any work which may be done thereafter upon said drainage ditches or any of them and from certifying any assessment therefor to the County Treasurer of the County of Minnehaha and State of South Dakota,

And the defendant, J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, his agents, servants, employees, attorneys and successors in office are hereby forever enjoined and restrained from filing any assessment and from
167 collecting any assessment against any of the property of the Chicago, Rock Island and Pacific Railway Com-

pany hereinafter described, for the construction, repair or maintenance of the drainage ditches above described, or any of them, for work which has already been performed upon the same or which may be hereafter performed thereon.

The property of the Chicago, Rock Island and Pacific Railway Company covered by the foregoing injunction is situated in Minnehaha County, South Dakota, and described as follows, to-wit:

Station grounds in the Northeast Quarter (NE¼) of the Southwest Quarter (SW¼) of Section Sixteen (16), Township One Hundred One (101) North, of Range Forty-nine (49), West of the Fifth Principal Meridian, between 6th and 8th Streets, and east of the Illinois Central station grounds in the City of Sioux Falls.

Tracts One (1) and Two (2) of the Southwest Quarter (SW¼) of Section Sixteen (16), Township One Hundred One (101) North of Range Forty-nine (49), West of the Fifth Principal Meridian.

Lots A and B of Tract Seventeen (17) of the Southwest Quarter (SW¼) of Section Sixteen (16), Township One Hundred One (101) North, of Range Forty-nine (49).

Tract Twenty-nine (29) of the Southwest Quarter (SW¼) of Section Sixteen (16), Township One Hundred One (101), Range Forty-nine (49).

The west forty-four (44) feet of Lots Seven (7), Eight (8) and Nine (9), in Block Twenty-six (26) of J. L. Phillips Sioux Falls, in Section Sixteen (16), Township One Hundred One (101), Range Forty-nine (49).

All of the right of way tracks, embankments and bridges across Sections Sixteen (16), Twenty-one (21) and Twenty-two (22), in Township One Hundred One (101), north of Range Forty-nine (49), West of the Fifth Principal Meridian.

168 And the plaintiff, the Chicago, Rock Island and Pacific Railway Company is hereby given judgment against the defendants and each of them, and against the intervening defendants and each of them named herein for its costs and disbursements herein, to be taxed by the Clerk of this Court and inserted herein at $.....

Done this 28 day of February, 1922.

By the Court:

JAS. D. ELLIOTT,
Judge.

(Seal of Court)

Attest:
Jerry Carleton, Clerk.

The defendants and intervening defendants except to the foregoing order and exception is allowed.

JAS. D. ELLIOTT
Judge of the District Court.

Endorsed: Filed in the District Court on Feb. 28, 1922, at 3 P. M.

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170 (Assignments of Errors.)

And now, on this 25" day of August, A. D. 1922, come the defendants, by their Solicitor, Elbert O. Jones and L. E. Wagoner, and the intervening defendants, by their Solicitor, Norman B. Bartlett, and say that the decree entered in the above entitled cause on the 28th day of February, A. D. 1922, is erroneous and [unust] to the defendants.

First:

Because plaintiff's bill of complaint herein does not set forth any matter of equity entitling the plaintiff to the relief prayed for, and it affirmatively appears, from said
171 bill of complaint that the plaintiff has a plain, adequate and complete remedy at law.

Second:

Because the bill of complaint does not set forth any matters of equity in addition to the pretended constitutional question, or any special circumstances to bring the case under some recognized head of equity jurisdiction, and it is necessary to allege and prove some special circumstances in addition to the constitutional question, and thereby bring the case under some recognized head of equity jurisdiction, in order that this Court shall have jurisdiction of said matters.

Third:

Because the bill of complaint fails to set forth facts sufficient from which this Court can infer or presume that there will result a multiplicity of suits, irreparable injury, or a cloud [case] upon the title of its property, and it is necessary to specifically allege facts from which this Court can infer that either a multiplicity of suits, irreparable injury or a cloud will be cast upon the title of its property as a direct result of the action that plaintiff is attempting to enjoin, and

such allegations must be specific allegations of fact, and not conclusions.

Fourth:

Because it affirmatively appears from the face of plaintiff's bill of complaint, and the record herein, that there is no jurisdictional amount in controversy in this case at this time, and can be none, and that, therefore, this action is prematurely brought, for the reason that no assessment, levy or tax has been, in fact, made, assessed, equalized, fixed or levied against the property of the plaintiff, or at all.

Fifth:

175 Because it affirmatively appears from plaintiff's bill of complaint, and the record herein, that the State Tribunal having jurisdiction of said drainage ditch proceedings, was enjoined by this proceeding before such Tribunal had had an opportunity to perform its statutory duty to determine, equalize, assess, fix or levy the amount of benefit, assessment or tax, if any, chargeable against the property of the plaintiff, and for this Court to maintain jurisdiction before such State Tribunal had performed its full statutory duty, determined, equalized, assessed and fixed the amount of benefit, assessment or tax, was a usurpation of the authority invested in the State Tribunal, and an attempt to substitute this Court for such State Tribunal; and for the further reason that there is no provision of law giving this Court original jurisdiction over said matters.

Sixth:

Because the allegations of plaintiff's bill of complaint herein involve and present for litigation the determination of facts and matters controlled and governed by the drainage statutes of South Dakota, which, by their terms, create and provide a special tribunal with exclusive original jurisdiction to try and determine the questions presented in said bill of complaint, which determinations of said State Tribunal are final and conclusive upon this Court in this action, for the reason that this Court has no original jurisdiction by a bill in equity, to direct, reject, or control the proceedings and determinations of that tribunal, and thereby take away from that tribunal the power of discretion, and the exercise of its judgment in arriving at a proper determination of the matters before it.

Seventh:

Because until the tribunal created by the drainage statutes of South Dakota has exercised its judgment and discretion in

the determination of questions of fact properly before
173 it, and the necessary steps of procedure have been taken, and it has finally determined, equalized and fixed the proposed tax or assessment, if any, against the plaintiff's property, this Court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, for the reason that until such proposed assessment, tax or servitude has been equalized and fixed and assessed, this action is premature.

Eighth:

Because the undisputed evidence shows that on or about December 4, 1920, an equity suit was instituted in the State Circuit Court, within and for Minnehaha County, South Dakota, the same being a court of general jurisdiction and having jurisdiction over the subject matter therein presented, by one Oluf O. Gilseth, being a person belonging to the same class of persons as the plaintiff herein, whose lands were affected by the construction of Drainage Ditch No. 1 and 2, and against whose lands the proportion of benefits for the construction of said ditch had been proportioned at the same time, upon the same basis, and in like manner and under the same law as the proportion of benefits to the land of this plaintiff, which said action was brought by said Oluf O. Gilseth for himself, and as a representative of the class to which he and this plaintiff belong, and which action was brought against the defendants herein, and was instituted, tried and determined with notice to and knowledge by, approval, acquiescence and consent of this plaintiff, its officers, agents and attorneys, and in which said case the same facts were alleged and relied upon in the bill of complaint of the said Oluf O. Gilseth as are alleged and relied upon by the plaintiff herein in its bill of complaint, and which bill of complaint prayed for the same relief, and which said action came on for
trial, in which trial this plaintiff was entitled to be
174 heard, on the 31st day of January, 1921, and thereafter said State Court entered its judgment and decree dismissing said action upon its merits, and denying the plaintiff the right to an injunction against these defendants, which said judgment and decree is now in full force and effect, and which determination is binding upon this plaintiff, and is, therefore, a bar to this action, for the reason that all matters presented by plaintiff's bill of complaint herein are res adjudicata.

Ninth:

Because the uncontradicted evidence in this case shows that the petition of the City of Sioux Falls, F. L. Blackman and

others, filed August 3, 1916, and upon which the drainage ditch designated as Drainage Ditch No. 1 and 2, was ordered established and constructed, and the notice of the hearing said petition given pursuant to law, and the resolution of the Board upon the hearing of said petition establishing said ditch, all contained a description of plaintiff's property, and alleged that the same was affected thereby, and said resolution determined that plaintiff's property so described was affected by said Drainage Ditch No. 1 and 2, which determination, unappealed from, is now final and conclusive upon this plaintiff, and this Court, and, therefore, this Court was unwarranted in determining and decreeing that plaintiff's property is not affected by Drainage Ditch No. 1 and 2, no extrinsic fraud being alleged in plaintiff's bill of complaint.

Tenth:

Because the undisputed evidence in this case shows that the p'aintiff's property is receiving some benefit, and that it has not exhausted its statutory remedy for an equalization of such benefits, and its only complaint is that too many units of benefit have been apportioned against its property; and, therefore, this Court has no jurisdiction under its gen-
175 eral equity powers to correct an unequal or unjust assessment, since the statute prescribes a method for reviewing or correcting unequal or unjust assessments.

Eleventh:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was a new project, with plaintiff's property included therein, which finding and judgment of said Tribunal are binding upon this plaintiff and upon this Court, and can not be attacked in this collateral action, for the reason that said Tribunal is, by the drainage law of the State of South Dakota, given jurisdiction to determine the nature, kind and character of the proposed drainage, and the description of and the amount of property affected by said drainage project, and having made said findings and judgment, and this plaintiff not having appealed therefrom, said plaintiff is now bound thereby.

Twelfth:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minne-

haha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was conducive to the public health, convenience and welfare of the territory described in the petition of the City of Sioux Falls, F. L. Blackman and others, and was necessary and practicable for draining agricultural lands, which findings and judgment of said Tribunal are now binding upon this plaintiff and
176 upon this Court, and cannot be attacked in this collateral action, for the reason that, by the drainage law of the State of South Dakota, the Board of County Commissioners are given authority to determine whether or not a proposed drainage ditch will or will not be conducive to the public health, convenience and welfare of the territory described in the petition therefor, or necessary and practicable for draining agricultural lands; and having found in the affirmative in both instances, and the plaintiff herein not having appealed from such determination, the same is now binding upon this plaintiff and upon this Court.

Thirteenth:

Because no facts have been alleged in plaintiff's bill of complaint constituting extrinsic fraud on the part of the Board of County Commissioners of Minnehaha County, South Dakota, or any one else, in filing the petition of the City of Sioux Falls, F. L. Blackman and others, or in the allegations contained therein, or the resolution or other proceedings on, and prior to, or in the establishment of said drainage ditch designated as "Drainage Ditch No. 1 and 2", on October 3, 1916; and there is no evidence in the record of any extrinsic fraud on behalf of the Board of County Commissioners, or anyone else, in any of said proceedings, and, therefore, the determination of the facts found by said Board in said resolution of October 3, 1916, are now binding and conclusive upon this plaintiff and upon this Court, and this Court has no right, authority, or jurisdiction to enter upon, attempt to decide, to decide or re-litigate such questions of fact as were previously determined by such special Tribunal.

Fourteenth:

Because the undisputed evidence in this case shows that more than five years have elapsed after this plaintiff
177 had actual knowledge and legal notice of the establishment and construction of Drainage Ditch No. 1 and 2, and during all of said time this plaintiff took no steps to question or stop said proceedings, and the expenditure of over

Two Hundred and Fifty Thousand Dollars ($250,000.00) thereon and plaintiff's bill of complaint wholly fails to make any distinct avermeats, and none of the evidence tends to excuse this unwarranted delay, and for these reasons this Court should not come to its relief.

Fifteenth:

Because the drainage statutes of South Dakota provide a fixed and determinable basis, method and rule of apportionment of benefits, and, pursuant thereto, the Board of County Commissioners of Minnehaha County, South Dakota, applied such fixed and determinable basis, method and rule of apportionment of benefits, which will probably produce approximately correct general results as to the benefits to plaintiff's property, as well as all other [prioerty] in the drainage district, and, therefore, such apportionment is not arbitrary, and this Cou·t cannot usurp the power of the Board to equalize the proportion of benefits as provided by said statutes.

Sixteenth:

Because the evidence wholly failed to show that there would result a multiplicity of suits, or irreparable injury, or a cloud cast upon the plaintiff's property, and also failed to show any circumstances to bring the case under same recognized head of equity jurisdiction, and the evidence does show that the plaintiff had a plain, adequate and complete remedy at law.

Eighteenth:

Because all the evidence now shows that there is no jurisdictional amount in cont:oversy in this action, and that, therefore, this action was prematurely brought, in that the
178 apportionment had not been equalized, and no tax had ever been assessed or levied against the plaintiff's property, or any other property, and that the amount of such tax, if any, and, therefore, the amount in controversy herein, has not been, and cannot be, determined until after such equalization and final assessment has been made, as provided by the law of South Dakota, and the uncontradicted evidence shows that said equalization of the apportionment of benefits was prevented by the temporary restraining order and the final decree in this case.

Nineteenth:

The Court erred in not adjudging and decreeing that on October 3, 1916, Drainage Ditch No. 1 and 2 was duly and legally established by the Board of County Commissioners of

Minnehaha County, South Dakota, for a public purpose, including but not limited to the drainage of agricultural lands, for the reason, that the Constitution of the State of South Dakota and Section 8458 of the Revised Code of South Dakota, 1919, provide therefor.

Twentieth:

The Court erred in not adjudging and decreeing that the proceedings taken by the Board of County Commissioners of Minnehaha County, South Dakota, upon the petition of the City of Sioux Falls, F. L. Blackman and others, filed with the County Auditor on August 3, 1916, and upon which Drainage Ditch No. 1 and 2 was established on October 3, 1916, constituted the establishment of an entirely new drainage proceeding, and gave the Board of County Commissioners jurisdiction to construct such drainage as a new project, for the reason that such petition prayed for the construction of a drainage ditch over the exact line of drainage ditches
179 previously abandoned, and contemplated a more comprehensive and perfect drainage system for the purpose of draining and benefitting additional property, in compliance with and as authorized by Sections 8458, 8476 and 8489 of the Revised Code of South Dakota, 1919, and the undisputed evidence shows the work done consisted of about eight miles of canalizing the river, doubling the capacity of the ditch and outlet, building dikes, dams and controlling works, and an adequate spillway or outlet to said ditch, at a total cost of over Two Hundred Fifty-five Thousand Dollars ($255,000.00), which was more than double the amount of the total assessments for old Drainage Ditch No. 1 and Drainage Ditch No. 2, which was the sum of One Hundred Twenty-seven Thousand, Seven Hundred Six and 10/100 Dollars.

Twenty-First:

The Court erred in not adjudging and decreeing that plaintiff's land was subject to assessment for benefits which it received, if any, under the establishment and construction of Drainage Ditch No. 1 and 2, without regard to whether its lands had been assessed and included within the assessment district of Drainage Ditch No. 1 and Drainage Ditch No. 2, or not, for the reason that Drainage Ditch No. 1 and 2, as established on October 3, 1916, was established as a new project upon due and legal notice to the plaintiff, and in the manner provided by the drainage statutes of South Dakota.

Twenty-second:

The Court erred in entering its decree herein in favor of the plaintiff and against the defendants, upon this plaintiff's bill of complaint and the amendment allowed thereto, for the reason that said plaintiff's offer to amend said bill of complaint came too late, and long after plaintiff's attention was called to the fact that its bill contained no allegation
180 of arbitrary acts by objection to the introduction of testimony during the trial, and after the entire case had been tried, argued and submitted, and briefs had been filed twenty days, which amendment injected an entirely new cause of action into the bill of complaint, and to overcome which, the Court refused to receive evidence showing or tending to show that plaintiff's property was receiving a substantial benefit, and that the apportionment was not arbitrary and which amendment, when offered, did not conform to the facts established upon said trial, in that said proposed amendment assumed that the Board of County Commissioners were acting under jurisdiction obtained in the establishment of old Drainage Ditch No. 1 and Drainage Ditch No. 2, and not under the new drainage proceedings designated as "Drainage Ditch No. 1 and 2", as shown by the undisputed evidence; assumed that the equalization of the proportion of benefits had been had and assessment duly made thereon, [hereas], all the evidence shows that merely a tentative fixing of the proportion of benefits had been made; Assumed that the property of plaintiff had not been, and never could be, benefited by old Drainage Ditch No. 1 and Drainage Ditch No. 2 while the uncontradicted evidence shows a substantial benefit from the construction of Drainage Ditch No. 1 and 2; assumed that the assessment for benefits had been made, while the uncontradicted evidence shows that no equalization or assessment of benefits had ever been made, and cannot be made until after the proportion of benefits has been equalized and finally fixed; assumed that the acts of the Board in making the so-called assessment were arbitrary, while the evidence shows that no assessment or equalization of benefit has ever been made; and further, said amendment does not attack the drainage law as arbitrary, or the unit provided by law as arbitrary but alleges that the acts of the Board in fixing the amount
181 of the benefits to plaintiff's property were arbitrary, speculative and unjust, whereas, all the evidence shows that the Board, with its Engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received by plaintiff's property, using the fixed and determinable basis, method and rule of apportionment pro-

vided by the drainage law of South Dakota, and the undisputed evidence further shows on behalf of both parties that some benefit was received by the plaintiff; assumed the amount of the assessment and made an issue as to the amount of benefit, if any, plaintiff received, which matter this Court has no jurisdiction to determine; assumed and made an issue of the inequality of the so-called assessment upon plaintiff's property, and other agricultural land, which issue is within the exclusive jurisdiction of the State Tribunal, and this Court in this action has no jurisdiction to try or determine the same.

Twenty-third:

The Court erred in not adjudging and decreeing that the plaintiff herein is not in a position to question the regularity of the proceedings in the establishment and construction of Drainage Ditch No. 1 and 2, as an independent drainage proceeding, as it, by its officers and agents, had actual knowledge and legal notice of the proceedings taken to establish said drainage; as it, through its officers and agents, saw the work in the Court of construction, assisted in the work of construction thereof, by furnishing services and materials used therein, with knowledge that such services and materials were furnished therefor, and were being used in the construction of said drainage, and received compensation for said services and materials so furnished and used; as it, through its officers and agents, urged and encouraged the Board of County Commissioners to take the action and do the work which was done under such drainage proceedings for its benefit, and as it is now, and has been for more than three years last past, receiving protection and substantial benefits from said drainage construction, with the full knowledge, that there was no manner of paying for such construction except by assessment upon the property benefited, included in which was plaintiff's property, all without protest against the doing of any such work, or the extent or manner thereof, until such work and drainage project had been substantially completed, and until this action was brought to restrain the making of an assessment to pay for the cost of said construction, and, therefore, the plaintiff is now estopped from questioning said proceedings and maintaining this action.

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Twenty-fourth:

The judgment and decree herein is not supported by the evidence, and is contrary to law, in that it appears from the undisputed evidence that the outlet to old Drainage Ditch No.

1 was destroyed and abandoned and thereby said ditch abandoned and that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, fully complied with the requirements of the drainage statutes of South Dakota for the establishment of a new drainage, and that thereafter all the statutory requirements were duly and fully followed and pursued, and such proceedings were had that, pursuant to statute, on October 3, 1916, the Board of County Commissioners of Minnehaha County, upon due notice and hearing of said petition, ordered and adjudged the establishment of said drainage as a new project and drainage ditch, and designated it as "Drainage Ditch No. 1 and 2", and further adjudged and decreed that the construction thereof was for a public purpose, and was necessary and practicable for draining agricultural lands, and that the property of this plaintiff was included within the drainage area, and affected
183 thereby, which property was described in the petition, notice, and said resolution and judgment, which resolution and judgment was never appealed from by this plaintiff, or anyone, and is now in full force and effect, and has been for more than six years last past; that there is no evidence at all in the record that the plaintiff has been in any manner prevented from fully presenting its defense, if any, to the allegations and prayer contained in said petition of the City of Sioux Falls, F. L. Blackman, et al, or from fully trying all the issues herein presented, or that the jurisdiction of the Board of County Commissioners was imposed upon.

And it further appears from the undisputed evidence that an apportionment of benefits has been made for the payment of the costs of construction of said Drainage Ditch No. 1 and 2, and that the law provides, and the County Commissioners applied, after personal inspection, and exercising their best judgment, a fixed and determinable basis, method and rule of apportionment of benefits, which will probably produce approximately correct general results as to the plaintiff's property, as well as all other property in the drainage district; and that no equalization of benefits or assessment has been had thereon, and that no legal charge or servitude has yet been placed upon the property of plaintiff, or anyone else, and that this action is premature.

Twenty-fifth:

The said decree is not sustained by the evidence, but is contrary thereto, in that it appears from the undisputed evidence that Drainage Ditch No. 1 and 2 was established as a new ditch by the Board of County Commissioners of Minne-

haha County, South Dakota, on October 3, 1916, included in which drainage district was plaintiff's property, and of which proceedings this plaintiff had knowledge and legal notice for more than six years last past, and has never taken any
184 steps prior to the institution of this action, to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars ($250,000.00) thereon, and has wholly failed to establish any lawful excuse for said unwarranted delay; and that all steps taken by the Board of County Commissioners leading up to and the establishment of said Drainage Ditch No. 1 and 2, were warranted in law, and said Board was lawfully acting under and in conformity with the Constitution and drainage statutes of the State of South Dakota, and that said drainage ditch was petitioned for, and lawfully established for a public use and purpose, and for the purpose of draining agricultural lands; that the apportionment of benefits, as made by the Board of County Commissioners, was made pursuant to and in conformity with the method and rule laid down by the drainage statutes of South Dakota, and after a personal inspection and deliberation by said Board, applied in conformity therewith in such a manner as will probably produce approximately correct general results as to the benefits enjoyed by plaintiff's property, as well as all other property in the drainage district and that plaintiff's property is enjoying substantially the amount of benefit apportioned to it.

Twenty-sixth:

For all the reasons and errors aforesaid, the Court erred in not entering and rendering a decree in favor of the defendants, and against the plaintiff, dismissing its bill of complaint, and denying the injunction herein, and in not entering its judgment and decree in accordance with the prayer of defendants' answers.

Wherefore, defendants pray that the judgment and decree of said Court be reversed, with directions to enter a
185 decree in favor of the defendants and against the plaintiff, dismissing plaintiff's bill, as prayed for in defendants' answers.

ELBERT O. JONES and
L. E. WAGGONER
Solicitor for Defendants.

NORMAN B. BARTLETT
Solicitor for Intervening Defendants.

Endorsed: Filed in the District Court on Aug. 25, 1922, at 5 P. M.

186 (Petition for appeal and allowance thereof.)

To The Honorable James D. Elliott, Judge of the United States District Court Within and for the Southern Division of the District of South Dakota:

The above named defendants and intervening defendants feeling themselves aggrieved by the decree made and entered in this case on the 28th day of February A. D. 1922, do hereby appeal from said decree to the Circuit Court of Appeals, for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that their appeal be allowed, and that citation [issued], as
187 provided by law, and that a transcript of the record, proceedings and papers, upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Paul, Minnesota, and your petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

ELBERT O. JONES and
L. E. WAGGONER
NORMAN B. BARTLETT
Solicitors for Defendants and Intervening Defendants.

The foregoing petition granted, and the appeal allowed upon giving bond, conditioned as required by law, in the sum of One Thousand and No/100 Dollars ($1,000.00).

JAS. D. ELLIOTT
Judge of the United States District Court within and for the Southern Division of the District of South Dakota.

Endorsed: Filed in the District Court of Aug. 25, 1922, at 5 P. M.

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189 Bond on Appeal.

Know All Men By These Presents: That we, A. G. Risty, et al, defendants and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, as Prin-

cipals, and the Southern Surety Company of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the Chicago, Rock Island and Pacific Railway Company, a Corporation, appellee in the above cause, in the sum of One Thousand Dollars ($1,000.00), conditioned that, whereas on the 28th day of February, A. D. 1922, in the District Court of the United States, for the Southern Division of the District of South Dakota, in a suit pending in that court wherein
190 the Chicago, Rock Island and Pacific Railway Company, a Corporation, was plaintiff, and A. G. Risty, et al, were defendants, and the Minnehaha National Bank of Sioux Falls, South Dakota et al, were intervening defendants, numbered on the Equity Docket as 98, a decree was rendered against the said A. G. Risty, et al, defendants, and the Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, and the said A. G. Risty et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, having obtained an appeal to the Circuit Court of Appeals for the Eighth Circuit, and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree, and a citation directed to the said Chicago, Rock Island and Pacific Railway Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals, for the Eighth Circuit, to be held in the City of St. Paul, in the State of Minnesota, on the 2nd day of May, A. D. 1923, next.

Now, if the said A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void else to remain in full force and virtue.

A. G. RISTY
Signing for all Defendants.
THE MINNEHAHA NATIONAL
BANK OF SIOUX FALLS,
H. V. HARLAN, V. P.
Signing for all Intervening Defendants.

(Southern Surety Corporate Seal)

SOUTHERN SURETY
COMPANY OF DES MOINES,
IA.
By C. T. Charnock, Attorney in fact
Surety.

191 State of South Dakota,
County of Minnehaha—ss.

On this 15th day of August, 1922, before me H. B. Charnock, a notary public in and for said County, and State, personally appeared C. T. Charnock, well known to me to be the Attorney-in-fact of the Southern Surety Company, a corporation that is described in and that executed the above and foregoing instrument and duly acknowledged to me that said corporation executed the same.

And I further certify that at the same time the said C. T. Charnock exhibited to me the original certificate of authority issued to said Company by the Commissioner of the State of South Dakota, and that the following is a true, perfect and complete copy thereof:

STATE OF SOUTH DAKOTA
DEPARTMENT OF INSURANCE.
[Rewable] Annually.
Office of the Commissioner
Company's Certificate of Authority
No. 11050

Whereas, The Southern Surety Company, a corporation organized under the Laws of Iowa, has filed in this Office a sworn statement exhibiting its condition of business for the year ending December 31st, 1921, conformable to the requirements of the Laws of this State regulating the business of Insurance, and

Whereas, The said Company has filed in this office a duly certified copy of its charter, with certificate of organization, and has complied with all the requirements of the Insurance Laws aforesaid;

Now Therefore, I, W. N. Van Camp, Commissioner of Insurance of the State of South Dakota, pursuant to the provisions of said laws do hereby certify that the above
192 named Company is fully empowered through its authorized agents to transact its appropriate business of Accident and Health, Liability, Workmen's Compensation, Fidelity, Surety, Burglary, Theft, Plate Glass and Automobile Insurance in this State according to the Laws thereof, until the last day of February, 1923.

In Testimony Whereof, I have hereunto set my hand and official seal at Pierre, this First Day of March, A. D. 1922.

(Notarial Seal)

W. N. VAN CAMP,
Commissioner of Insurance.
By W. J. Madden,
Deputy Commissioner.

H. B. CHARNOCK,
Notary Public, South Dakota.

The foregoing bond is hereby approved.

JAS. D. ELLIOTT,
Judge of the United States District Court
Within and for the Southern Division of
the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25, 1922, at 5 P. M.

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194 (Notice to plaintiff of lodgment of statement of evidence in District Clerk's office.)

To A. B. Fairbank, Solicitor for Chicago, Rock Island & Pacific Railway Company, Plaintiff:

Please take notice that the Appellants have prepared a Statement of the evidence to be included in the record upon the appeal of the above entitled matter to the Circuit Court of Appeals, for the Eighth Circuit, and has lodged the same in the office of the Clerk of this Court for your examination, (a copy of which Statement is herewith served upon you).

You will further take notice that the Appellants will ask the Court, at the Government Building, in the City of Sioux Falls, in said District of South Dakota, at ten o'clock in the forenoon of the 3 day of October, A. D. 1922, or as soon thereafter as counsel can be heard, to approve said Statement.

Dated this 23 day of September, A. D. 1922.

E. O. JONES,
N. B. BARTLETT,
Solicitors for Appellants.

Service of the foregoing Notice this 23 day of September, A. D. 1922, is hereby acknowledged, also service of the Statement therein referred to.

BOYCE, WARREN & FAIRBANK,
Solicitor for the Chicago, Rock Island &
Pacific Railway Company, Plaintiff.

195 Endorsed: Filed in the District Court on Sept. 23, 1922.

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196 (Praecipe for Transcript.)

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the Circuit Court of Appeals of the United States, for the Eighth Circuit, by including therein the following:

1. The Bill of Complaint, except the title and verification, and except the Exhibits thereto attached.

2. Order Allowing Intervention.

3. The following portions of Defendants' Answer, viz:

(a) Paragraphs "A", "B", "C", "D", and "F" of Defendants' Special Answer.

(b) Introduction and Paragraphs "First" to "Nineteenth" inclusive, of Defendants' General Answer; and

(c) Paragraphs "VIII", "XI", "XIII" and "XIV" of Defendants' Affirmative Defense, together with the prayer.

4. The Statement of the Evidence Submitted, and Approved by the Court.

5. Order to Show Cause for Permission to Amend Bill, and Affidavit supporting the same.

197 6. Return to Order to Show Cause and Affidavit.

7. Order Permitting Amendment of Bill, and Exception taken to said Order.

8. Amendment to Bill.

9. The Opinion and Decree of the District Court.

10. Assignments of Error.

11. Petition for Appeal.

12. Order Allowing Appeal.

13. Bond upon Appeal, and Approval of same.

14. Notice of Deposit of Statement of Evidence with Clerk and Proof of Service thereof.

15. Approval of Court of the Statement of the Evidence.

16. Citation in Appeal, and Service thereof.

17. Praecipe and Clerk's Certificate.

Dated at Sioux Falls, South Dakota, this 23 day of September, A. D., 1922.

E. O. JONES
N. B. BARTLETT,
Solicitors for Appellants.

Endorsed: Filed in the District Court on Sept. 23, 1922.

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199 (Additional praecipe for transcript.)

The Clerk of this court is hereby directed to incorporate into the transcript on appeal in the above entitled cause, for the use of the Circuit Court of Appeals of the United States for the Eighth Circuit, the following additional portions of the record, which are not indicated in the precipe filed by appellants, to-wit:

1. The title of the case as a part of and as it appears in the bill of complaint and Exhibit "B" and Exhibit "C" attached to and made a part of the bill of complaint.

2. The title of the case as a part of and as it appears in the defendant's answer.

3. Paragraphs I, VI and XII of defendant's affirmative defense, as it appears as a part of defendant's answer.

200 4. The following exhibits made a part of the defendant's answer, to-wit: The petition of F. L. Blackman, and others, upon which the proceedings with reference to Drainage Ditch No. 1 and No. 2 are alleged to have been had; the order for filing said petition; the resolution for survey under said petition; the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman, and others; the published notice of hearing said petition, (said notice not being attached to the answer but having been filed after the filing of the answer and on November 28, 1921, together with the stipulation that it might be considered as a part of the answer), and the resolution establishing Drainage Ditch No. 1 and 2. All of said exhibits appear as a part of the answer and to be inserted as a part of said answer.

Dated this 23rd day of October 1922.

O'BRIEN, STONE, HORN & STRINGER,
BOYCE, WARREN & FAIRBANK,
Solicitors for Appellee.

Due service of the within Precipe this 24 day of Oct. 1922 is hereby admitted.

E. O. JONES, Attorney for Def.

Endorsed: Filed in the District Court on Oct. 24, 1922, at 4 P. M.

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202 (Statement of Evidence.)

(Filed in U. S. District Court on January 10, 1923.)

The above entitled suit came on for hearing before the Court on December 15th, 1921, before the Honorable J. D. Elliott, Presiding Judge, plaintiff appearing by A. B. Fairbank, Esq., its solicitor, defendants appearing by Mr. E. O. Jones, their solicitor, and the intervening defendants appearing by Messrs. Porter & Bartlett, their Solicitors, the following proceedings were had:

203 Evidence of Plaintiff.

F. E. WARD, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Stipulation.

"It is stipulated and agreed between all parties that the testimony received in these consolidated cases shall be considered as received in each case, so far as such testimony is pertinent to such case, and that such testimony apply only to that case."

Q. You may state your name.

The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set aside, for the reasons that the said bills of complaint fail to state any matter of equity entitling the plaintiffs to the relief prayed for, nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this court has no jurisdiction over these matters, because plaintiff's bills of complaint here-

in do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this court can infer or presume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property, or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that the plaintiffs have a plain, adequate and complete remedy at law.

204 For the further reason that it affirmatively appears from the fact of the bills of complaint and record, that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits, assessments or tax chargeable against the property of the plaintiffs, if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multipicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determinations of the state tribunal upon questions of fact before them, are conclusive upon this court in this action, this court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings. Motion denied, defendants and intervening defendants excepting.

The defendants and intervening defendants then objected to the introduction of any testimony for the reason and on the ground urged in the motions to dismiss. Objection overruled. Defendants and intervening defendants excepting.

(Testimony of Witness F. E. Ward)

I am the auditor of Minnehaha County, South Dakota;
205 drainage ditch records A and B and commissioners record 5 and 6 are part of the records of Minnehaha County.

Plaintiff offered in evidence the following portions of Drainage Ditch Record A.

July 1, 1907.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioner respectfully represents: That he is a resident of the City of Sioux Falls in said County; that he is the owner of certain lands in the valley of the Big Sioux River north and west of the City of Sioux Falls in said County, viz: Blocks Three (3) and Thirty-one (31) of Meredith's First Addition to Sioux Falls, according to the recorded plat thereof; the Northwest Quarter of the South West Quarter of Section Eighteen (18), and the South West Quarter of the North West Quarter of said Section Eighteen (18), except the railroad right of way, all in Township One Hundred and One (101) North, of Range Forty Nine (49); also a certain tract or parcel of land bounded and described as follows, to-wit: Commencing at a point twenty-four (24) rods north of the southeast corner of the North West Quarter of Section Thirty Two (32), in Township One Hundred and Two (102) North, of Range Forty Nine (49); running thence north ten (10) rods; thence west eighty (80) rods; thence south ten (10) rods; thence east eighty (80) rods to the place of beginning all of which lands will be affected by the drainage herein proposed;

Your petitioner further represents that it is necessary for the drainage of agricultural lands in said Big Sioux
206 Valley between the dam of the Cascade Milling Company in the City of Sioux Falls and the City of Dell Rapids that the proposed drainage be established.

Your petitioner further represents that the establishment of such drainage will be conducive to the public health, convenience and welfare of the inhabitants of the City of Sioux Falls and of the inhabitants of the Big Sioux Valley between Sioux Falls and Dell Rapids that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in said valley and will prevent great damage to the buildings and their contents; and will prevent great damage to the highways in said County, and also to the railroad tracks and rights of way of the Chicago, Milwaukee & St. Paul Railway Company and of the South Dakota Central Railway in said valley; and will prevent damage and

destruction of many bridges and their approaches in said valley;

Your petitioner further represents that the general purpose of said proposed drainage is, among other things, to prevent the annual or occasional flooding of lands in said valley caused by high water in said river, by providing a drain to carry off all the water of said river above its normal stage or above the point where it overflows its banks, that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the center line of Section Five (5) in Township One Hundred and One (101) North of Range Forty Nine (49), and running thence southeasterly across said Section Five (5), Section Four (4) and the North Half of Section Nine (9), all in Township One Hundred and One (101) North of Range Forty nine (49) and
207 east of the buildings of the State Penitentiary to a terminal point on said river in the City of Sioux Falls near the center of Section Nine (9) in said Township, the length of which will be approximately one and three fourths miles.

Your petitioner further represents that the territory [lilely] to be affected thereby is that portion of the Townships of Dell Rapids, Sverdrup, Mapleton, Wayne and Sioux Falls and of the City of Sioux Falls in the immediate valley of the Big Sioux River subject to overflow from said river.

Dated July 1, 1907.

WILLIAM H. LYON
Petitioner.

Said petition was duly verified and filed with the County Auditor on the first day of July, 1907.

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208 Plaintiff offered and there was received in evidence pages 562 and 563 and the first two lines of 564 of Commissioners' Record 5, it being a resolution of the Board of County Commissioners fixing the route and width of the proposed ditch and the time and place of hearing the petition of W. H. Lyon for the proposed drainage ditch thereafter established as Drainage Ditch No. 1.

This resolution is not printed at length herein because it contains matter not deemed of importance. It established the line of Drainage Ditch No. 1 as follows: Commencing 58 feet west and 135 feet north of the southeast corner of Section 29,

Township 102, Range 49, thence south parallel to the adjacent highway 2085 feet to station No. 114; also commencing 674 feet north and about 35 degrees west of Station No. 114; thence southeasterly 674 feet to said Station 114, thence south and parallel to said highway 7700 feet to Station No. 37, thence south 45 degrees, east 3700 feet to Station Zero (0), thence south 59 degrees, 36′, east to the Big Sioux River.

It also contains the following provisions: "Be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the width of said drainage ditch be and it is hereby fixed at 40 feet at the bottom thereof, with a side slope of one foot to one."

Plaintiff offered in evidence the following part of Commissioner's Record 5:

209 Sioux Falls, S. D. Dec. 31, 1907.

Pursuant to adjournment, at 2 o'clock P. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the county court house.

Present:

Dist. No. 5: Thomas McKinnon, Chairman,

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson,

Dist. No. 3: Alfred Acheson.

Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. Howard offered the following resolution:

Resolution Establishing Drainage Ditch No. 1:

The matter of the petition of William H. Lyon for the establishment of a drainage ditch filed in the County Auditor's office of Minnehaha County, South Dakota, on July 1, 1907, the said drainage ditch having been heretofore described and named "Drainage Ditch No. 1", coming on to be heard by the Board of County Commissioners at a regularly adjourned meeting, on Monday, December 30, 1907, pursuant to notice heretofore given, and written objections thereto having been filed by Martin Oien, et al, and by Joseph C. Carpenter, and by the Chicago, Milwaukee and St. Paul Railway Co. and the claims of said parties having been presented orally by their

counsel, and William H. Lyon, F. L. Blackman, O. Benson and others having appeared in behalf of said petition, and said hearing having been adjourned to this 31st day of December, 1907, and this Board having fully heard and considered said petition and all matters in opposition to and in support of the same; Now Therefore

Be it Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that said Drainage Ditch No. 1, is [condicive] to the public health, convenience and welfare, and is necessary and practicable for draining agricultural lands, and it is so found:

210 Be it further Resolved that said Drainage Ditch No. 1, be and is hereby established:

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land, or other property through which the same shall pass, and damages as compensation for the land taken for the route of such drainage.

Mr. Howard moved the adoption of said resolution, and that the vote be taken by districts. Mr. Harvey seconded the motion. Upon roll call,

Charles Harvey, Dist. No. 1 voted, Yes;

J. E. Johnson, Dist. No. 2 voted No;

Alfred Acheson, Dist. No. 3 voted No;

J. D. Howard, Dist. No. 4 voted Yes;

Thomas McKinnon, Dist. No. 5 voted yes;

The Chairman declared the resolution adopted.

Plaintiff offered in evidence the following portions of Ditch Record A;

April 11, 1908.

Resolution Assessing Benefits.

Whereas, The Board of County Commissioners of Minnehaha County, South Dakota, has established Drainage Ditch No. 1, and has fixed the damages arising therefrom, and has been investigating and considering the proportion of benefits that will accrue to the lands, tracts and lots within the drainage area of said Drainage Ditch; and

Whereas, in arriving at this determination of the proportion of benefits it has considered, not only the benefits which will accrue directly by virtue of the construction of said Drainage Ditch, but also the indirect benefits by virtue of said drainage being an outlet for connecting drains that may hereafter be constructed, and particularly is this so in ref-
211 erence to the lands within the drainage area lying north of a line running east and west through the center of Section Twenty Nine (29) Mapleton Township; and

Whereas, the number of acres set opposite each tract hereinafter described represents the actual number of acres of land within said tract that are benefitted, and excluding therefrom lands taken by said Drainage Ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said Drainage Ditch, the land taken by the drainage is excluded; and

Whereas, in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat of the County Auditor's Subdivision of the particular quarter section in which the land is located on le in the Register of Deeds office; and

Whereas, in the consideration of benefits said Board has assumed that the North East Quarter of the North East Quarter of the South West Quarter of Section Thirty Three (33) in Township One Hundred and Two (102) of Range Forty Nine (49) West of the Fifth P. M., owned by the state of South Dakota, and containing ten acres is benefitted "one", and taking the same as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sverdrup, Mapleton, Sioux Falls and Wayne; the benefits to the County of Minnehaha; and the benefits to the several Railroad Companies hereinafter described, arising and accruing by the construction of Drainage Ditch No. 1, be, and they are hereby fixed and determined in the following proportions, viz:

212

Name of Owner	Description	Section	Township	Range	Acres	Proportion of Benefits
Esten E. Eggen	E½ of NE¼	31	102	49	5	.45
Thomas Paulson	E½ of SE¼	31	102	49	43	3.87

State of South Dakota	E½ of NE¼	32	102	49	72.9	9.11
Ellen Berg and Mary Schjodt	(Except right of way of South Dakota Central Ry. Co.) NW¼ of NE¼	32	102	49	35.88	4.48

213 Here follows some twenty-two pages of similar assessments of individual owners of lands, describing lands in the following sections, townships and ranges:

Section	Township	Range
31	102	49
32	"	"
33	"	"
29	"	"
28	"	"
21	"	"
20	"	"
19	"	"
17	"	"
16	"	"
9	"	"
8	"	"
5	"	"
4	"	"
3	"	"
34	103	"
33	"	"
32	"	"
29	"	"
28	"	"
27	"	"
4	101	"
5	"	"
6	"	"
7	"	"
8	"	"
17	"	"
18	"	"
19	"	"
30	"	"
13	101	50
24	"	"
25	"	"

Also Lots in the following additions of Sioux Falls, South Dakota:

Berwick Addition
Brookings "
Brooks "
Bunkers "
Carpenters "
Central Park "
Englewood "
Harrison "
Lakeview "
Lincoln Park "
McClellan "
Meredith "
Millard Park "
North Boulevard Addition
North Park "
North Park 2nd "
Sioux Falls Improvement Addition
214 Summit Addition
West Lawn "
West Park "
Town of Renner
Olson's Addition to Renner
215 And also the following railways:

Name of Owner.	Description	Acres.	Proportion of Benefits
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 28, 29, and 33, township 103, range 49, west 5th p. m.....	25.02	3.75
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4, 9, 16, 21, 28 and 33, township 102, range 49, west 5th p. m. Sioux Falls and Egan line....	72.50	15.41
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 5, 8, and 9, township 102, range 49 west 5th p. m. (Sioux Falls and Madison line)	17.30	2.60
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4 and 9, township 101, range 49, west 5th p. m.	17.05	5.12
South Dakota Central Railway Co.	Right of way as now laid out and located across sections 29 and 32, township 102, range 49 west 5th p. m.	11.06	3.32

South Dakota Central Railway Co.	Right of way as now laid out and located across sections 4, 5, and 9, township 101, range 49, west 5th p. m.....	17.72	5.32
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 18, Township 101, range 49, west of 5th p. m.	12.18	3.65

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Name of Owner	Description	Acres	Proportion of Benefits
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 13, Township 101, range 50, West 5th p. m.	16.88	5.06
Sverdrup Township.	Seven miles and 84 rods of laid out and established highways within the drainage area.		2.9
Mapleton Township.	Twelve miles and 52 rods of laid out and established highways within the drainage area.		7.73
Sioux Falls Township.	Two and onehalf miles of laid out and established highways within the drainage area.....		3.2
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.		.6
City of Sioux Falls	1⅛ miles of highways and dedicated streets within the drainage area		.9
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area		25.

Be It Further Resolved that Tuesday, the 5th day of May, 1908, at two o'clock P. M. at the office of the County Auditor of said County be and it is hereby fixed as the time and place for the equalization of such proportion of benefits, and that notice thereof be given, in accordance with the provisions of Sec 6. of Chap. 134 of the Laws of 1907 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Weekly Argus-Leader, once in each week for two consecutive weekly issues, and one further publication in the Sioux Falls Daily Argus Leader, and by posting copies
of such notice in at least three public places near the
217 route of said Drainage Ditch, the said posting and the last of such publications to be made at least 10 days prior to the time of said hearing.

Adopted April 11, 1908 THOMAS McKINNON,
Chairman.

Attested:
C. E. Hill,
County Auditor.
(Seal)

Filed in the office of the Auditor of Minnehaha County, S. D. this 8th day of April, 1908.

C. E. HILL
County Auditor.

That in the foregoing assessment of benefits the Chicago, Rock Island and Pacific Railway and no property belonging to the said railway was in any way described or assessed.

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218 Plaintiff offered in evidence pages 53 to 61 inclusive of Ditch Record A, being the record of notice of hearing upon the equalization of benefits with reference to Ditch No. 1. In this notice of hearing the same persons and the same property is described as in the "resolution assessing benefits".

Plaintiff offered in evidence pages 260 to 268 inclusive of Ditch Record A, the same being a record of the levying of the assessment for Drainage Ditch No. 1. In this assessment the same persons and the same property was assessed as is described in the "resolution assessing benefits." This record shows that the commissioners ascertained and determined the entire cost of Drainage Ditch No. 1 to be the sum of $46,600.10.

Plaintiff offered in evidence pages 94 to 95 and a portion of page 96 of Ditch Record A, as follows:

April 10, 1908.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioners respectfully represent that they are all residents of the Township of Mapleton in said County, and that each of them is the owner of certain lands in said Township in the valley of the Big Sioux River as follows: The said Iver R. Peterson is the owner of the South Half of the

South West Quarter of the North East Quarter of Section Seventeen (17) and the South Half of the East Thirteen (13) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said Bernt Mekvold is the owner of the South-West Quarter of the North West Quarter of Section Seventeen (17) and the West Twenty-six and Two-Thirds (26 2/3) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said William O. Quincy is the owner of the West Half of the North West Quarter of Section Twenty (20); and that the said Iver I. Nelson is the owner of the East Half of the South West Quarter of Section Seventeen (17) and the North West Quarter of the South West Quarter of Section Seventeen (17), all in Mapleton Township, Minnehaha County, South Dakota, all of which lands will be affected by the drainage herein proposed;

Your petitioners further represent that it is necessary for the drainage of agricultural lands in said Big Sioux Valley from a point about four miles north of the south line of Sverdrup Township to a point about one and one-half miles north of the south line of Mapleton Township, that the proposed drainage be established;

Your petitioners further represent that the establishment of such drain will be conducive to the general health, convenience and welfare of the inhabitants of said territory, and that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in the valley and will prevent great damage to the buildings and their contents, and will prevent great damages to the highways in said territory, and also to the railroad tracks and the rights of way of the Chicago, Milwaukee and St. Paul Railway Company in said territory, and will prevent damages and destruction of many bridges and their approaches in said territory;

Your petitioners further represent that the general
220 purpose of said proposed drainage is, among other things, to prevent the annual or occasional flooding of land in said territory caused by high water in said river by providing a drain to carry off all of the water of said river above its normal stage from about the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the south line of Section Five (5) of Mapleton Township, and running thence southeasterly adjacent to the right of way of the Madison line of the Chicago, Mil-

waukee and St. Paul Railway Company to the west line of the East Half of the North East Quarter of Section Eight (8) in Mapleton Township, running thence south about three miles to a point about forty (40) rods south of the north line of Section Twenty Nine (29) in Mapleton Township where the said line intersects Silver Creek, running thence southeasterly to the upper end of Drainage Ditch No. 1, as established by said Board;

Your petitioners further represent that, as a part of said plan of drainage, there should be constructed a dike along the south and southeasterly side of said Big Sioux River where the same flows through the North East Quarter of Section Thirty-two (32) in Sverdrup Township, such dike to be of the length of thirty (30) or [forth] (40) rods.

Your petitioners further represent that the territory likely to be affected thereby embraces Sections Sixteen (16), Seventeen (17), Eighteen (18), Twenty (20), Twenty-one (21), Twenty seven (27), Twenty Eight (28), Twenty Nine (29), Thirty-Two (32), Thirty Three (33) and Thirty Four (34) in Sverdrup Township, and Sections Three (3), Four (4) Five (5), Eight (8), Nine (9), Sixteen (16), Seventeen (17), Nineteen (19), Twenty (20), Twenty One (21), Twenty Eight (28), and Twenty Nine (29) in Mapleton Township.

221 Dated April 9, 1908.

IVER R. PETERSON
IVER I. NELSON
BERNT MEKVOLD
W. O. QUINCY

Petitioners.

Filed in the office of the Auditor of Minnehaha County, S. D., this 10th day of April, 1908.

C. E. HILL

County Auditor

Plaintiff offered in evidence page 113 of Ditch Record A, as follows:

January 8, 1909.

Further Petition.

To the Honorable Board of County Commissioners, of Minnehaha County, South Dakota:

The undersigned land owners in the valley north of Sioux Falls respectfully request, pursuant to the trip of inspection made by you on December 15, 1908, that in acting upon the petition of Iver R. Peterson and others for a drainage ditch in Mapleton Township you will cause the proposed drainage ditch to be extended further north and made a part of Ditch No. 1, also that as a part of said proposed drainage system, you will cause a ditch to be established on the west side of the Big Sioux River from a point above the Baltic dam southerly to a suitable place on the river in Section Eighteen (18) in Sverdrup Township, and that you will by a proper outlet on the east side of the river, provide for the taking care of the surplus water so dumped into the river at that point.

A. L. Berg
Ole J. Ustrud
G. T. Gunderson
O. G. Brende
John A. Aasen
222 P. M. Thompson
Ole O. Langness
J. H. Williamson
Gunerius Thompson
Oluf Lyng
Mrs. Mary Lee
Mrs. Anne Larson by Agt.
K. Larson
H. G. Solem
T. A. Berven
E. O. Fossum
John P. Rievold

Filed in the office of the Auditor of Minnehaha County, S. D., this 8th day of January 1909.

C. E. HILL County Auditor.

Plaintiff offered in evidence pages 121 to 123 inclusive of Ditch Record A, as follows:

Resolution for Adjourned Hearing:

(Transcribed from Commissioners Record No. 6, Page 170-1-2-3)

On motion the following resolution was unanimously adopted:

Resolution:

Whereas, on April 10, 1908, Iver R. Peterson and others filed their petition with the County Auditor of Minnehaha County, South Dakota, for the establishment and construction of a certain drainage ditch in Mapleton Township in said County; and

Whereas, this Board did on June 12, 1908, adopt a resolution for the survey thereof; and

Whereas, Mr. S. B. Howe, County Surveyor, employed by this Board for making such survey, did on November 13, 1908, file his report thereof, together with maps and profiles, and

Whereas, this Board did on said last named date fix Friday, December 4, 1908, at the office of the County Auditor of said County as the time and place for the hearing of said petition, and did cause notice of said hearing to be given publication and posting, as required by law; and

223 Whereas, December 4, 1908, a petition was presented by A. L. Berg, and others for the extension of said ditch; and

Whereas, said matter has by successive adjournments been continued until April 9, 1909; and

Whereas, said engineer did on April 8, 1909 present his supplemental report of survey and plans and profiles; and

Whereas, this Board has inspected the route of said drainage ditch as described in said petition and as hereinafter described; and

Whereas, this Board deems it practicable, necessary and best that the route of said drainage ditch be varied from the route described in said petition and its northerly terminal points be materially changed; therefore

Be [is] Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the line of said drainage ditch be and it is hereby changed from the route described in said petition to run as follows: the same being substantially as petitioned for up to the point where the same crosses the Madison branch of the Chicago, Milwaukee and St. Paul Railway Company, viz:

First Section.

Commencing at a point ten hundred forty-five (1045) feet north and fifty-eight (58) feet west of the Southeast corner of Section twenty-nine (29) in Township One Hundred and Two (102) North, Range Forty-nine (49); running thence north five hundred forty seven (547) feet; thence north 23° west thirty three hundred eighteen (3318) feet to a point fifty eight (58) feet west of the quarter quarter line in the North East Quarter (NE¼) of Section Twenty Nine (29), in said Township; thence north parallel with, and fifty-eight (58) feet west of said quarter quarter line through Section

Twenty Nine (29), Twenty (20), Seventeen (17), and a
224 part of Section Eight (8) Twelve thousand nine hundred thirty five (12935) feet; thence north 50° East twenty seven hundred thirty two (2732) feet to a point thirty three (33) feet west of the west line of the right of way of the Chicago, Milwaukee and St. Paul Railway Company in the North West Quarter of Section Nine (9) in said Township; thence northerly parallel with and thirty three (33) feet west of the said right of way line nineteen thousand three hundred, sixty eight (19368) feet to a connection with a high water channel of the Big Sioux River in the South East Quarter of Section Twenty (20) in Township One Hundred and Three (103) North, Range Forty Nine (49).

Second Section:

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103) North, Range Forty Nine (49); running thence north 33° west thirty one hundred and fifty five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line of Section Seven (7) and Six (6) in said Township, and in Section Thirty One (31) in Township One Hundred and Four (104) North, Range Forty Nine (49) to the center line running East and West through said Section Thirty One (31); thence northeasterly to the creek near the northeast corner of said Section Thirty One (31), the said line being the center line of said proposed drainage ditch; that the width of said drainage ditch be and it is hereby fixed at forty (40) feet at the bottom thereof with a side slope of one and one-half feet to one; and that the fall of said
proposed drainage ditch be three (3) feet per mile from
225 north to south, and that the area required for right of way and dump space will be four (4) rods on each side of said line, except where it is adjacent to the right of way of the Chicago, Milwaukee and St. Paul Railway Company, and that the area required for right of way and dump space where said proposed line runs adjacent to the right of way of said Railway Company shall be two (2) rods on the easterly side of said line and six (6) rods on the westerly side of said line;

That in addition thereto the Big Sioux River be straightened in Section Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred Three (103) North, Range Forty Nine (49) in order to afford better means of communication between the lower end of Section Two (2) of said ditch and the upper end of Section One thereof;

Be It Further Resolved that this hearing be and it is hereby adjourned until Thursday May 6, 1909, at two o'clock P. M. at the office of the County Auditor of said County, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by the Laws of 1909, the same to be signed by the Chairman of this Board and attested by the County Auditor by publishing the same once in each week for two consecutive weeks in the Sioux Falls Daily Argus-Leader, and by posting copies of said notice in at least three public places near the route of said proposed drainage ditch as varied and extended, such posting to be made at least two weeks prior to the time of said hearing.

Adopted April 9, 1909.

THE BOARD OF COUNTY COMMISSIONERS MINNEHAHA COUNTY, SOUTH DAKOTA.
By Thos. McKinnon, Chairman.

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226 Plaintiff offered in evidence pages 135 to 136 of Ditch Record A, as follows:

Resolution Establishing Drainage Ditch No. 2:

The matter of the petition of Iver R. Peterson and others for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on April 10, 1908, coming on to be heard by the Board of County Commissioners of said County at a regularly adjourned meeting on Thursday May 6, 1909, pursuant to notice heretofore given, and said Board having heard and considered said petition and all matters in support of the same and in opposition thereto; Now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said drainage ditch as extended and varied and as described and set forth in the resolution adopted by this Board on April 9, 1909, is conducive to the public health, conveyance and welfare and is necessary and practicable for draining agricultural lands, and it is so found;

Be it Further Resolved that the said drainage ditch as described and set forth in the said resolution of April 9, 1909, be and it is hereby named and designated "Drainage Ditch No. 2".

Be it Further Resolved that the said Drainage Ditch No. 2 be and the same is hereby established;

Be it Further Resolved that in the construction of said drainage ditch the rights of flowage of Wm. G. Milne, the owner of the mill at or near Baltic, S. D., will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch, where the same joins with the creek near the northeast corner of Section Thirty One (31) in Dell Rapids Township that it will not diminish or interfere with such rights of flowage and that a head gate or other protection will be
227 established if necessary, to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

Be it Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same be made a special order for Friday May 7, 1909, at nine o'clock A. M.,

On motion, the Board adjourned to May 7, 1909 at 9 o'clock A. M.

Plaintiff offered in evidence pages 48 to 60 inclusive of Ditch Record B, as follows:

October 7, 1910.

The Board having had under consideration for several days the matter of the preliminary Assessment of Proportion of Benefits which was being prepared by J. H. Gates, Attorney with the assistance of Engineer Wagner and the same being completed, on motion the following resolution was adopted:

Resolution Fixing Proportion of Benefits
Drainage Ditch No. 2.

Whereas the Board of County Commissioners of Minnehaha County, South Dakota, has established the Drainage Ditch No. 2, and has fixed the damages arising therefrom and has been investigating and considering the proportion of benefits that will accrue to the lands, tracts and lots within the drainage area of said drainage ditch; and

Whereas in arriving at this determination of the proportion of benefits it has considered not only the benefits which will

accrue directly by virtue of the construction of asid
228 drainage ditch, but also the indirect benefits by virtue of such drainage being an outlet for connecting drains that may hereafter be constructed; and

Whereas said Board is of the opinion that the drainage area of Drainage Ditch No. 1 is benefitted by the establishment and construction of Drainage Ditch No. 2, and that both of said drainage ditches are mutually interdependent, and should virtually be considered as one drainage system; and

Whereas in the determination of the proportion of benefits herein fixed and determined upon the several premises embraced within the drainage area of Drainage Ditch No. 1 the proportion of benefits as finally fixed and equalized in the matter of said Drainage Ditch No. 1 have been taken into consideration; and

Whereas the number of acres set opposite each tract hereinafter described represent the actual number of acres of land within said tract that are benefitted, and excluding therefrom lands taken by said drainage ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said drainage ditch the area therefor taken by the drainage is excluded; and

Whereas in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat in the County Auditor's Subdivision of the particular quarter section in which the land is located, on file in the Register of Deeds' office of said County, and in the description of lands herein by reference to books and pages of deed records such references are to the deed records in the office of said Register of Deeds; and

Whereas, in the consideration of such proportion of
229 benefits said board has assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section Twenty, in Township One Hundred Three North, Range Forty-nine, West Fifth P. M., owned by Martha R. Roberts, and containing ten acres, be benefitted "One", and taking said tract as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls, the benefits to the Townships of Sioux Falls, Wayne, Mapleton, Sverdrup and Dell Rapids, the benefits to the County of Minnehaha; and the benefits to the several railroad companies hereinafter described, arising and accruing

by the establishment and construction of Drainage Ditch No. 2, be, and they are hereby fixed and determined in the following proportions, viz:

Name of Owner	Description	Section	Township	Range	Acres	Proportion of Benefits
E. S. Carter and S. C. Carter	W½ of NE¼	4	101	49	57.	.570
David Frank	E½ of NE¼ of NW¼	4	101	49	19.50	.244
M. H. Rylatt	W½ of NE¼ of NW¼ (except right of way of C. M. & St. P. Ry. Co.)	4	101	49	19.50	.244

230 Here follows some twenty-six pages of similar assessments of individual owners of land, describing lands in the following Sections, Townships and Ranges:

Section	Township	Range
4	101	49
5	"	"
6	"	"
7	"	"
8	"	"
9	"	"
17	"	"
18	"	"
19	"	"
30	"	"
31	"	"
13	"	50
24	"	"
25	"	"

Section	Township	Range
3	102	49
4	"	"
5	"	"
8	"	"
9	"	"
16	"	"
17	"	"
20	"	"
21	"	"
28	"	"
29	"	"

31	"	"
32	"	"
33	"	"
5	103	"
6	"	"
7	"	"
8	"	"
9	"	"
16	"	"
17	"	"
18	"	"
20	"	"
21	"	"
27	"	"
28	"	"
29	"	"
32	"	"
33	"	"
34	"	"
29	104	"
31	"	"
32	"	"

Also all lots in the following additions to the Town of Renner:

231 Town of Renner

Olson's Addition to Renner.

And also lots in the following additions to the City of Sioux Falls:

Berwick Addition
Brookings "
Brooks "
Bunkers "
Central Park Addition
Englewood "
Harrison "
Lakeview "
Lincoln Park "
McClellans 2nd "
Meredith's 1st "
Meredith's 2nd "
Millard Park "
N. Boulevard "
N. Park "
N. Park 2nd "
Sioux Falls Improvement Company Addition

Summit Addition
West Lawn "
West Park "

Also the following railroads, cities and townships:

232

Name	Description	Acres	Proportion of Benefits.
City of Sioux Falls	One and one eighth miles of highways and dedicated streets within the drainage area.....		.090
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area		.320
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area		.060
Mapleton Township	Twelve miles and 52 rods of laid out and established highways within the drainage area		8.723
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area		17.710
Dell Rapids Township	One and three-eights miles of laid out and established highways within the drainage area		1.936
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area		9.100

233

Name	Description	Acres	Proportion of Benefits.
Chicago, St. Paul, Minneapolis & Omaha R. R. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50, West 5th P. M., within the drainage area (1.5 miles)	18	20.320
South Dakota Central Railway Co.	Right-of-way as laid out and located across Sections 4, 5 and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49 West; 5th p. m. within the drainage area (2 6 miles)	20.80	59.980
Chicago, Milwaukee & St. Paul	Right-of-way as laid out and located across Sections 4 and 9, Township 101, Range 19,		

Railway Co.	and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29 and 33, Township 103, Range 49, and Section 32, Township 104, Range 49 West, 5th p. m. within the drainage area (the above being the Sioux Falls and Egan line); also across Sections 5, 8, and 9, Township 102, Range 49 West, 5th P. M., within the drainage area (being the Renner and Madison line) Total 14.5 miles	167.06	383.130

Be it Further Resolved that Thursday, the 3rd day of November, 1910, at two o'clock P. M. at the office of the County Auditor of said County be, and it is hereby fixed as the time and place for the equalizing of said proportion of benefits, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909 of said State, such notice to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Daily Argus Leader once in each week for two consecutive weeks, and by posting copies
234 of said notice in at least three (3) public places near the route of said drainage ditch, said posting and the last publication of said notice to be made at least ten (10) days prior to the time of said hearing.

Adopted October 7th, 1910.

THOMAS McKINNON, Chairman.

Attest:

(Seal) Henry Howe, County Auditor.

Filed in the office of the Auditor of Minnehaha County, S. D. this 7th day of October 1910.

HENRY HOWE, County Auditor.

That in the foregoing assessment of benefits the Chicago, Rock Island & Pacific Railway, and no property belonging to the said railway, was in any way described or assessed.

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235 Plaintiff offered in evidence pages 61 to 71 inclusive, of Ditch Record "B", being a record of the notice of hearing on the questioning of equalization of benefits of Ditch No. 2. This notice of hearing named the same persons and

the same property specified in the resolution of the County Commissioners fixing the proportion of benefits of Ditch No. 2.

Plaintiff offered in evidence pages 153 to 165 inclusive, of Ditch Record "B", the same being the record of the assessment made by the County Commissioners for Drainage Ditch No. 2. This assessment named the same persons and the same property specified in the resolution fixing the proportion of benefits of Drainage Ditch No. 2 and the assessment was made as provided for in said resolution. This record shows that the commissioners ascertained and determined the entire cost of Drainage Ditch No. 2 to be the sum of $81,106.19.

The foregoing exhibits with reference to Drainage Ditch No. 1 and Drainage Ditch No. 2 were received in evidence.

It is stipulated that filed herein as a part of the answer of the defendants are correct copies of the following records of the Board of Commissioners of Minnehaha County, with reference to Drainage Ditch No. 1 and 2, to-wit: the petition of F. L. Blackman and others, upon which the proceedings with reference to Drainage Ditch No. 1 and are alleged to have been had, the order for filing said petition, the resolution for survey under said petition, the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman and others, the published notice of hearing petition, (such notice not being attached to the answer, but having been filed after the filing of the answer with a stipulation that it might be considered as a part of the answer), and resolution establishing Drainage Ditch
236 Ditch No. 1 and 2. Said exhibits were offered in evidence by plaintiff and received in evidence.

(The foregoing exhibits relating to Drainage Ditch No. 1 and 2 are printed herein as a portion of the answer of the defendants and are consequently not herewith reprinted.)

Plaintiff's exhibit "A" was identified by the witness F. E. Ward as one of the records of the office of the County Auditor of Minnehaha County, and was offered in evidence by plaintiff.

To the offer in evidence of plaintiff's exhibit "A" the defendants and intervening defendants objected as incompetent, irrelevant and immaterial to any issue in the case, the same not being pleaded in plaintiff's bill of complaint and a part of their case. For the further reason that the appor-

tionment made and set forth in plaintiff's bill of complaint affirmatively appears to be an apportionment made during the year 1921. Plaintiff's exhibit "A" was received in evidence subject to objection.

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237 Drainage Notice.

To Whom It May Concern:

Notice is hereby given that Tuesday, April 25th, 1919, at Two o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, at the Court House in the City of Sioux Falls, in said County, have been fixed by the Board of County Commissioners of said County as the time and place for equalizing the proportion of benefits to the several lands, tracts, lots, roads, streets and railroad rights of way embraced within the district of Drainage Ditch No. 1 and 2, and benefitted by the construction of said Drainage Ditch, and that the route of said Drainage Ditch No. 1 and 2 is as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of Section twenty-nine (29) Township One Hundred Two (102), Range Forty-nine (49), West of the 5th P. M., running thence south parallel to the adjacent highway two thousand and eighty-five (2085) feet to station one hundred and fourteen (114); also commencing at a point Six hundred and seventy-four (674) feet north, and about thirty-five (35) degrees west of said station number one hundred and fourteen (114) thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and [parallet] to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south forty-five (45) degrees, east three thousand seven hundred (3700) feet to Station number zero (0), the same being on high water line, thence south fifty-nine (59) degrees and thirty-six (36) minutes, east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to Big Sioux River, the said line being the center line of said drainage ditch, and is intended to sever the exact loca-
238 tion of drainage ditch Number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five (1035) feet north and fifty-eight (58) feet west of the southeast corner of Section twenty-nine (29), in Township One Hundred and Two (102), Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north five hundred and forty-seven (547) feet, thence north twenty-three (23) degrees, west Thirty-three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the Northeast Quarter of Section Twenty-nine (29), in said Township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17), and a part of Section Eight (8), Twelve thousand nine hundred and thirty-five (12,935) feet, thence north fifty (50) degrees east, twenty-seven hundred and thirty-two (2732) feet to a point thirty-three (33) feet west of the west lines of the right of way of the Chicago, Milwaukee & St. Paul Railway Co., in the Northwest Quarter of Section Nine (9), in said Township, thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with the high water channel of the Big Sioux River, in the southeast Quarter of Section Twenty (20), in Township One Hundred and Three (103), north of Range Forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18), in Township One Hundred and Three (103), Range Forty-nine (49);
239 running thence north thirty-three (33) degrees west thirty-one hundred fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8), in said Township; thence north parallel with and sixty (60) feet west of the quarter line in Section Seven (7) and Six (6) in said Township, and in Section Thirty-one (31), in Township One Hundred and Four (104), North of Range Forty-nine (49), to the center line running east and west through said Section Thirty-one (31); thence northeasterly to the creek near the northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River has been or is being straightened and the channel changes made as fol-

lows: Channel changes on Sections Five (5) and Seven (7), Township One Hundred and One (101), Range Forty-nine (49); Channel changes on Section Thirty-two (32), Twenty-nine (29), Twenty (20), Eighteen (18), Seventeen (17), Eight (8) and Five (5), Township One Hundred and Two (102), Range Forty-nine (49); and Channel changes on Sections Thirty-two (32), and Twenty-nine (29), Township One Hundred and three (103), Range Forty-nine (49); the same being in accordance with the lines of said Drainage Ditch as actually constructed and for which the said Board of County Commissioners has heretofore assessed condemnation damages; that maps and profiles of said Drainage Ditch are now on file in the office of the County Auditor of said County, to which reference is hereby made.

That there have been included within the drainage area of Drainage Ditch 1 and 2 the entire drainage area of Drainage Ditches No. 1 and No. 2 heretofore established and constructed, and additional territory contiguous thereto, which is benefitted by the establishment and construction of said Drainage Ditch No. 1 and 2, and that in the judgment
240 of said Board of County Commissioners all of said territory is interdependent, and is considered as one drainage system, that in the determination of the proportion of benefits fixed upon the lands and premises embraced within said drainage area, the amounts of the assessments heretofore made in the matter of Drainage Ditch No. 1 and Drainage Ditch No. 2 have been taken into consideration.

That in the consideration and assessment of benefits, as hereinafter set forth, the said Board of County Commissioners have assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section 20, in Township 103, Range 49, West of the 5th P. M., owned by Martha R. Roberts, and containing ten acres, is benefitted "one"; also that Lot 1, in Block 22 of J. L. Phillips' Addition, owned by G. Keriakedes, containing a single lot, is benefitted "one", and that County Auditor's Tract 14 of the Southwest Quarter of Section 16, Township 101, Range 49, except the east 132 feet thereof, owned by Albert Larson and George E. Larson, is benefitted "one", and taking the said lands, tracts and Lots as a unit, the proportion of benefits to each and all of the lands, tracts, lots, roads, streets and railroad rights of way and the description of each tract of land affected by said drainage, and the names of the owners

thereof as they appear from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, at the date of said petition and at the date of filing said petition, was fixed as follows:

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Name of Owner	Description	Sec.	Twp.	R.	Acres	Proportion of Benefit.
Fred Nelson	W¼ of NE¼	4	101	49	57.00	6.897
State of South Dakota	E½ of NE¼ of NW¼	4	101	49	19.5	2.952
State of South Dakota	W½ of NE¼ of NW¼	4	101	49	19.5	2.952

Here follows some forty-nine pages of similar assessments of individual owners of land, describing lands in the following Sections, Townships and Ranges:

Section	Township	Range
4	101	49
5	"	"
6	"	"
7	"	"
8	"	"
9	"	"
17	"	"
18	"	"
19	"	"
30	"	"
13	"	50
24	"	"
3	102	49
4	"	"
5	"	"
8	"	"
9	"	"
16	"	"
17	"	"
19	"	"
20	"	"
21	"	"
28	"	"
29	"	"
31	"	"
32	"	"
33	"	"
5	103	"

	6	"	"
	7	"	"
	8	"	"
	9	"	"
	16	"	"
	17	"	"
	18	"	"
	20	"	"
	21	"	"
	27	"	"
	28	"	"
	29	"	"
	32	"	"
	33	"	"
	34	"	"
	29	104	"
	31	"	"
	32	"	"
242	Section	Township	Range
	24	101	50
	25	"	"
	36	"	"
	31	"	49
	32	"	"
	33	101	49
	34	"	"
	27	"	"
	22	"	"

Also city lots in the following additions to the Town of Renner:

Town of Renner

Olson's Addition to Renner.

Also lots in the following additions to the City of Sioux Falls:

Berwicks' Addition
Brookings "
Brooks "
Bunkers "
Central Park "
Englewood "
Harrison's "
Lincoln Park "
McClelland's "

Meredith's 1st "
Meredith's 2nd "
Millard Park "
N. Boulevard "
North Park "
North Park 2nd "
Sioux Falls Improvement Company's Addition
Summit Addition
West Park "
J. L. Phillips' Addition

Burlington's Subdivision of Block 26 of J. L. Phillips' Addition

Morningside Addition

Gale's Addition to Sioux Falls

Chicago, Rock Island & Pacific Railway Co. Lots 1, 2, 3, 4, 5, and 6 Block 24, proportion of benefits 0.550

Morse's Addition

Millspaugh's Addition

Chicago, Rock Island & Pacific Railway Co., Lots 1 and 2, Block 13, proportion of benefits 0.137

Daniel's Addition
Van Eps "

Brookings & Edmunds' Addition

Braley's Addition

Silver Park Addition

Unplatted lots in Sections 16, 21 and 22, Township 101, Range 49, within the City of Sioux Falls.

243 Equitable Realty Company's subdivision of NE¼ of NW¼ of Section 16.

Chicago, Rock Island & Pacific Ry Co. Tract 29 of SW¼ of Section 16, proportion of benefits 3.437.

Chicago, Rock Island & Pacific Ry Co. Tracts 1 and 2 of SW¼ of Section 16, proportion of benefits 3.437.

Chicago, Rock Island & Pacific Ry. Co. Lots A and B, subdivision, Tract 17, SW¼ of 16, proportion of benefits 0.480

Then followed the following assessments on cities, townships and railways:

244

Name of Owner	Description	Proportion of Benefit.
City of Sioux Falls	Parks, Water System, Highways and dedicated streets within the drainage area.	111.11
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area.	0.384
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.	0.072
Mapleton Township	Twelve miles and fifty-two rods of laidout and established highways within the drainage area.	10.468
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area.	21.252
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area.	2.323
Minnehaha County	Benefits arising from and to the safety and preservation of bridges within the drainage area.	25.555
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50 West of the 5th P. M., within the drainage area (1.5 miles)	15.263
Watertown & Sioux Falls Ry. Co.	Right-of-way as laid out and located across Sections 4, 5, and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49, West of the 5th P. M., within the drainage area (2.80 miles),	28.86
Chicago, Milwaukee & St. Paul Ry. Co.	Right-of-way as laid and located across Sections 4 and 9, Township 101, Range 49, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29, and 33, Township 103, Range 49, and Section 32, Township 104, Range 49,	

West of the 5th P. M., within the drainage area, (the above being the Sioux Falls and Egan line), also across Sections 5, 8 and 9, Township 103, Range 49, West of the 5th P. M., within the drainage area, (being the Renner and Madison line), total 14.5 miles	147.533

245 All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed, as stated, and the said determination of said Board made final.

Dated March 8, 1919.

A. G. RISTY
Chairman of the Board of County Commissioners of Minnehaha County, South Dakota.

Attest:
E. H. Shenkle
County Auditor
(Seal)

Filed in the office of the Auditor of Minnehaha County, S. D. this 8 day of March, 1919.

E. H. SHENKE
County Auditor.

That the only place in which the Chicago, Rock Island & Pacific Railway Company is in any way mentioned in the foregoing notice is as owner of the lots as above set forth therein.

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246 It is stipulated that attached to the bill of complaint herein is a true copy of the drainage ditch notice of hearing upon the question of equalization of apportionment of benefits of Drainage Ditch No. 1 and 2 on the 1st day of August, 1921, caused to be published by the Board of County Commissioners of Minnehaha County, South Dakota, said Drainage Ditch Notice being Marked "Exhibit C".

Exhibit "C" attached to the bill of complaint is offered in evidence by plaintiff and received in evidence.

(Exhibit "C" being printed herein as an exhibit to the bill of complaint, is not at this place reprinted.)

(Cross-Examination of witness F. E. Ward)

The proportion of benefits of Drainage Ditch No. 1 and 2 was not equalized upon the notice returnable April 25th, 1919, upon that date or at any other time. The proceeding was abandoned on account of errors in the published notice.

A. G. RISTY called and sworn as a witness for the plaintiff testified as follows:

(Direct Examination)

My name is A. G. Risty; I am one of the defendants in this action and am and for nine years have been a member of the Board of County Commissioners of Minnehaha County, South Dakota; for about seven years I have been Chairman of the Board; in the spring of 1919 the County Commissioners passed a resolution apportioning the benefits for Drainage [Dirch] No. 1 and 2; notice of hearing upon the proposed equalization of such benefits was published; the plaintiff's "Exhibit "A" is the notice I refer to; I was a member of the Board at the time of making that apportionment of benefits.

247 Q. Please state to the Court, Mr. Risty, in what manner and upon what basis you determined, in the resolution referred to, the proportion of benefits to the Chicago, Minneapolis, St. Paul & Omaha Railway?

Objected to by defendants as incompetent, irrelevant and immaterial, the record now showing that the exhibit referred to by counsel in his question, that the proceedings therein were abandoned and are not the proceedings upon which the present actions were instituted, or the present controversy before the court.

Counsel for plaintiff: I state to the Court this is offered solely for the purpose of showing to the court the attempted application by the County Commissioners of the law which we are questioning.

The evidence received subject to objection.

A. Well, in all those cases we tried to take into consideration the right of way, the value of the line as compared with adjacent lands and the benefits that might be derived from this drainage proposition as to the maintenance of the tract and the bridges and so on.

In determining the apportionment of benefits as stated in Exhibit "A" to the Chicago, St. Paul, Minneapolis & Omaha

Railway, 1.5 miles; to the Watertown & Sioux Falls Railway Company, 2.60 miles; and to the Chicago, Milwaugee & St. Paul Railway Company 14.5 miles; I don't think we computed on a mileage basis; we may have had that number of miles in mind, but we tried all the while to base it on a certain unit, as I remember it.

Q. Just how, Mr. Risty, did you compare the alleged benefits to the three railway companies mentioned, with the
248 unit of agricultural lands to which you have just referred?

A. How we determined the units for the railroads?

Q. How you compared the alleged benefit to the railroads with the unit you have referred to.

A. Well, we arrived at—I don't remember what value we passed on that unit at that time (referring to the agricultural unit). We had the value fixed of the agricultural unit and the proportion of benefit that this drainage would be to that unit; when we came to the railroad question and other properties we took into consideration the benefits that they would derive and I might say we capitalized that—how much the average annual benefit would be to those properties, we might say to a certain piece of railroad, and having that amount fixed, we took the benefit that this unit of farm land was supposed to have and divided the benefits of the railroads—for instance we will say the unit of the farm land was $100; we would make the proportion of the benefit 25% or $20; then when we came to place a unit on other property after having exercised our judgment and made our investigation as to what those benefits might be, we arrived at a certain amount; we divided that by 25, the benefit of the farm unit and that gave us the number of units that we would assess up to that property or railroad, you might say if you wish; I am now testifying with reference to the procedure in 1919; we employed about the same procedure all the time.

Q. Mr. Risty, I call your attention to the fact that the units tentatively assessed to each railroad company in the drainage notice Exhibit "A" bears the same proportion to the mileage of said railway company in each case; with that in mind will you state to the court whether or not that attempted assessment was made by you upon a mileage basis?

A. The mileage basis—if it is the same number of
249 miles or if it is the same per mile for each company, then we must have estimated that the benefit was about the same and that gave the same number of units per mile.

In our attempted fixing of proportion of benefits which is in question in this lawsuit I don't think we used the mileage basis but I don't remember positively.

With reference to drainage Ditch No. 1 or reference to Ditch No. 1 and 2 no warrants to any great amount have been used since the time of fixing this proportion of benefits in the spring of 1919; it might possibly be that the cleaning of the ditch was not paid at that time; I don't remember that would be the kind of work that has been paid for since if it wasn't paid for before that; we have done some work around the foot of the spillway and so on since the publication of this notice in April, 1919, but I don't remember what it cost.

Q. In what manner, Mr. Ritsy, did you determine the benefit to the unit of agricultural land in 1919?

A. We made an estimate of what that land was worth according to our judgment and how much more it would be worth after it had the benefit of this drainage ditch, fair value, I don't remember we had any other basis to go on other than our own judgment as to the value of the land before the drainage and after the drainage.

We arrived at our determination with reference to the benefit of 111.11 units to the parks, water system, highways, and dedicated streets of the City of Sioux Falls without the drainage area in April, 1919, in just the same way as I stated to you that we arrived at the benefit to the railroads
250 and so on; what in our judgment we thought was the benefits; we fixed the amount that in our judgment we thought was the benefit. We fixed an amount that in our judgment we thought was right and proper and divided by the benefit to the agricultural unit to get the number of units in regard to this other property; we based that judgment upon the fact that some of us, most of us, are farmers or were farmers and we all know the price of land—was selling it at that time; with reference to parks, water system, highways, and streets of the City of Sioux Falls we based our determination upon the same facts as we used in regard to all other property; we estimated according to our judgment and our investigation what these properties had cost and what benefit they were to the public, what loss they would be at in case they were annually overflowed; to some extent we used the cost of the parks of the City of Sioux Falls; the cost of the water system of the City of Sioux Falls was talked of; we made our determination on the estimate of the cost and the benefit that those properties would derive; we never

had a hearing; it might be more and it might be less we didn't get far enough to hear the other side; we made an estimate of the damages that might accrue in case the highways and streets of Sioux Falls were overflowed; we based that estimate on our best judgment; suppose you have a building down along the Sioux here and have it overflow; the basement filled with water; your own estimate on what damage it would be to you and it would vary probably a great deal from mine, neither one might be right. It is doubtful whether you and I would agree; I have stated the manner in which we compared the benefits to the parks and water system, streets and highways of the City of Sioux Falls with the agricultural unit; we took the public highway that would be annual-
251 ly overflowed; we had in mind as road builders what damages that would be to that road; in our judgment we fixed the damages to be what we thought were right and the number of units on that piece of property; then we proceeded as in all other cases, divided by the benefit to our original unit; to get the number of units we first attempted to determine what the benefit was and then divided it to get the proportion; it is probably a fact that the unit as used by us in the measurements in the spring of 1919 represented approximately $80.00 or $85.00 in cost; we used at 10A. unit; I am not certain whether the unit was supposed to have been benefitted $80.00 to $85.00 or $7.00 to $8.00 per acre, that might be it, I don't remember.

Q. I now call your attention, Mr. Risty, to the drainage notice provided for hearing on the 1st day of August, 1921, upon the equalization of benefits of drainage ditch No. 1 and 2 and call your attention to the benefits to roads, railroads, etc. and ask you to state to the court in what manner and upon what basis you arrived at your determination with reference to the proportion of benefits to the Chicago, Rock Island & Pacific [Rr]., the Chicago St. Paul, Minneapolis & Omaha Ry., the Great Northern Ry., the Chicago, Milwaukee & St. Paul Ry., the City of Sioux Falls, and the Northern States Power Co., referring particularly to the benefits to the Hydro-Electric plant and water rights of the Northern States Power Co.

Mr. Bartlett: "That is objected to as incompetent, irrelevant and immaterial, not within the issues that can be tried by this Court in this collateral action, the same being a legislative matter and not subject to inquiry in this Court, it not having been alleged in plaintiff's bill of complaint herein that

the Commissioners acted fraudulently or arbitrarily."

252 The Court: "Received, subject to objection."

A. As to the railroads and other property mentioned in this question we arrived in the manner stated before; we took into consideration the value of the right-of-way compared the right-of-way with adjacent lands and what protection from this water would benefit them and the savings it would be in upkeep of the railroad track, bridges, etc; in regard to the Hydro-Electric Co. plant we took into consideration the overflow and high water that would clog up their turbines and put them out of working order for some time, and we had in mind the great overflow of 1881 when it swept out the lumber yards down there and took out the mill at the foot of the falls, and in our estimation after having taken all those things into consideration which I wouldn't mention all now, we arrived at the conclusion that this water, the drainage proposition was of immense value to the water Power Co. and we figured on that with a good deal of care and then I think we arrived at the amount of $50,000.00; I would not say positively that was the amount; we compared the benefits which we arrived at to the North States Power Co. with the benefit to our 1A tract of agricultural land as I have stated before; the benefit to that unit we had said was $25.00; when we had estimated the benefits to the water power company was $50,000.00 we wanted to find out how many units that it represented and we divided it by 25 and that gave us the number of units that would be assessable to the water power company; I suppose there was no material increase in value of the railroad companies' rights-of-way and other property I have mentioned by the making of these two apportionments of benefit unless it might be increase in value with the value of other property increased at

253 that time, but the expenses to be paid were more; there were probably in the neighborhood of $250,000.00 of ditch warrants outstanding at the time we made this apportionment of benefits in 1919; I know there has been some issued since but I don't know how much; in estimating the benefits to various railroad companies in our last apportionment of benefits, we had about the same ideas as we did in 1919; we did not use the mileage basis or farm basis or street basis anywhere; we used the units.

Q. Just how did you use the units, that is what I am trying to find out?

A. When we find out what amount we have to raise—when we come to levy the assessment, the proportional benefits will be assessed to each unit—one unit may be 100%, an-

other is 150% and some only 10%, others 25%; they won't all be alike, of course they are not benefitted alike; in arriving at our determination in 1921 of the last apportionment of benefits and the number of units of the benefit to the Chicago, Rock Island & Pacific Rr. Co. we took into consideration the damages that might be done to the railroad tracks with high water to the grades; and in regard to the bridges, bridges could be built smaller; wooden bridges generally have a duration of about ten years and if they could get along with smaller bridges or make grades instead of tressel works which would be a benefit to the company; we inquired minutely into those things but as I say haven't heard the other side; we might be away off; the hearing was not allowed and we didn't get any basis from you folks on that question; we determined that the benefit to the track of the Rock Island Ry. from the ditch was a certain specified amount in dollars and cents; I wouldn't say that we put those amounts on record; that is the way we arrived at our units; we took into consideration in determining this benefit the fact that the Rock Island
254 might build a shorter bridge somewhere and that was part of the basis of our assessment of benefits after arriving at the amount of dollars and cents benefit we proportioned it by dividing by the value of the unit; in determining the proportion of benefits to the Chicago, St. Paul, Minneapolis, & Omaha, the Great Northern, the Chicago, Milwaukee & St. Paul Railroad Companies we followed the same procedure; the basis for our determination of the benefits with reference to the highways, streets, water supply, water plant, Sherman Park and Phillips Park in the City of Sioux Falls was as I have stated to you before; it may seem [arbitrarily] but in regard to county highways for instance, we knew pretty well what it would take to keep them in good passable condition in seasons when there was any overflow and in seasons when there was no overflow; in regard to the streets and basements that have been flooded each year I made an estimate as to how much it would damage a basement if filled with water; same way to the streets, same way to the parks; If you had ever had a hearing those things would all have been adjusted. I wouldn't say absolutely that we did in 1921 the same as we did in 1919 with reference to the city; we had the same idea in mind when we gave it reconsiderations and wherever we saw we could improve, we did it to make a more equitable proportion; in my judgment and in the judgment of the commissioners the last proposition is better than the first one; I don't want to say we absolutely followed the methods of the first instance or we followed any particular practice in the last

instance; it may be we did and possibly we didn't; in arriving at the determination that the benefit to the Hydo-Electric Co. plant of the Northern States Power Co. was about $50,000.00, we based our determination upon the following facts; in the first place we have a stream that tends to give a steady flow of water around the bend so that it will not go over the spillway. In one certain place about 3 miles northwest from
255 town outside of the ditch proper; the river broke through and would eventually have cut across the bottom and into the spillway and we dammed that up; then we took into consideration the high water backing up and filling up the gorge below their [plan] so that at certain times the water power would not be serviceable and that it would cost them fuel and other items to a great etxent and then primarily, any water which overflowed would be apt to sweep out everything around that electric plant if they should have an overflow like 1881.

Q. You say there was danger of some ditch cutting through and diverting the water out of the river?

A. Yes sir.

Q. State whether or not that was the Ditch No. 1 or ditches Nos. 1 and 2 which were constructed by the Board of County Commissioners, the records of which have been placed in evidence here.

A. Those ditches were established and built before my time on the Board and that might possibly have been that it was cutting into Ditch No. 1 and making that immense excavation, but I would not say. But it was necessary to have it dammed up according to the orders of the hydro electric engineer; the ditch I refer to must have been probably the terminus of ditch No. 1; the engineer gave orders it had to be dammed up absolutely.

Q. In just what manner did you arrive at the fact that this alleged benefit to the Northern States Power Company amounted in dollars and cents to approximately $50,000.00?

A. After taking those things into consideration, that was our best judgment. We might have itemized it and added it up; I don't remember that; but according to our best judgment that would be reasonable assesment upon the water power company.

We based that judgment upon the benefits I have stated
256 to you; giving them a uniform flow of water in dry seasons and protecting them from overflow when we had an overflow season; I have stated practically everything that was taken into consideration in determining that the Northern States Power Co. was benefitted $50,000.00. if I remember right.

Q. I call your attention, Mr. Risty, to the alleged benefit in your apportionment of 1921 to the Chicago, Milwaukee & St. Paul Railway; benefits to right-of-way, tracks, embankments, bridges and grades across sections 4-9-16-21-22, Township 101 Range 49, and across sections 4-9-16-21-28 and 33 Township 102 Range 49, and across sections 5-8-17-20-28-29-33 in Township 103, Range 49, and ask you to tell the court what you took into consideration in determining that the Chicago, Milwaukee & St. Paul Ry. Co. was benefitted 1678.9 units.

A. We took into consideration what it would damage the tracks—what the damage would be if those tracks washed out and the expense to rebuild them, and with the assistance of a competent railroad engineer we arrived at those figures that we have given there.

We assumed that except for this spillway these tracks of the Chicago, Milwaukee & St. Paul Railway would wash out and be under water for a certain period; I have seen the Milwaukee road under water 8 or 10 days at a time when they had to run their trains around to Pipestone on other railroads; I don't remember what proportion of its tracks we assumed would wash out; the distance used is about equal to the lands that overflow; those lands that overflowed and had the tracks on; of course it would overflow the tracks; I don't remember how many times we estimated that to be; we tried to figure it out and our engineer worked it out and that was the number of miles; the tracks were on land subject to overflow, that is what determined the distance; with reference to the bridges of the Chicago, Milwaukee & St. Paul Railway in arriving at this benefit—I don't remember whether there is any more bridges on the Milwaukee; yes, there are two; we took
257 into consideration that by diverting the great volume of water from the river into these ditches, their bridges would be less subject to destruction by the ice gorges and by high water and that they could be made smaller when they come to build new ones because they would not have such high waters; the water would be divided between the river and the ditches; in arriving at that feature of the benefit in dollars and cents, we figured out with our engineer what it would cost to build and maintain bridges of the size they have now and what it might cost to build them smaller and their relief when they were subject to overflow and ice gorges; these were the elements we had in mind.

After the filing of the Blackman petition in 1916 when it was decided that the spillway was to be repaired we employed engineers to go ahead and investigate that and it took about

a year and a half before all of the preliminaries were taken care of so that we went to actual excavation on the structure; we employed a competent engineer and he laid the plans and we let the contract to a contracting company here, they were to have a percentage for their work; they proceeded to sink that shaft and make the channel of the spilling basin; to put it all in shape that it is at the present time; on the river we straightened a number of bends, made cuts across bends and straightened out the river to facilitate the flow of the water; I think Ditch No. 2 was cleaned about as far as Renner; then the time arrived that the ditch warrants did not sell any longer and we had no means to complete the work; there always were control gates at the head of Ditch No. 2; we made no change at the head of Ditch No. 2 after the filing of the Blackman petition if you call the end of it up there near Baltic where the ditch begins; it crosses the river at one certain place up there and if you have reference to where this lower part is started, there we built a small dam of willows
258 and earth to keep the water from coming out of the ditch entirely and doing damage that way; the route of the ditch was left the same as the route of Ditch No. 1 and Ditch No. 2, the old ditches; no changes were made in the initial point or terminal points of either ditch.

(Cross-Examination).

Prior to the attempt to fix the proportion of benefits in 1919, no topographical survey was made or thorough investigation upon which to base the assessments or fix the benefit. In order to save money we thought the old survey would answer; in making the proportional benefits we took the old figures and old survey to avoid expense; we didn't get far enough to make any assessment on any particular tract of land; the Board abandoned that attempt to fix the proportion of benefits because of an error in adopting three units instead of one; after that time the Board caused a full topographical survey to be made by Chenoweth & Rettinghouse of this city and a thorough investigation of the benefits that would accrue to the various properties within the drainage area; Mr. Rettinghouse reported and explained to us the conditions which he found generally throughout the drainage area and the property that was benefitted in making that report he stated to us the various elements that he considered as benefits and submitted to us the facts upon which he based his conclusions; Mr. Rettinghouse as our engineer made the computation with reference to this apportionment of benefits and the plans and we talked it over and he was practically the one that planned

how it should be done; he did all the figuring and the computations; before we adopted the resolution of June 10, 1921, we had been fully advised as to the topographical situation and the elements that went into the fixing the proportion of benefits against each of the various pieces of property that we deemed to be benefitted; the board made a personal investigation of all the property within the drainage area and
259 determined the benefits before we adopted this resolution; we selected as a unit an acre of land about three miles north of town in the district between the river and the ditch and visited that unit in company with Mr. Rettinghouse; we determined that in our judgment that unit was benefitted by the improvement 25%; in reaching that conclusion it seems to me we valued the unit without the drainage at $100 and with the drainage at $125.00; it being our judgment that the real benefit to that unit was the sum of $25.00; after determining the value of this unit we proceeded to equalize and fix the proportion of benefits among the other property; the engineer accompanied us and had with him various figures and maps he had made showing these tracts, we referred to the map right along as we traveled; the Board proceeded to investigate the whole territory proposed to be assessed on this basis investigating first upon the east side of the river and then on the west side and then around the bend clear in through town; we looked over the railroad situation and other properties including the power plant, city streets, parks, and water system that in our judgment were affected; my judgment and the judgment of the board coincided almost entirely with the report of the engineer, Mr. Rettinghouse, with reference to these various proportions of benefit; after having made our investigation and having had the elements of benefit explained to us by the engineer. The board exercised its judgment and concluded that these properties were actually benefitted relatively or approximately as the engineer had reported them, we considered as a basis for making assessments on these various properties the acreage of the right-of-way within the drainage area; with reference to the Great Northern Railroad property, Mr. Rettinghouse gave us the facts as to the area within the various territories; he pointed out to us that certain bridges would be benefited by
reason of it, that certain bridges might be shortened
260 by reason of having the water by-passed through the ditch; all of these facts together with the betterment or saving in maintenance on the roadbed were considered by the Board in determining and fixing the proportion of benefit as against the Great Northern Railroad; in like manner the

engineer explained the amount of acreage of right of way of the Chicago, Rock Island & Pacific within the drainage area would be protected and benefitted the same as the adjacent farm lands; he pointed out that there was a certain length of its track that would be affected in having its maintenance cheapened by the drainage and that certain of its bridges might be shortened and were protected by reason of this drainage ditch by-passing the portion of the water that would come down the river; these amounts were all taken into consideration and passed upon by the Board in determining the amount of benefit our judgment indicated the Chicago, Rock Island & Pacific received; the Chicago, Milwaukee & St. Paul Railway extends almost the full length of this ditch and adjacent to it; in some places the track is right along the ditch and in other places it runs pretty close to the ditch all the way; it might possibly be 80 rods away where the ditch crosses the river at Renner; he explained the amount that this railroad benefitted upon the same proportion that the farm lands adjacent thereto; that the embankments, tracks and roadbeds were benfitted in the same manner by being made more substantial and requiring less upkeep; that there was a certain number of bridges that could be shortened and a certain bridge might be abandoned by reason of by-passing this water; these matters were all taken into consideration by the Board in determining the amount of benefit that we fixed against the railroad for its proportion and the amount of benefit was figured out by Mr. Rettinghouse for us in the manner in which I have testified on the basis of maintenance
261 and upkeep; the Chicago, Minneapolis & Omaha Railway extends directly across the project in two places and Mr. Rettinghouse explaind to us that its right of way would benefit the same as adjacent land and that its roadbed was benefitted by being more easily maintained; that there were a certain number of bridges over the Sioux River and adjacent thereto that were protected by the drainage; that a certain number of trestles might be shortened or abandoned and that by reason of these benefits the railroad company was actually benefitted a certain amount and it was in our judgment; we took all these matters into consideration and exercised our judgment in determining the amount to be fixed as against these various properties.

Mr. Rettinghouse, as our adviser, explained to us the number of miles or blocks of streets in the city of Sioux Falls that were within the drainage area and would be benefitted

by being protected and drained by this drainage; also the benefits that would accrue to the two city parks and to the Sioux Falls water system and the elements of such benefit; the Board took all these elements into consideration in exercising its judgment and determining the amount of proportional benefits which it fixed against the city of Sioux Falls.

At the same time, Mr. Rettinghouse explained to the Board and the Board considered the elements of benefit which would accrue to the Northern States Power Co. by reason of the drainage; we went through that very thoroughly; the facts that the dam was put in adjacent to the river near Schotz, about three [unles] north of the city of Sioux Falls and that the controlling works in the nature of [wiers] were put in at Thompson's about ten miles north of the city were considered as elements of benefit to the Northern States Power Co. by reason of holding the water in the river and permitting to flow down and over its power plant; to by-pass the flood water
or a portion thereof through the ditch and save the
262 retarding effect of permitting that flood water to pass
over the dams of the power company and pile upon and retard the whole power produced at the power plant also was considered an element of benefit; all of these matters were taken into consideration by the Board in determining the amount of benefit that should be fixed against the Northern States Power Co. The construction of this drainage project, several river cut-off channels, were put in up the river north of Sioux Falls, and in determining the Northern States Power Co. benefit the Board took into consideration the effect and influence of these cut-offs in hastening the flow of the flood water down the stream and shortening the time of floodage upon the power plant. All of these matters were taken into consideration by the board in exercising its judgment of the amount should be fixed, in the first instance against the Northern States Power Company.

The work that the Board did upon this drainage project consisted of constructing the spillway, cleaning and widening and deepening the ditch between here and Renner, diking the ditch and putting in the dam at Schotz and controlling works at the Thompson Bridge, and putting in these numerous river cut-offs.

The Court: Where is the Thompson Bridge?

A. Up where the ditch ends and turns into the river, and crosses the river and goes up on the other side.

The Court: How far is the Thompson Bridge from Sioux Falls?

A. About 12 or 14 miles.

The Court: How far is Renner from Sioux Falls?

A. 8 miles.

Q. Do you know the approximate present width of the ditch as it extends from Sioux Falls to Renner, or
263 thereabouts? A. No, I don't. That would be a mere guess.

Q. Isn't it in the neghborhood of 80 to 100 feet?

A. It probably is as far North as Renner.

Where we diked the ditch had taken the channel of the creek; there hadn't been dirt enough taken out to make a dike and when the floods came it backed up on the farm lands to the west of it; we diked there probably five or six feet high; and protecting those farm lands from overflow from the ditch after that; the dam at Schotz covered the break in the bank of the river about 150 feet wide and had the effect of keeping the water from the river from flowing in the bayou that is tapped by the ditch.

After the attempted assessment made in 1919, some work was still to be done in cleaning a portion of the ditch from Renner to the railroad tracks; settlement for this work had not been fully made.

Q. And this dam at Schjodt's that has finally been made to stand was not in at that time?

A. No, it was not.

Q. And some repair work has been done on the spillway since that time, has it not?

A. Yes, the control work at the bridge at Thompson's was put in since that time, but at the initial point of the ditch we haven't made any change.

Exhibit "1" is a copy of a map of the territory affected by drainage ditch No. 1 and 2 submitted by Mr. Rettinghouse to the Board as a part of his report.

We had a map similar to this upon which the percentages were marked before us when we made the inspection of the drainage before making the apportionment of benefits, on June 10th last,

Exhibit "1" offered in evidence by defendants and received in evidence.

264 Q. Mr. Risty, in applying and using this unit as explained by Mr. Rettinghouse to you, and as followed by the Board in fixing these apportionments of benefits of the various properties affected, you stated that you determined what the actual benefit to the unit selected was, and that its value was twenty-five dollars? A. Yes sir.

Q. Did you use that value of twenty-five dollars as the actual benefit to the unit in determining the apportionment of benefits which each of the various classes of lands aside from farm land should be assessed in this drainage proceedings?

A. We did. This was in regard to farm lands.

Q. And your engineer figured out the total benefit to each of these various pieces of property and divided that benefit by twenty-five, the value of the unit, to determine the number of units to be fixed against these various pieces of property?

A. Yes, that is the way we determined the number of units.

Q. That applies generally to all of the plaintiffs in these actions? A. Yes sir.

Q. Your understanding is that in determining the amount of the assessment upon this basis, that the total number of units are added together to determine the number of units, and the total cost of the ditch is computed and the total cost is divided by the number of units to get the actual assessed valuation of a unit? A. Yes sir.

F. E. WARD recalled on behalf of plaintiffs testified as follows:

The plaintiff's Exhibits "B" and "C" are part of the files and records of my office.

Exhibit "B" was offered in evidence by plaintiff and received in evidence. It is the resolution of the County
265 Commissioners of Minnehaha County fixing the proportion of benefits on drainage ditch No. 1 and 2, dated June 10th, 1921; it is not printed here because it describes the same property, names and same persons, and fixes the same units as are described, named and fixed in Exhibit "C" printed as a part of the bill of complaint herein.

Exhibit "C" was offered in evidence by plaintiff and received in evidence. It is the same as Exhibit "C" printed herein as a part of the bill of complaint and for that reason is not reprinted here.

H. E. BARLOW, called and sworn on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am civil engineer of the Chicago, St. Paul, Minneapolis & Omaha Railway; the Sioux Falls-Mitchell branch of the Omaha enters the City of Sioux Falls from the west, crossing the big Sioux River and the bottoms approximately three miles west of the city. The line then swings somewhat to the south and enters the city on the southeastern corner again crossing the Big Sioux River and through the station grounds runs approximately north and south; the spillway is a couple of miles north of the line of the Omaha; in the west portion of the City of Sioux Falls there is a spur track known as the west side spur, which branches off from the main line a short distance west of the westerly course of the Big Sioux River, and runs approximately north and south for a distance of about a mile; the Omaha railroad has no agricultural lands in the City of Sioux Falls other than its right of way and depot grounds or in the drainage district involved in this controversy; all of its property consists of its railroad right-of-way, station grounds and appurtenances and is used exclusively for railroad purposes.

I know Mr. Rettinghouse, the engineer of the County
266 Commissioners in this drainage ditch matter; I called upon him at his office in Sioux Falls and had an extended conversation with him during which he very kindly outlined the method by which he had arrived at the amount of benefits; this conversation was in February or March last; the information was given me by Mr. Rettinghouse but not in confidence; the method he used in arriving at the total benefits deals primarily with the question of bridges; at the point where the Omaha crosses the bottoms west of town, we have in addition to a hundred foot steel span over the main channel, an approach bridge approximately 233 feet long, and two other bridges east of the main river bridge, one 126 ft. and one somewhat shorter; in addition to these bridges we have a small one span pile bridge considerably west of these bridges which takes care of local drainage only and is not concerned in this question; Mr. Rettinghouse has figured that by reason of the diversion of a certain amount of flood waters of the Big Sioux River by means of the spillway constructed by the County authorities, the Omaha Railway would be justified in filling in certain of these approaches, particularly our bridges known as 129 and 130, aggregating 239 feet in length; these are the bridges a mile east of the mail bridge over the river west of town about three miles out; he has

figured that it would cost to rebuild these bridges about $25 a foot or $5975; he has assumed that it will be necessary to rebuild these wooden structures about once in ten years; he has therefore figured that the average annual expenditure would be one-tenth of $5975; he has capitalized this amount at 7% arriving at $8536; then he has deducted the cost of filling these bridges and the riprap necessary to protect the dam; he has used this $2000, which deducted from the $8536 makes a net of $6536 benefit on account of filling bridges
267 129 and 130; in a similar manner he has figured that we could fill the approaches to the two steel spans we have here in town, where the amount of pile bridging is 166 ft. going through the same proposition [abd] capitalizing the annual expenditures and deducting the cost of filling he has arrived at $2930; these bridges which we have here in town are what are known as through bridges; the supports are above the track, and Mr. Rettinghouse has figured that if the Omaha Company thought it desirable it might rebuild [tyose] bridges and substitute the deck built character construction which is a cheaper type construction, and by using shorter girders and necessitating two additional piers, this type of construction could be used, and he has planned to reproduce these bridges as through structures would cost $45,500 and with the deck plate girder type would cost $25,500, making a difference of $20,000; then there is one other item which relates to the maintenance of the roadbed of the mile and ¾ length of track we have west of town in the district; this track has an embankment varying from 3 to 4 ft. to 10 or 12 ft; he has figured that on account of the diversion of a part of the flood waters, the embankment would be less, consequently the amount of labor that would have to be expended in keeping up the track would be less by an amount equal to $100 per year; he has capitalized this $100 at 7% arriving at $1400; in summarizing all of these items he arrived at the total benefit of $30,866; now the assessment of the Omaha is fixed at 839.45 units; if 1 unit is approximately $9.50, the total assessment would be $7975; the total amount of benefit divided by the total number of units would make an average value of about $36 for the unit; he has assessed us at approximately 25.8% of the total benefits; figuring the one unit at $9.50.

The situation at the west crossing is that we cross the valley approximately at right angles; the valley is quite wide at this point; the track is on an embankment and has
268 these 4 openings; three of them are at a distance of about ¼ of a mile; the land north of the track on the upstream side is cultivated to a considerable extent, not in

the immediate vicinity of the bridges, but a short distance each way from the river the land is cultivated; in a time [or] normal high water this land is flooded and on account of the likelihood of holding this water an unnecessary length of time on this bottom land if we don't have considerable opening there through our embankment and taking into consideration the danger to the roadbed that might result if we closed the opening, it is my opinion that we would be unjustified in reducing the size of our openings or the length of them; in my opinion there are absolutely no benefits resulting to those bridges west of the city or to the railroad west of this city by virtue of this drainage ditch construction.

Referring to the bridge west of the depot in the City of Sioux Falls and taking up the question of the substitution of the belt girders for the trestle, the fact of the matter was that the Omaha Company has no intention of making any changes in these bridges; the bridges are amply strong for the locomotives we are now running or which we anticipate we will run in the future; there is absolutely no reason for disturbing the bridges at all; furthermore, if we should decide ever to substitute the plate girders we could do so and still have the light iron at about the high water of 1881.

There is one other point that has not been covered and that is in regard to filling the pile approaches; there are short approaches at each end; the west approach is 62 or 63 feet; and the east approach is 103 ft; we have felt that we could fill both of these approaches whenever we got around to it and could at any time; as a matter of fact it would involve considerable expense and we have felt it would
269 be better economy to maintain that type of approach; as to the filling of those approaches the drainage ditch construction has no effect one way or the other.

I have figured up the acreage the right-of-way of the Omaha Railroad in the drainage district amounts to; we have 22 acres on the main line, 21.2 of which is [one of] the west bottom and 5.89 acres on the west side spur previously described; these figures, include .2 of an acre in the vicinity of the bridge out here in the city and includes all the right-of-way within the drainage district sought to be assessed.

(Cross-Examination)

I have been in the business of civil engineering something over 22 years and have occupied my present position since the first of March 1920; it is a fact that water in flood seasons permitted to stand along side of the embankment which sup-

ports the tracks of the railway has a tendency to weaken that embankment and it necessarily requires a greater outlay of money to keep the bank in solid form; as a general proposition the more water standing there the more effect it has.

Q. Do you know when these bridges were built west of town?

A. I think our records disclose that they were built about 1880 or 1879, along in there.

Q. Then these extra full bridges were built at a time when all water was coming down the river?

A. Yes sir; the engineer building the bridges would naturally have in view that they would take care of all the water that came down the river; if the evidence should disclose in this case that from 1/3 to ½ of the water that comes down the river was diverted and does not pass under this bridge, it would not be the reasonable conclusion that at least part of the bridge could be done away with; I don't know how much water stood out there last year north of those bridges on the uphill side of those embankments; I don't know how much water there was the year before or the year before that.

Q. You do not know any of the data, but you are willing to swear you got no benefit, notwithstanding the fact that you do not know how much water stood there?

A. Yes, I am willing to say that.

I think it had no effect whatever; if only ½ of the water came down the river last year that previously went under the bridges there would have been no benefit to our embankment in the solidity of the same and in the cost of the maintenance of it; it would make no difference how much water comes down the river unless it should go over the track and begin to wash the bottom out; I stated as a general proposition that when the embankment stood in water it had a tendency to weaken it and make a higher cost of maintenance; this fact is not true at this place and our embankment would stand all amounts of water; there is a peculiar reason why it should.

It is not a fact that we cannot run over that bridge the same class or weight of engines that bring our trains from St. Paul and Minneapolis to Sioux Falls; that bridge would not have to be changed if we wanted to run the same class or weight of engines to Mitchell; my company has not put in any different trestles since this spillway has been constructed; I have been in Sioux Falls several times; I think I was here in 1919; I think I was here in 1917 or 1918, and went over the

ditch matter at that time; our former chief engineer had at one time under consideration the question of the shortening of the bridge just east of here; my understanding is that the spillway is designed for 2000 second feet and could take an overload of 500 more, making a total of 2500.

271 (Redirect Examination)

The special reasons why water standing by this railroad embankment did not affect it is that this particular embankment is very wide and deep and very heavily overgrown with vegetation and sod; in the vicinity of the river course where any washing has ever taken place are thoroughly protected by rip-rap; for this reason I believe that water standing along this particular embankment would have no effect on it in so far as the labor that would have to be expended in maintaining the tract is concerned; that is the answer that I would make to the claim of benefits made by Mr. Rettinghouse in regard to saving $100 a year maintenance; my understanding is there has been no decrease in the force employed on the section since the construction of the spillway in 1918 and that would be the determining factor as to saving in maintenance account.

The reason why trains the same as come from St. Paul to Sioux Falls cannot be run to Mitchell is that we have other bridges between here and Mitchell which would not permit of the running of heavier locomotives; the bridge in Sioux Falls is restricted in our time card; we do not permit our heavier engines to go over it at the present time; as a matter of fact there is no reason why the heavy engines that operate down here cannot go over this particular bridge although it is restricted in our time card; there is no reason why the heavier engines should run any further than Sioux Falls if they cannot go clear through to Mitchell; Mr. Rettinghouse the engineer of the drainage district, was the former chief engineer of the Omaha road who had under consideration the question of changing the bridge at Sioux Falls.

C. GEELAN, called and sworn on behalf of the plaintiffs, testified as follows:

272 (Direct Examination)

I am road master of the Chicago, St. Paul, Minneapolis & Omaha Railway from Worthington to Mitchell and from Luverne to Doone, and I have been since August 15, 1906; prior to becoming roadmaster, I was section foreman and extra

gang foreman; I was section foreman at Montrose; I started working for the Omaha in April, '80, and was employed by that road during 1881; I remember the flood waters of 1881; I was in Sioux Falls when the water was the highest; I am familiar with that portion of the Omaha Railroad in the City of Sioux Falls and west of the City comprised in the area sought to be assessed for the construction of drainage in this drainage district No. 1 and 2, and have been familiar with it since 1908; there is very little noticeable difference in the water conditions along that line of the Omaha railroad subsequent to the construction of the new spillway in 1918; I realize that more water has come down and stood on the bottoms, but it spread out such a wide territory across the bottoms that it didn't raise it very much; I wouldn't say that there has been more water on the bottoms west of the city and north of the Omaha Railway track since the construction of the spillway than there was before, but to my knowledge there is fully as much; I have seen the water conditions each year beginning with 1918 and have visited that part of the line and know how much water there was; the water that has collected in the field north of the track does not seem to have had any bad effect, that is, it doesn't seem to make any more particular, work across the bottom; I can't say it has a bad effect one way or the other either before or after the construction of the spillway; the construction of the spillway and other works in Drainage Ditch No. 1 and 2 has made no apparent difference
273 one way or the other as to the flood waters of the river and as to the line of railroad of the Omaha west of the city and east of the river; I can't say that there is any particular noticeable difference in regard to the water conditions at the bridge in the city of Sioux Falls before and after the construction of the new spillway; I am familiar with the course of the river through the City of Sioux Falls and have seen it each year since I have been roadmaster; so far as effects the maintenance and operation of the railroad, the difference is very little; in fact so far as the operation of the railroad is concerned, it doesn't affect the river being a little high or low west of the depot; it never has had any effect before or after the construction of the spillway with the exception of one year, that was 1881; that was the year there was an ice gorge formed in the southeastern part of the city; that gorge held the water back and when the ice gorge broke there was a flood which flooded the track about the location of the present station; the Omaha has never been troubled with water at its station or at its bridge west of the station since 1881.

(Cross-Examination)

I have been familiar with this particular part of the river between here and Montrose since 1880; in my travels back and forth over this road from year to year I have never set any permanent structure to indicate the course of the water at any particular year; when I say that the water is the same now as 5 or 10 years ago, that is the best of my judgment; in 1881 it washed out the whole line; in 1907 the waves had cut down into the bank and there was some riprap put there for fear it might wash; the water caused us additional expense and maintenance that year; if the water should pile up in the same way as it did in 1907, it would not be necessary to put riprap in again.

274 Q. You say the [heighth] of this water has been practically the same every spring? Were you advised of the fact that from one-third to one-half of the water coming down the valley had been diverted from your railroad?

A. Yes sir.

Q. Still the [heighth] of the water remains about the same each spring as to your railroad track?

A. Not the same every spring.

The [heighth] of the water as to the railroad track varies with each season but is relatively the same; if there should be an increase of 30% to 50% of the amount of water coming down the Sioux River the effect upon the track would be very little, if any; it would not require any more riprap and would stand up just as well as it does now; we would not need any greater flood bridges than we have now; we did need them in 1881 but it was then fixed out there to take care of the flood water we have kept the same amount of lineal feet of flood bridges since 1881 to take care of the flood water even since the spillway has been put in.

(Redirect Examination)

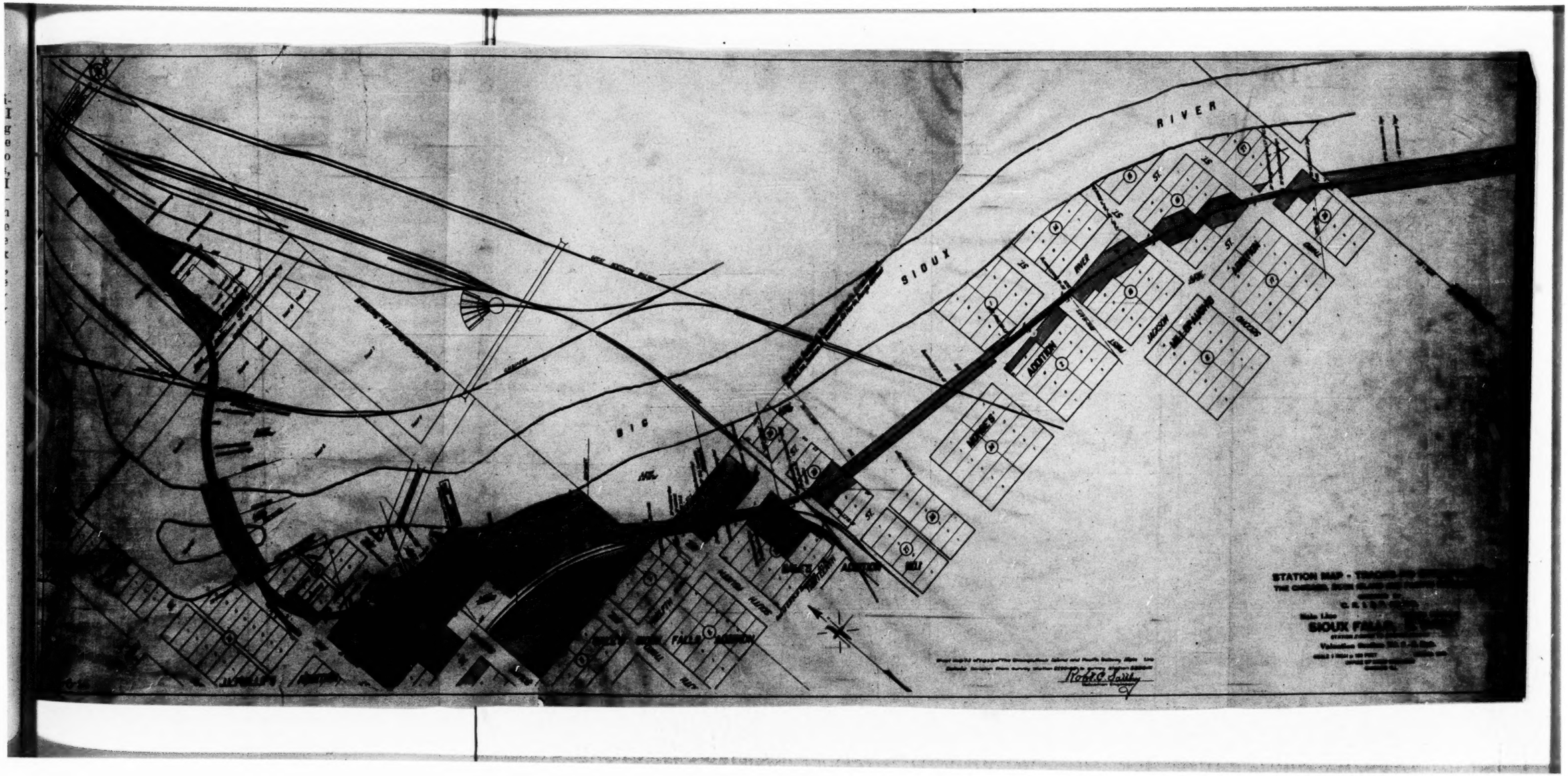
The riprap which was put in in 1907 was put in on the west spur which is possibly 500 ft. west of the main channel; it was on that branch or spur which runs north of the main line and the water has never since made any trouble; no other riprap has been put in.

276 B. A. WAITE, called as a witness on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am B. A. Waite of Des Moines, Iowa; am assistant Engineer of the Chicago, Rock Island and Pacific Railway. I have been Assistant Engineer of the Dakota division coming into Sioux Falls frequently. I became connected with the line that runs into Sioux Falls in 1907. From then down to the present time I have been on this division, five or six years, and while I was working in Chicago and in Davenport I worked on this territory part of the time. Am a Civil Engineer, practicing that profession since 1892. Am familiar with the right of way and the bridges and railroad tracks of the Rock Island Railroad within this drainage district. I have here a map showing the property owned by the Chicago, Rock Island & Pacific Railway within the City limits of Sioux Falls, marked Rock Island Exhibit "1". That is a correct blue print representing the right of way, the property owned by the Rock Island Railroad within the City limits of the City of Sioux Falls. The red pencil mark outlines the property owned by the Rock Island Railway.

Rock Island Exhibit "1" is offered in evidence by the plaintiffs and received.


SIOUX
RIVER
BIG
SIOUX
RIVER
ADDITION
JACKSON
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ADDITION

I have computed the number of acres of property owned by the Rock Island Railroad within Drainage Districts No. 1 and 2, and as far as I can tell it is about thirty acres (30) or a little less. There are two bridges on the Rock Island across the Big Sioux River, one two miles east of town and one just north of the depot. The Rock Island comes into Sioux Falls from the southeast, crossing the river the first time two miles southeast of the City. It then comes up the west side of the river into Sioux Falls. It then crosses the river again within the City limits at the foot of 9th Street; that is a spur
277 known as the Bismark spur. The trains do not cross this bridge. The Rock Island station is on the west side of the river on 10th Street. The Rock Island Railway Company has no property within this Drainage District that is used for agriculture and none of it has ever been so used. All of its property is used for railroad purposes, location of side tracks, industrial tracks, station grounds, roundhouse grounds and right of way of the main lines. The rock Island has no more property within the City of Sioux Falls or within this drainage area than is necessary for railroad purposes. The first half mile of the track from the east bridge toward the City is about eight feet above the average water of the Big Sioux River and is practically level with the adjoining ground near all the rest of the distance, and inside of the City limits it is above the level of the river about fifteen to twenty feet. That is true throughout the course of the line, except at the east end over the bottom where it is about eight feet above the river. Neither the track nor the embankment of the Rock Island has ever been reached by high water within my knowledge, and neither the track nor the right of way has ever been affected by high water from the Big Sioux River since I have known it. I have here a blue print of a cross section of the bridge about two miles southeast of town marked Rock Island Exhibit "2". I have checked the measurements over at this time and it is correct. There is in the center of this bridge a true span made of steel and then it has piled approaches. The approach on the east end is ninety-seven feet (97) and on the west end one hundred ninety feet (190), making a total bridge, including approaches, of four hundred nineteen feet (419). From the top of the tie to the bottom of the river is twenty feet.

Rock Island Exhibit "2" is offered in evidence and received.

278 I also have a cross section of the Bridge at 9th Street inside the City of Sioux Falls marked Rock Island Exhibit "3". This shows the construction of the bridge, with

the exception of the pile portion, which has been re-built since that plat was made. The plat was made in 1913 and part of the piling on the east end has been filled in since then. It was filled in gradually, took several years from 1913 to 1915 and the land on either side of the bridge was filled in as we filled in the approach. The shore line has been filled out on either side of the approach so the approach was of no use there.

The exhibit is offered and received in evidence.

In regard to the bridge southeast of town, we have never had any trouble with that bridge from high water to my knowledge, either before or after the building of the spillway. As an engineer I would not dare to fill in any of the bridge or any of the approaches at the present time, because at the present the waterway is no more than would be required according to our way of figuring the waterway required. We figure the drainage area on Dunn's tables and a certain proportion of that is the waterway required according to the area drained, and under such computation we have no more waterway under this bridge than is required for the area drained. The approaches to this bridge have not been in any way effected by the building of the spillway and the spillway has had had no effect upon the bridge that I know of.

In regard to the bridge in the city at 9th Street. I understand it is proposed by Mr. Rittenhouse to eliminate one section of that bridge, that is the south or east one hundred ten feet (110) steel span truss. The bridge now is three hundred seven (307) feet long. If that span was taken out the bridge would be one hundred ninety-seven (197) feet long. I
279 would not dare to cut that bridge down to one hundred ninety-seven feet. The bridge as it is now is about the same length as the other railroad bridges on this stream. I believe that they have two one hundred foot (100) spans, and if we eliminate one hundred ten (110) feet this bridge would be shorter than the other bridges. This bridge on 9th Street was raised by the Rock Island before I came here. This span that is contemplated to be eliminated by the drainage engineer is filled in about half way. There is no water under it at the present time, the current is under the other end of the bridge. This was caused by the building out of approaches and driveways, pushing out the shore line. The spillway has nothing to do with the filling of this river on either side. It has been caused by the buildings being extended towards the river. There is at the present time a garage known as the Homan

Garage directly west of this span in the bridge and extending out at least half of the length of the approach, so that a line from the warehouse on the east side of the bridge to the corner of the garage would strike the middle of this span. I would not consider that it was reasonable engineering to eliminate any of this bridge. Since I have known this property the water of the Big Sioux River has never been over any of the track in any place, and I have known it since 1907.

(Cross-Examination).

It is twenty feet (20) from the rails on the bridge two miles south of town to the bottom of the river. This bridge was built in 1886. Either this bridge or replacements of it. Since 1907 it has been in the same condition. I have never compared this with the Great Northern Bridge down the river. I have never observed this bridge at extreme high water. From the area of the waterway required I would say that none of the approaches to this bridge could be filled in. I asked Mr. Rittenhouse in regard to the waters had in this drain-
280 age area, and I think he said it was 4500 square miles. This was the whole watershed. I do not know the slope of the land from north to south per mile. I do not know the velocity of the water, but from our rules we could not reduce the length of the bridge. The steel span in the center is 127 feet with pile approaches. These piles are treated and should last 20 to 30 yars. We do not know just how long creosote piling will last.

I said that one of the approaches to the bridge within the City had been filled in gradually along about 1914. It has not caused us any trouble since then. Where the filling is there was formerly a trestlework. Under the present condition of the river since 1914 it has not been necessary to have as much approach to the bridge as when it was constructed. The shore line that I spoke about from the Homan Garage to the warehouse, that is in a bend in the river. I do not know the difference in elevation of the two bridges and I do not know the velocity of the water at either one of them.

Q. And still upon this information that you don't seem to possess as to the fundamentals as to how much water this river carries, the slope of the land, or the difference in the [heighth] of the land, you still wish to be understood that it would not be safe, in your judgment, to shorten these bridges?

A. Yes sir.

I do not know what would be the effect on the bridge here in town if the amount of water flowing down the river

should be increased thirty to fifty per cent. I think the one east of town would be all right, but I am not sure about the one here in town. The high water has never reached our embankment that I know of. I do not believe that the water has ever [crosses] our right of way. I do not remember of it. I have not been here very often for the last year, once be-
281 fore in the last six months, but have been here before. My headquarters are at Des Moines. I have been here at high water periods. I could not tell you just what year, but I have been connected with this end of the railroad intermittently. I could not remember the year that they had high water when I was here.

(Redirect Examination.)

In regard to the filling in of the piling on the bridge in the City known as the Bismark Spur, the land adjacent had been built out to the end of the piling so there was nothing but dead water that stood under it. The water could not flow under the piling on account of the land having been filled in on each side.

C. E. DEAN Called as Witness on Behalf of the Plaintiffs Testified as Follows:

(Direct Examination.)

I live in St. Paul and am a bridge foreman on the Chicago, Rock Island & Pacific. I am a bridge foreman upon the division running into Sioux Falls. I began work here in the fall of 1893 and left this division in 1913, so that from 1893 down to 1913 I have known this railroad running into the City of Sioux Falls, with the exception of the years 1905, and 1906, when I was with another railway. From 1893 to 1897 I was a bridgeman. From 1897 to 1905 I was bridge foreman, and from 1907 to 1912 I was master carpenter on this division. I was familiar with the two bridges on the Rock Island within this drainage district at the time I was here and down to 1913. I remember when the bridge across the Big Sioux at the foot of 9th Street in the City of Sioux Falls was raised. It was raised about four feet on the two spans, but the old approaches were left alone. That was just before or about the time of the breakup of the ice in the spring. We contemplated a flood. The report came that there was an ice gorge
282 up the river. We expected it to break loose and have heavy water. It had been a hard winter and the ice was heavy, but it did not materialize. We had no trouble from it. The bridge was lowered a little after that, but not

put back where it was originally. I think the permanent raise was about two and one-half feet and the ends dropped down to their original position. During the time that I was on the division we never had any trouble with the bridge southeast of town. I was here in 1907 when the spillway was put in, was master carpenter. I have never noticed any perceptible change in the condition of the water flowing under these two bridges before or after the building of the spillway. I have no record of high water marks myself. The building of the drainage ditch and the spillway has never benefitted these bridges in any way that I know of. From an engineering standpoint I cannot say but from a practical standpoint I would not fill in either of these bridges at the present time. I base my opinion upon the fact that the engineers as a rule do not give enough waterway. I have taken many an opening —for instance—four foot opening I put in once on the engineers orders and afterwards had to be a seventy foot opening. During the time that I have known the Rock Island property within the City of Sioux Falls the railroad track has never been under water. The water has never been up at the embankments at any place to my knowledge.

(Cross-Examination.)

I was here in the high water of 1911. There was no damage that I know of. I have not been here at any other time of high water except in 1897. I have never made any definite measurements of the water in the river. I do not know the amount of watershed that the river and the ditch drain, I do not know the elevation of the land from our right of way north and I do not know how fast the water flows. I do not know the amount of water that comes down the river, or that comes down the drainage ditch. If the water was in-
283 creased fifty per cent I do not believe the bridges would stand it. The present bridges represent the same length of span that was here in 1893. Only the spans have all been renewed. There have been piers put in. The [pils] we are using now are creosoted piles. Piles not creosoted last about ten or twelve years, and this is true of hard wood culverts.

S. P. PERKINS Called as a Witness on Behalf of the Plaintiffs Testified as Follows:

(Direct Examination.)

I am an inspector on the Rock Island Railroad. I have been connected with the bridge and building department as bridge foreman and master carpenter. I was master carpenter on the division running into Sioux Falls from January 1, 1913, to June 1, 1920. During that time I was familiar with the two bridges on the Rock Island in the City of Sioux Falls. During that time there never was any high water that damaged or threatened to damage these two bridges in any way. The water has never been upon the embankment of the right of way of the Rock Island at any time to my knowledge. I have worked upon these bridges more or less. As a bridge man I would not think it safe or advisable as a railroading proposition to fill in any part of these two bridges. From my experience I have been obliged to put in several larger openings at different points where we have had similar openings. We have had to increase the length of the openings on account of high water, and I would not think it safe to close up any of these openings.

(Cross-Examination).

I do not know the number of acres of watershed drained by this ditch or by the Big Sioux River or the elevation of the land or the excessive or average rainfall for a year in this drainage district, and I do not know the capacity of the spillway to take care of the water from the ditch, but I want the court to understand that these spans could not be safely shortened. That is based upon the fact that several times I have had to make openings larger and that is the foundation of my testimony.

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284 A. F. PITCHER Called as a Witness on Behalf of the Plaintiff Testified as Follows:

(Direct Examination).

I am general agent of the Rock Island Railroad at Sioux Falls. Have been here since June, 1890. I was the agent of the Rock Island until 1914 and since then the general agent. I have been familiar with the property of the Rock Island within this drainage district for thirty-one years. The Rock Island has no property within this drainage district that has ever been used for agriculture and none of it is used for agriculture at the present time. It is all used for railroad purposes, roundhouses, stations and railway tracks. It has no land that is not necessary for railroad purposes at the present

time. The right of way and the rails upon the track in the city are about 20 feet above the water in the Big Sioux River at ordinary times. Two miles south of town, at what is known as The Cherry Creek bridge, they are about eight feet above the water. The right of way has never had any water standing on it in the Big Sioux River since I have known it, that is since 1890. None of the roadbed of the railway has ever been washed by the Sioux River. There has never been any difficulty with the bridge southeast of town in handling floods. In regard to the bridge at the foot of 9th Street in the City, in 1897 there were rumors that an ice gorge had formed and as a precautionary measure we raised this bridge at the foot of 9th Street but we found out it was not necessary. The high water did not develop. The Big Sioux River has never been out of its bank here in the City of Sioux Falls since 1890.

(Cross-Examination).

I live in Sioux Falls and worked for the Rock Island Railroad Company in 1916, 1917 and 1918 and at that time knew about this new ditch going in. I saw the publications in the newspapers. I knew it was being constructed. I went over to the spillway and saw it in the course of construction. I know of no reason why the land of the Chicago, Rock
285 Island & Pacific Railway Company could not be used for agricultural purposes if not covered with the railroad tracks. It has agricultural land as a basis.

C. M. Bassett called and sworn on behalf of the plaintiff trestified as follows:

(Direct Examination)

My name is C. M. Bassett; I live in Sioux City; I have been a civil engineer 24 years; I am assistant engineer of the Great Northern Railway Company; I have been in its engineering department 9 years; at the present time I have jurisdiction of the entire Sioux City Division, including all of Minnehaha County, South Dakota; I have been in charge of that Division since the spring of 1916; during that period of time I have made frequent trips to Sioux Falls, and over the lines throughout Minnehaha County; for two years 1916-17 I was in Sioux Falls practically all the time; since then I have been here practically every week. I am familiar with what is known as drainage ditch Number 1 and 2, and the spillway; I am also assistant engineer of the Watertown and Sioux Falls Railroad Company; its line is located along the

ditch for about 3½ miles; every spring I have ben to the spillway; then I have been over the entire line of the ditch and looked at the various head-works and retaining dams; the line of the Great Northern enters the city of Sioux Falls from a northeasterly direction at a point about a mile and a half from the mouth of the spillway; that is the nearest point on the line of the Great Northern to the mouth of the spillway; the course of the line of the Great Northern as it goes through the city of Sioux Falls and around south of the City and down through Section 31 is as follows: We enter in a northeasterly direction and then through town we go practically north and south and then we swing southeasterly towards Yankton; Exhibit 1 is a plat I prepared or caused to be prepared, showing the location of the line of the Great Northern over the area referred to and the general location of a portion of drainage ditch Number 1 and 2 and the
287 location of the bridges along the line of the Great Northern within the area referred to; the plan is drawn to scale, 1 mile to the inch.

Plaintiff offered and it was received in evidence, Great Northern Exhibit 1.

286 (Great Northern Exhibit 1, Map showing location of lines of Great Northern Railway Co.)

The acreage of the right of way and station grounds of the Great Northern Railway within the area in question, Sections 16, 27 and 31, Township 101, Range 49, is 27.14 acres; the acreage of the station grounds included in that is 6.09 acres; tract 11 consisting of approximately one and one half acres is not included within the 27 and a fraction acres; tract 11 lies at the north end of our bridge 146 and on the west side of the main line; it is between the Omaha and Great Northern rights of way and the Milwaukee is on the north; it is just south of Tenth Street; it would be on Eleventh Street if it were extended out; it is an irregular tract; it was originally purchased for station grounds and is part of the station grounds of the Great Northern; it is bounded on the east by our grade; on the north, the Great Northern and Milwaukee connection; on the west the Omaha grade and on the south the river; the tracts of the various railway companies bounding it I would say are about ten feet above the natural surface of the ground; tract 11 has never been used for agricultural purposes; I would not consider it agricultural land; it is not accessible; it is bounded by the river and three railroad rights of way on there is no road into it; no one could get into it to farm it; it is not feasible for that purpose. I am familiar in a general way with the channel and banks of the Big Sioux River from a point near our bridge in the city of Sioux Falls; the North bridge down to and through Section 31; to the south of town the banks of the river are well defined; there is a deep channel there and the river is confined to that channel, through town there is a greater chance; the channel is wider and the banks are
288 not so steep; as you go further north the channel again deepens and it is confined, the valley is narrowed considerably south of town; I am acquainted with Mr. Rettinghouse; I had a conversation with him in reference to the manner or basis upon which he based his opinion and report to the Board of County Commissioners with reference to the alleged benefit to the right of way, bridges, tracks and embankments of the Great Northern Railway from Drainage ditch No. 1 and 2 and the spillway in question; the first conversation with him was in early spring of this year; the last one was about ten days ago, I think it was last week; during the first conversation Mr. Rettinghouse stated that he had figured we could shorten our bridge and had figured out the cost of renewing those and the cost of filling and made deductions and based his figure on that amount capitalized at seven per cent, and divided by twenty-five per cent, was what our assessment came to—the number of units.

"Q. In your conversation approximately ten days ago, did he go more into detail with reference to the subject?

A. Yes sir.

Q. State the substance of that conversation.

Objected to as not binding upon the defendant commissioners.

Overruled.

A. We have two bridges within the area, and he stated bridge 150-7 that that bridge was about the right size, and bridge 146-0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures, and figured on the amount saved by the shortening of the bridge.

Counsel.

289 At this time, if the Court please, the defendants object and ask that the question be stricken, and objects to the testimony on behalf of the plaintiff company, and to the proposition of whether or not the plaintiffs are benefitted or not, or the extent thereof, by the drainage project, for the reason the same is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction in the same matter in these proceedings, and proceeded with the construction and repair of the ditch in question. For the further reason that this Court has no original jurisdiction of a bill in equity to reject or control proceedings of the Board of County Commissioners of Minnehaha County in the construction or reconstruction and repair of this ditch. And that the plaintiffs have a plain adequate and complete remedy at law, by appeal from the equalization arising from the proceedings taken by the Board of County Commissioners. For the further reason, it calls for evidence of a fact, the determination of which is in the exclusive jurisdiction of the Board of County Commissioners, and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action, and with no allegation or proof of fraud or arbitrary action on the part of that tribunal. Is not within the issues of the case and not a proper subject of inquiry in these collateral proceedings, and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these proceedings attacking the question of whether or not they are or are not benefitted by the ditch proceedings?

The Court: Yes, the motion is denied. The testi-
290 mony is received subject to objection. Mr. Rettinghouse made no statement to me with reference to any other element of benefit to the Great Northern Railroad than the shortening of the north bridge within the city limits; basing my answer upon my knowledge of drainage ditch No. 1 and 2, the spillway, the location and construction of the tracks, bridges and embankments of the Great Northern Railroad Company, and my knowledge of the waters in the Big Sioux River; in my opinion no benefit result to such right of way tract, bridges, embankments or station grounds from drainage ditch No. 1 and including the spillway; no part of the right of way, tracks or bridges within the area in question to my knowledge have ever been flooded by the waters of the Big Sioux River; we have a plan drawn up for a new steel bridge at bridge 146 which provides for shortening of fifty feet of that bridge and putting in deck girders which are much lower and nearer the water; we considered that owing to the fact that we are lowering the steel we would have to provide practically the same opening we have there now; in planning to shorten the bridge fifty feet we did not take into consideration the existence of the drainage ditch; the present height of the track on this bridge above what I understand to be the high water mark of the Big Sioux River, according to our best record is eleven feet; if I were planning to construct new the bridges in question on the Great Northern, or to rebuild them, in determining the sizes of the openings from an engineering standpoint, I would not take into conisderation the existence of drainage ditch No. 1 and 2, because my observation has been that before the spillway went out in 1916, and the water conditions have been just the same; I consider there is great danger as the spillway is constructed now of its going out, and there is danger that they will have to close the ditch and turn the water back into the original channel; I would not take it into consideration even if the ditch and spillway were working at capacity; I don't think
291 it takes enough water out of the river to make any material difference; I would plan new openings without considering the ditch and considering the highest possible water in the river; I would consider it bad engineering to plan otherwise.

I observed the flood waters that entered the ditch coming out of the ditch north of Sioux Falls and re-entering the Big Sioux River; on the Watertown and Sioux Falls we are flooded every year just south of the city pumping plant at the top of the hill; the water comes out of the ditch and goes over our track; it has every year I have been here; we have probably over six inches over the top of our track; the water stands in there, sometimes for probably ten days on the Watertown and Sioux Falls line.

The length of the north bridge is 615 feet; I do not think it would be good engineering or safe for us to shorten that bridge more than fifty feet under any conditions; as I have stated, for some period of time we have contemplated the construction of a new bridge and of a different type, and shortening it fifty feet; as constructed at present the bridges are supported by a truss above, and in contemplating the new construction we had in mind what we called a deck girder, and that support is below the rail which makes a difference; our plan will be to lower it five or six feet due to the use of deck type girders instead of the truss now used; in planning this new bridge we did not take into consideration the possible effect of the drainage ditch.

(Cross-Examination)

When we lower five or six feet, the girders I have mentioned which are in the nature of I beams probably five feet thick, will still be underneath the track; the elevation of the track would remain the same as the bridge work is all underneath the track; from my observation I say that during the last five years the water from the south bridge and north to
the termination of our line in the city has remained
292 about the same; during this same time the water has
been high enough up around the penitentiary where the Watertown track goes to flood its tracks some inches of water every year; the water that came over the Watertown & Sioux Falls came out of the ditch; I have been told and know approximately the amount of watershed in this drainage project; I couldn't say off hand how much it is; I haven't the figures with me; I do not know how much water really falls in the watershed when we have high water here; I know generally the topography of the country north of Sioux Falls through which this water is collected and conveyed by the river and ditch south; I have been pretty well all over its; I do not know the number of cubic feet of water the river carries per second when it is banked full at flood time, nor the

whole capacity of the ditch and spillway; I was up there when they were building the spillway in 1917 and have been watching it; I didn't like the construction; I saw them repairing the ditch on north and throwing up embankments on either side; I am still of the opinion that the spillway isn't what it should be; I have seen it every year since then; I know of no reason why if the tracks were not upon the right of way and station grounds, those premises could not be used for agricultural purposes, except our station grounds which are right on top of rock; Section 31 and 27 could be used; Tract 11 I don't think has any soil to amount to anything on it; the bridge south of town is 304 feet long and takes care of the water; the bridge in town is 615; since I have been on the division there has been no new bridge put in; these bridges have been constructed for some years and before the spillway project was put in; I judge that they were put in to take care of the water that came down the Sioux River at the time; the water has come out of the ditch every year since the spillway was put in; north of the city at level siding
293 the water has come out of the ditch over the tracks of the Watertown & Sioux Falls Company right at the city pumping plant; it comes through the dikes in the ditch.

(Redirect Examination).

Along the right of way south of town we have an embankment about 1800 feet long; bridge 150-7; it is about 16 feet deep; side slopes approximately one and one half to one, approximately fifteen feet high; the toe is protected in some places with rip rap, and it is now overgrown with grass and weeds; that embankment is so constructed as to withstand any possible flood condition in this neighborhood.

THOMAS SIMPSON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination).

My name is Thomas Simpson; I have lived in Sioux Falls twenty-seven years; I am general agent of the Great Northern Railway Company at Sioux Falls, and have been its agent for twenty-seven years; I am familiar with the line of the Great Northern included within the area in question here in Section 16, 27 and 31; during such twenty-seven year period no part of the tracks, bridges or right of way of the Great Northern Railway within that area has been flooded, we have had no trouble during that period of time from high water; the sta-

tion of the Great Northern is east of the river; I have lived on the west side of the river twenty-seven years; the depot has been located where it is now approximately fifteen years; during that time I have crossed the Big Sioux River several times a day and I have not observed any appreciable difference in the flow of the Big Sioux River before and after the construction of the spillway.

(Cross-Examination).

During the time referred to in my testimony the [heighth] of the river has fluctuated, but there has been no floods; the [heighths] during flood periods has been at about the
294 same level; I do not know how much water the spillway takes care of or how much the river banks carry; I heard about it when they put in the spillway.

ANDREW NELSON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination).

I am section foreman for the Chicago, Milwaukee & St. Paul Railway between Baltic and Renner. Renner is six miles and Baltic fourteen miles north of Sioux Falls. I have been section foreman there twenty-seven years and was foreman in 1916. There is a place on my section where the drainage ditch is just outside of the right of way. I think they diked it there four feet just outside of the right of way. From a point about four miles south of Baltic the ditch is on the west side of the railway, and from that point down to Renner it runs close to the track. The Ditch runs between the railroad and the river and the ditch and the river are both on the west side of the track. In 1916 at a point four miles south of Baltic the dam went out of the river and the river let the water in the ditch. The ditch couldn't carry the water and it went over the bank and washed the dike out, and a few miles further south it washed the track and let all the water out over the farms around. It flooded the farms around there and washed back on the track. This water came from the ditch. The ditch is constructed with a dike and the water broke through that dike. Before the water came out of the ditch there was no water east of the track. The water came into the ditch and went out of the ditch and washed all the track out and flooded the ground. The water in the ditch came from the river. I did not have any trouble with the water in 1919 and 1920. It came out of the ditch at several places, but not

enough in those two years to hurt the track. In 1919 and 1920
the water came out and went up to the track and the
295 ditch was full of water. It came to the bottom of the
railroad track but didn't cut in much or wash. At the time the water came through and flowed up to the top of the bridge there was no water east of the railroad track. There was no flood water between the ditch and the river until the water ran out of the ditch. It ran out of the ditch and filled up between the river and the ditch too. It went over the dike on the west side of the ditch. The origin of that water was the river. In 1916 the water remained on the lands that were overflowed about ten days or two weeks. In 1919 and 1920 it stayed over two weeks. It stayed a little longer in 1920 than in 1916. The point at which the ditch protects the track is about a half mile south of the Thompson bridge. The ditch comes to the right of way at the Thompson bridge and runs nearly four miles down the track. The water comes in the ditch where that bridge is built. There has always been a bridge there. They built a cement bridge there a year ago. It is a highway bridge. At the point where I said it washed out we had to put in riff raff. We had to build a bridge there temporarily and afterwards we filled it with riff raff and it is riff raff now.

(Cross-Examination).

The water wall washed the track out the way the bridge is put in there. The water in 1916 washed out part of the track but not at the place where the bridge is. That was the year the old spillway went out and there was high water that year. I have no idea of the amount of rain or water that was carried by the river or the ditch in 1916, 1919 or 1920. In 1897 the track was washed out south of Renner. In 1916 the water did not cover the abutting lands before it went through the track, but it did not cover half as much ground as it did in 1897. Then it covered all over the East side after it got through the track. If the dikes were raised a foot or two they would keep more water in than they do now. Our track was not injured in 1920.

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296 NELS OLESON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination).

I am section foreman for the Chicago, Milwaukee & St. Paul Railway Company. I started in 1887 as a laborer. The most of the time I have been employed as section foreman I worked in the yard five miles south of Sioux Falls. I have

been continuously living here and working for the railroad company since 1887. I have not noticed any injury to railroad property or to railroad property covered by waters from Sioux River south of here during that time, and none in Sioux Falls. I do not know of any water doing any damage on J. L. Phillips' Addition and on the Millspaugh's Addition near the roundhouse, or east of the roundhouse, or north of the ice house. I do not know of any flood waters doing any damage to railroad property since I have been here. There are five tracks in the new yard in what they call Daniel's Addition and Millspaugh's Addition in the vicinity of the ice house east of the depot. I do not know of any damage being done there. There has been no interference with any of these tracks by the waters of the Sioux River since I have been here. There has never been any difficulty or damage on account of the flood waters at the roundhouse property.

(Cross-Examination).

The ice generally comes down in the spring and goes over on the east side and over the rocks there. There is a Current through the east side of the channel of the river and it lifts the ice right around the roundhouse. The water comes close to the roundhouse but never does any harm. It does not come out to the banks by the ice house very much. I never saw water standing in the ditch alongside the track on the ice house side.

"Q. You don't know, Mr. Oleson, whether or not the amount of water that has been gathered into the Sioux
297 River and the ditch above Sioux Falls in the past five or ten years has increased or not, do you?

A. I couldn't tell you about that.

Q. And so if there is twice as much water coming down this valley as previously came down, you couldn't say that was true or not?

A. If the water raised five or ten feet I could tell.

Q. You don't know the actual amount of water?

A. No, I don't know nothing about that."

WILLIAM SHEA Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination).

I am general road master of the Chicago, Milwaukee & St. Paul Railway Company, and have been such about four years. Prior to that time I was district general road master and di-

vision road master. I have been in these divisions for the railroad since 1890. Prior to that time I was track laborer and section foreman and construction foreman. We have many miles of railroad built across river bottoms and creek bottoms where we have to maintain grades that will guaranty us that we can operate our railroad during high water. The Chicago, Milwaukee & St. Paul have many lines upon which heavy traffic is carired upon which they have tracks to maintain under such a situation. I have been over the line between here and Baltic and have noticed the material of which the grade is constructed. From what has been my experience and observation I would state that adjacent water standing alongside of and extending against the grades has no effect upon the maintenance of the grade or the stability of the track upon it, for the reason that we used our track embankment in many cases as the bulkhead to our reservoirs of water for engine supply. We do not hesitate to use our track bank for that purpose. We have many of them on our railroad and we do not notice that we have any bad results from it.

298 No additional expense of up-keep is occasioned by that situation on embankments twenty years old or over. We prepare our property for the purpose we are going to use it for by building up a track bank. In this particular instance, it would cost from $800 to $1,000 an acre for us to build up the track bank and make the line serviceable for our purpose, which in this case is about what that cost up there. I do not believe the farmers ever went to any expense worth mentioning in that community to prepare their properties that way. I didn't notice anything of the kind. The overflow upon this embankment or alongside the embankment would have no effect whatever upon the railroad bridge. If the flood remained two or three, or five days, upon the adjoining agricultural land I think it would ruin their crops.

(Cross-Examination.)

It would cost $800 to $1,000 per acre to prepare our right of way for railroad purposes, and if the embankments would wash out it would cost something like that to replace it. It has not been our experience in washouts that the damage to the right of way of the railroad would be greater than it would be to the farm land. When the water goes over it generally breaks through the embankment and cuts out a short piece, or whatever is necessary to carry the overflow of water from one side of the track to the other. After the water would get over our track it would not take our entire roadbed out, just break through and make openings similar to the kind

we have in other places known as arches. It would not necessarily take out our entire embankment. Yes, when this embankment is taken and is washed away it does hold up our traffic and cuts off our income during that time just the same as the farmers. It costs about twenty-five dollars a cubic yard to put the dirt back in a washout.

I am familiar with this branch of the railroad running north and going through the drainage district. I pass over
299 it and inspect it in different ways three or four times a year. We have had no washouts for the last four years, other than that the water got up on the track in 1919 and 1920. This year it didn't come over the track but it got very close to it. We possibly delayed our traffic. I came over on this line in 1918.

WILLIAM E. WOODS Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am assistant district engineer of the Chicago, Milwaukee & St. Paul Railway and have been in the employ of that company about thirty years in the engineering department. I am familiar with the lines of the Chicago, Milwaukee & St. Paul Railway described in the notice of assessment published in the Daily Argus Leader dated August 13, 1921. None of the land of the railway company is used for agricultural purposes. The width of the right of way is usually one hundred feet, being 50 feet on each side of the center line of the main track. We have a little piece of right of way in Sioux Falls 50 feet wide, being 25 feet on each side of center line. There is approximately 198 acres of right of way in the drainage district, none of which is agricultural land. I am acquainted with the lands described as Lots 13, 14 and 15, of Block 28 of Millspaugh's Addition to Sioux Falls. That property is near the ice house property south and east of the town. It is used for new yard tracks. The main line lies between the trackage of this yard and the river. These tracks are lower than the main tracks. The main track was built in 1879. It has never been disturbed by high water. It remains in the same position as when originally constructed. Block 9 of Daniel's Addition to Sioux Falls is just east of Millspaugh's Addition and is used in the same manner. Lots 5, 6, 7, 8, and 9 in Block 25 of J. L. Phillips' Addition to Sioux Falls is used for roundhouse and ice tracks and turning table. This property is situated on the west bank of the Sioux River about 18 or 20 feet above the surface of the water.

300 (Cross-Examination)

The Chicago, Milwaukee & St. Paul Railway Company have 198 acres altogether in the drainage district. That includes what is known as the right of way of the north branch and also includes same going south. A very small portion of that 198 acres is taken up by the roundhouse grounds and the yard out near the ice house. The most of it is right of way. If there were no railroad through the most of it it could I presume be used for agricultural purposes.

A. G. HOLT, called and sworn on behalf of the plaintiff testified as follows:

(Direct Examination)

I am assistant chief engineer of the Chicago, Milwaukee & St. Paul Railway Company and have held that position about eight years. I am a civil engineer by profession and have been connected with the railroad company in a professional capacity about thirty years. I am familiar with and have made a study of the matter of locating lines of road. In turning the line of road from one point to another the character of the country generally determines or controls the location of the line. In locating a line of road through the Sioux Valley an engineer would necessarily have in mind as one of the elements the cost of construction. He would have in mind the height of embankment to be constructed and maintained on account of flood waters. That would be an important feature. In making a location it is a part of the duty of the locating engineer to find out the height of the flood waters of the various streams he crosses. The grade line is usually established with reference to the high water. The engineer gets as much information as he can in regard to the elevation that the high water reaches in the valley. He gets the information partially from the people who live there and partly from his observation of high water marks as they are shown on trees and washes in the sides of the valley. He then deter-
301 mines largely the height of the grade from past experience as indicated by the information he has received. In determining the openings and bridges the engineer makes what is called a ravine section. That is a chart showing the elevation of the valley. Then on this chart he shows the elevation of the high water and from that he computes the size of the bridges and the openings, that will be required to carry that water. There are certain rules adopted by railway companies upon which these computations are made, and they

are made as an engineering proposition. I have recently examined the territory put into the drainage district. In locating a new line of railroad through the Sioux valley occupying the place where the Milwaukee railroad now has its track you would have to take into consideration the fact that the drainage ditch was there. You would have to provide a bridge to span it. In providing the openings in bridges and other provisions in the line for overflow of water I would not make any deductions on account of that ditch, because I would figure that at the time of the flood the entire valley would be covered with water and this ditch would be simply a wrinkle in the valley. When the flood waters were the highest they would cover the ditch up. I do not know the amount of cubic feet of water the river carries per second. I do not know the cubic feet of water per second the ditch carries, yet I think the ditch is a wrinkle.

In computing the space I have testified about which I would make for a bridge, I do not think the speed of the water in passing a given point would make any difference if you had a high water mark that was dependable. If subsequent to the time I had that high water mark something was done to increase the speed of the water in passing a certain point I would have to take that into consideration.

It is stipulated that the mileage of the Great Northern within the drainage district in question, to-wit: Sec-
302 tions 27, 16 and 31, is 3.04 miles.

It is stipulated that the mileage of the Rock Island Railroad within Minnehaha County is 4.3 miles and within the district sought to be assessed 3.5 miles.

THOMAS HARDIMON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination)

I have lived in the City of Sioux Falls since April, 1879. I am a member of the City Commission and am in charge of the roads, streets and highways of the City. I have been a City Commissioner of the City of Sioux Falls for nine years last October. Since 1879 my occupation has been constructing and road work a great deal of the time. Some of the time I have done bridge work on railroads. I was in Sioux Falls in 1881 at the time of the big flood. There was an ice gorge out on the south side right over where the bridge runs on the Coats

farm. When it came through the City it took all the bridges but one and swept up the mills and lumber yard on the east side. The only thing left on the east side was the Omaha railroad bridge. With the exception of that flood which was caused by the ice gorge there has never been any high water since I have been here that has done any damage to the property of the City. The Coats farm is about two miles southeast of here. I think the west line of the farm is in the neighborhood of Eleventh or Twelfth Avenue. It is probably eighteen miles from the spillway following the course of the river around. I am familiar with the photograph of the channel of the river from Sherman Park down through the City. As you leave Sherman Park the most of the shore line is fairly level on one side. On the other side it is higher and goes up further from the river. For several miles there is a high plain on the right hand side as you go down the river. The banks on the left side are fairly high too in places.
303 From the time you leave Sherman Park until you get down below where the ice gorge formed in 1881 you have a very decided embankment on each side of the river. The river through the territory I have mentioned is much narrower than it is up above Sherman Park. The ice gorge at the Coats farm held all of the water that collected there, except what ran in the channel until the ice gave way. It gorged different places there. It kept creeping along there for probably two or three days before it came down here. The waters did not spread out on either bank of the river. There was no gorge close to the neighborhood where the Milwaukee roundhouse is now in 1881.

I was here when the Great Northern bridge was built that crosses the river about Seventh Avenue and worked on that bridge. During the past nine years my duties in regard to city property have been overseeing it and attending to it, and also attending to the bridges across the river through the City and matters of that kind. From the experience which I have had during a residence of over forty years here I should say the results would be very unsafe of narrowing the bridges and lowering them in case of extra high water. This would be on account of the volume of water, and in case of ice gorges would leave it too narrow underneath. If a flood took one it would probably take all of them and form a gorge.

The east side of Sioux Falls is thickly built up with business places, wholesale places and residences, lumber yards,

and institutions of that kind. The City pumping station and the City electric light station are situated half or three quarters of a mile north of First Street. The pumping station is south and west of the spillway. The electric light and water plant is south and west of the pumping station. The spillway runs to the north and east of our property. The water
304 plant and the electric light plant are a little north and west of the Penitentiary. I observed conditions of the water around the electric light and water stations during the years 1919 and 1920. I was up there on different occasions when there was any danger or any prospect of water. My official duties required me to be there and investigate those things from time to time. The water around the City electric light plant and pumping station was greater in 1920 than it was any year prior to that excepting 1881. I do not remember so much about it in 1919. We were up there quite a number of times in 1920. When we went in there the water was over the tracks of the two railroads there and there was also a flood down almost to Russell Street and from there down to Covell's Lake. The high water subsequent to 1881 has done no damage to speak of that I know to the City property in the City of Sioux Falls. The water went over Minnesota Avenue in 1920 but not enough to amount to anything. It took a few loads of cinders to patch it up. I never saw the water on the West Sioux Falls road, with the exception of 1881, any higher than it was in 1920. Each street there is two and one-half or three feet above natural ground. In 1920 it went up to just about where it could go over. Then the bridge there carried it down to Covell's Street bridge and it flowed away. Phillip's Park runs along the east bank of Covell's Lake and goes up very abruptly to the east, all except a little piece down at the First Street bridge. There is a little corner there that is a little low, but the balance of it runs up to the east and slopes quite sharply. It has some fruit trees and some other trees on it and has been terraced up in the shape of a park. It is quite broken and is not agricultural land and is not used for agricultural purposes.
305 Sherman Park is very low and all timber and is in where the river bends around considerable. The west side runs quite flat but the east side goes up very abruptly. No part of Sherman Park is agricultural land. Sherman Park overflows pretty nearly every year. The bed of the stream forms a circle in the Park for probably three quarters of a mile. I do not know that the spillway and those ditches have ever been of any benefit to city property. It is pretty hard to state whether or not the spillway materially effects the flow

of the water through the City, because when the water is high it overflows a lot which comes down in the spillway and almost directly east of the pumping station. Then it comes out through a little ravine and into Covell's Lake and finally into the river.

The City has a park known as Lien's Park near where the spillway empties into the river. It has practically put the park out of commission. The water practically keeps it covered and washed out considerable. There has been an attempt to riff raff or dam it up but it has been of no avail. That condition did not exist prior to the establishing of the spillway.

In the City pumping station and electric light plant there are five wells, four of them are 25 to 50 feet in diameter. The last one is U shaped and is 16 feet. The furtherest one west is close to a mile west of the station. The City has a piece of ground that surrounds the well directly north of the pumping station. As I remember, there are about twelve acres in it. It is planted to young willow trees. Well No. 1 is located on this tract and well No. 2 is right close to it and directly west. Then follow each well after that up to No. 5. It is probably 30 or 40 rods running east and west at right angles west of the road. The tract is enough as the population of the City increases from year to year for the establishment of
306 additional wells as the needs of the people require.
All of the property other than I have described that is the three parks, the City pumping station and the electric light station, that is included in the assessment is the streets.

(Cross Examination)

There was high water in 1920.

"Q. Did you not testify in the case of Gilseth vs. County Commissioners, that if this ditch had not been reconstructed and the river had been permitted to take its then course over the bluff it would have destroyed the waterworks of the City?
A. It might".

The water was high twice that year; in the first place when the spring rains came and the snow went off, and then along about the first of June there was a heavy rain in the neighborhood of Flandreau that reached us a few days afterwards.

"Q. And the water was so high that year that it contaminated the city wells and it was necessary for your department to place certain notices in the city papers, in which

you informed the patrons of the water company that they should boil all water before using it?

A. The commissioner of water might have done that. Never anything of that kind came before the Board that I know anything about.

Q. As a matter of fact the water did come into the wells in 1920, surface water?

A. I don't know. I would not want to say one way or the other." The city owns a plat of land known as Sherman Park within the drainage area; it is owned and kept by the city for park purposes; it is practically overflowed every spring; I do not recall whether it was overflowed in the spring of 1921; I was not there that spring; the water does not need to get up but a little ways because the land is very low; the river forms the letter S just around it. Pos-
307 sibly anything that tends to divert a portion of the water that comes down the Sioux Valley and keeps it out of the river as it goes through Sherman Park would be a benefit to that park; there is none of the Covell's Lake Park, excepting a little piece of ground just by First Street Bridge, that would be overflowed; I do not think the water would cover one whole lot; we have 125 miles of street, and some of them cost more for up-keep and some of them cost less; I think the up-keep would be somewhere in the neighborhood of $100 per mile; in 1920 during the high water, the water came up on the [wides] of the West Sioux Falls road, but didn't cross it; the roadway is much higher than the surrounding ground;

"Q. That is true when Sherman Park floods, isn't it. The refuse from the river [funs] up on the banks and is left there, and a very healthy crop of mosquitos is produced?

A. There is a very good reason for that. Sherman Park is filled with little ravines and is very much shaded. It is much better now than it was because many of the trees have been cut out.

Q. Directing your attention to the Park again, those conditions are true every time that it floods, that it causes an unsanitary condition there?

A. I presume it does to a certain extent."

We have abandoned Lien's Park on account of the water, which has practically cut out the park; it has been kept open, and there are some picnics held there, but it is practically abandoned; it is a little north and east of the Pententiary, and just a little west of the spillway.

308 In my judgment it would be unsafe to change the lengths of the railroad bridges and other bridges across the Sioux River in town. The Omaha bridge is some wider than the Eighth Street bridge, I think. They have filled some of the trestles of the Omaha. It is not so wide as it was before. As the Eighth Street bridge now stands, I think it has always served its purpose of letting all of the water of the river pass underneath it. I do not know the amount of water that comes down the Sioux Valley. I know that the elevation of the land north of the spillway is about two and one-half to three feet to the mile from Thompson's bridge down to where it enters the present spillway. The amount of water shed varies very much. It would be pretty hard to tell the amount thereof.

(Re-direct Examination).

The channel of the Big Sioux River that passes through the city has been infringed on very much in the past twenty-five years; Since I came here in 1879—the river covered much more territory then than it does now and was very flat. When we got a heavy rain the stream flowed out and later would narrow down to a smaller stream again. During the years 1919 and 1920 the water in the river has been the highest that I can recall, and especially up around the city water plant and electric light plant, than at any time prior to that, since 1881; there has been no damage by high water to the city property since 1881: the Cascade Mill dam was built I think in, 1878; they were finishing it in the spring when I came here.

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309 O. S. THOMPSON, called and sworn as witness testified as follows:

(Direct Examination)

I reside in Sverdrup Township and was born there in 1875 and have resided there ever since; about 10 miles north of Sioux Falls; I own 503 acres in the Big Sioux River Valley where I live; within the drainage district there is close to 300 acres; I have farmed my land myself since 1897 and was residing there when ditch No. 2 and also ditch No. 1 was constructed; I think ditch No. 1 was constructed in 1909 and ditch No. 2 was constructed the following year; ditch No. 2 starts about 1 mile northwest of Baltic; it starts right in the river at a point about 15 miles north of the spillway at the

penitentiary; from the point where ditch No. 2 starts to where it joins ditch No. 1 is about 11 1/2 miles; the length of ditch No. 1 is 3 1/2 miles; the width of ditch No. 1 at the top is about 90 feet; the top width of ditch No. 2 is 45 to 50 feet; it is possible that at the very north end it is down to forty feet; the average depth of ditch No. 2 is about 6 feet and of ditch No. 1 about 6 feet; the present spillway was finished in 1918; the old spillway was washed out in 1916; the present spillway is a little less than 12 feet in diameter; the intake of the spillway is the lower end of ditch No. 1 and is rip rapped, then there are two gates leading into a hole that [does] down through the ground about 40 feet; the shaft is perpendicular for about 40 feet; at the lower end of it a channel is run out towards the river towards the east sloping downwards so that it comes out just above the river level on the lower end; there was nothing that prevented all of the water that was gathered by these ditches No. 1 and No. 2 at the old outlet or spillway to prevent all of the water going over the hill; since the new spillway was put in, I have lost more crops than I did before it was put in and after the
310 construction of ditches No. 1 and No. 2 my losses have been considerably more since the new spillway was put in than they were before it was put in and after the ditches were constructed.

Defendants were thereupon given permission by the Court to make the witness their witness for the purpose of identifying certain exhibits and he thereupon testified in behalf of defendants as follows:

Defendants' Exhibit 2 is a petition to the County Board asking for the establishment of what is known as Covell Lake cut-off. The first signature attached thereto is mine. I signed that, and I had that presented to the County Board for the purposes set forth in the petition. I own land in the vicinity of Drainage Ditch No. 1 & 2 that is affected by that ditch. I evidently furnished the bond designated as Defendant's Exhibit.

Defendants' Exhibits 2 and 3 were offered and received in evidence as part of defendants' case.

J. WILLIAM LINK, called as a witness on behalf of plaintiff and sworn testified as follows:

(Direct Examination.)

My name is J. William Link; I reside in Chicago; I am a hydroelectric engineer employed at the present time by the

Byllsby Engineering & Managing Corporation; next February I will have been in its employ 12 years; my first experience in hydro-electric work was with the Missouri River Commisison; I was with them for five years on the Missouri River Work; subsequent to that I was for five years on the Metropolitan Water Works in Boston; following that I was with the Niagara Falls Power Company for 4 years; I think it was; and then with the former resident engineer of that company, who opened an office for himself and I took charge of his office for him for a year or 18 months; I then was
311 with the City of Columbus, Ohio, for two years; following that I was with the Long Soo Development Company of the St. Lawrence River for two years, and with the Passaic Valley Sewage Disposal Commission for three months; I then came with Byllsby & Co., and I have been with them ever since; I should say the experience I have outlined covers pretty well the field of hydroelectric engineering; I have had a good deal of experience in the designing and construction or superintendence of construction of hydroelectric plans and water plants, particularly plants for the generation of electric current; I have had experience in the installation and inspection of water wheels and water machinery; I have not had experience in the designing of water wheels; that is a specialty; I have installed that kind of work and written specifications for them and designed what kind of wheels should be installed, etc, since I have been with Byllsby interests; I have had complete charge of their hydro-electric plants in the different parts of the country; these plants are scattered pretty well over the country; we have 5 plants in Minnesota in the vicinity of the twin cities and southwest of there; we have two plants in Wisconsin; we have two plants in California; a plant in Oregon and a plant in Montana, and the plant here in Sioux Falls; I think that covers the water power plants pretty well; I have examined the drainage ditch and its course; I have made a study of the hydro-electric plant in this city operated by the Northern States Power Co.; that was constructed before my connection with the Byllsby interests; the Byllsby interests constructed that plant before they acquired it for other parties, the plant referred to being the hydro-electric plant in question here; I would call the construction of the plant very massive; I have investigated the stability of the dam, its capacity to withstand flood waters, and after examining the whole
312 plant, I should say that it is particularly well designed and constructed to withstand floods or anything of that nature; the massive walls I speak of are of con-

crete material; I have made a study of the flood conditions in the valley of the Big Sioux River; my sources of information have been government reports and the information I have gleaned from newspaper accounts and talks with various parties who have been on the ground and know the floods; the nearest I can judge, according to the information I have obtained, the greatest flood that there is any record of in that valley was the flood of 1881; I think the design and construction of the plant down here would be sufficient to withstand the flood stages of 1881; I think it would do that if there were no spillway or drainage ditch because the plant was constructed before the spillway was, and so far as I can find out no account was taken of the spillway at all; independently of that, the nearest estimate that I could make of the [probably] volume of the flood of 1881, the dam would discharge that without even raising the water any higher than we carry it ordinarily; in my judgment, the company operating this plan would absolutely not be justified in the expenditure of any money for the construction of the drainage ditch, and spillway that has been talked about here on the basis of benefits to the plant in any way; it is my opinion that there is no appreciable benefit to the plant of the construction of the improvement out there.

(Cross Examination)

"Q. Mr. Link, you made for the County Commissioners of this county a hydro survey at one time, of this territory, did you not?

A. I don't think I made a survey.

313 Q. You made a report to the Board? A. Yes.

Q. And the data you testified about? Your attorney asked you on what data you based your opinion and you said upon government reports.

A. And some survey data taken by the Board's engineer.

Q. And you made a report as to the feasibility of this drainage project did you not?

A. The feasibility? In what way do you mean? I don't quite get your idea.

Q. That it was feasible from an engineering as well as a financial standpoint?

A. It was feasible to build it, yes."

In that report I stated that the maximum flood liable to occur in the reaches of the Big Sioux River under consideration which has this ditch construction, will probably not exceed ten thousand second feet. This condition was probably approximately as it existed in 1881; and that the floods which

occurred in the spring of the year 1916—the amount of water that came down the river and the ditch at that time did not exceed six thousand or six thousand five hundred cubic feet per second; it seems to be the amount of water that went through the old spillway [un] 1916 was 1400 cubic feet per second; I am not sure; I recommended to the Board that the spillway be constructed to take care of approximately 2500 cubic feet per second; in my judgment the amount of water that was carried down the Sioux Valley during the freshet of 1916 was approximately 6000 feet per second; that was the spring that the spillway washed out; I do not know that you call the 1916 flood an ordinary flood; I have not been able to find any record of flood stages in the river and I am not sufficiently familiar with the floods from year to year to know whether that flood would be considered an
314 ordinary flood or not; I would say that it was larger than the ordinary flood; that is if by the ordinary flood you mean the intensity of flood that occurs most frequently; the amount of water that came down the Sioux Valley in the year 1881 is probably the maximum; I do not remember whether in that report I recommended to the Board that the opening which had occurred at what we have been calling Scholtz, about 3 miles north of town, a dam be placed in there to keep the river in its old channel and to keep it from coming down through the ditch; I would recommend it; at the time you made the report as representative of H. M. Byllsby & Co., Byllsby & Co. manage the Northern States Power Co., but it isn't the same company by any means, we do the managing for the Northern States Power Co.

315 (Redirect Examination)

Q. From your examination of that region up there at the time you made the report as representative of H. M. Byllby, I wish you would tell the court what that ditch and improvement is with regard to lands down here in the city and particularly in regard to the region down about the Northern States Power Co. property; what is the proper, term for it?

A. It acts as a flood water bypass; there is no drainage; by flood water bypass I mean that it takes flood waters out of the river and passes them around and back in again; it relieves flood water conditions a certain small extent in certain stages of the river; I would say that that ditch is not a drainage at all in this section down here; in my judgment the power plant of the Northern States Power Co. as now constructed would be sufficient to withstand a flood equal to the flood of 1881; as I stated before I would think it would pass such a flood without raising the water higher in the

dam than we ordinarily carry by means of flash boards; those flash boards would be removed at times of floods; the Bennett dam was destroyed under my supervision; it was destroyed to get advantage of more head water or units that head with ours in one plant.

316 (Recross Examination)

This bypass of the water I have mentioned would tend to relieve the Sioux River from the point where it took the water from the river to where it deposited it back in the river; it would relieve the river of the amount it carried.

Q. Doesn't that ditch up through there also drain agricultural lands?

A. As I saw it when I inspected it, I should say to very small extent as I understand drainage; there were only 3 or 4 inlets I could see where the farmers could take advantage of the drainage.

(Redirect Examination)

If I were designing a hydro-electric plant on the present site of the plant here today, knowing that the ditch and spillway had been constructed and are there as they are, as I know the ditch and its history, I would not take the ditch and spillway into consideration at all in the designing that plant, particularly with a view to resistance to floods or possible floods.

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317 A. G. RISTY, recalled and examined by the Court, testified as follows:

The northern end of this ditch No. 1 and 2 was one mile north of Baltic; the end of the ditch opens into the Sioux River; there are no artificial laterals; if there are heavy rains on the lands adjoining this ditch which runs north and south in a general direction that flood the lands on either side of it, it is the intent and purpose that the ditch shall take care of such flood waters.

Q. How will it get into the ditch?

A. It slightly slopes into the ditch.

Q. How could it get over the embankment without laterals?

A. There are pipes at certain places to let the water in through the embankment into the ditch, and that you can adjust running out into the farm lands; there are pipes here and there along the ditch to let waters in when the bottom lands overflow, and it has also been proven that these ditches drain the bottom lands, because there are farms all along

and it has lowered the water in their wells to a very considerable extent since the ditch was dug, so it shows it drains the lands; they propose to have gates in the embankment so that when the pressure was from the inside it would close the gates and if the pressure came from the outside it would open them within this service pipe.

Q. Then the real pupose of this ditch as I understand it is to take the water from the Sioux River in flood times and conduct it down to the spillway and into the river at the mouth of the spillway.

A. And preventing the overflow to a great degree from spreading over the farm lands.

Q. And the purposes of the ditch, the effects that
318 the ditch is to perform, the thing that you intended when you were contracting was that it should be an [auxillary] to the river to relieve it of the surplus flood water?

A. If the Court please, I was not on the Board when the ditch was constructed; only when we repaired the spillway, it has been my understanding always that it was to help carry off the flood waters.

Q. It is rather to take the water from the river at its maximum capacity and thus relieve the river of that water rather than to drain the lands along the sides; in other words, it is to keep them from being overflowed with this water?

A. That has always been my understanding.

Plaintiff rests.

Motion to Dismiss

The Counsel:

At this time, Your Honor, at the close of the plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these actions and set aside the restraining order heretofore issued, for all the reasons and upon the grounds urged in the motion made at the opening of these cases.

And for the further reason that the record now shows that notice of an opportunity to be heard upon the amount or proportion of benefits these plaintiffs have received and the amount or proportion of assessment that will be made against their property for such benefits, has been given to them and the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessment to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases, based upon their judgment of values and benefits con-
319 ferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred, by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason the record now shows the Board of County Commissioners of Minnehaha County, charged by the law of this State with the execution of the provisions of the drainage ditch law, has jurisdiction to proceed in respect to the property within said drainage area including the property of the plaintiffs in these actions, and if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs or otherwise, and the record does not indicate upon its fact any gross departure from the requirements of the statute, therefore this Court cannot inquire into these collateral proceedings, and the same are not questions presenting a federal question.

The Court: The motion is denied pro forma.

The defendants, to maintain the issues on their part, called as a witness F. L. BLACKMAN, who being duly sworn testified in substance as follows: My name is F. L. Blackman. I resided in the city of Sioux Falls on July 15, 1916, and at that time had property within the drainage area of Drainage Ditch No. 1 & 2. Defendants' Exhibit 10 being a petition dated July 15, 1916, addressed to the Board of County Commissioners of Minnehaha County, South Dakota, signed by the City and others, the name of F. L. Blackman appearing thereon, was signed by me.

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320 GEORGE W. BURNSIDE, in behalf of defendants, being duly sworn, testified:

"As mayor of the City of Sioux Falls, I signed defendants' Exhibit 10, being a petition addressed to the board of County Commissioners of Minnehaha County, dated July 15th, 1916;

at a special meeting of the city commission, they decided to ask the County Commissioners to protect the destruction of the drainage ditch in order to protect our water plants.

F. E. WARD, being recalled as a witness on behalf of the defendants, testified in substance as follows:

Defendants' Exhibits 10 to 32, inclusive, are records and files in my office as County Auditor of Minnehaha County, with reference to the establishment of Drainage Ditch No. 1 and 2. Defendants' Exhibit 10 is the petition of the City of Sioux Falls, F. L. Blackman, et al, for the establishment and construction of Drainage Ditch No. 1 and 2. Defendants' Exhibit 11 is the bond accompanying and filed with the petition. The material portion of said Bond, being defendant's exhibit 11 is as follows:

"Bond on Petition for Drainage.

Whereas, the parties whose names are signed hereto have prepared and executed and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition to reconstruct and improve drainage ditches Number 1 and 2, in Minnehaha County, South Dakota, and to construct a new spillway or outlet to the said drainage ditches numbered 1 and 2, and to pay therefor by an assessment upon the property, persons and corporations benefited thereby, a copy of which petition is hereto attached marked Exhibit "A" and made a part hereof.

321 Now, Therefore, we F. L. Blackman, E. D. Clark, W. Brady, Dan Donahoe, Den Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, as principals, and Inter State Surety Company as surety, do hereby undertake, promise and agree to and with the County of Minnehaha, of the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or in case the said petition is denied on appeal.

F. L. Blackman, E. D. Clark, W. Braley, Den Donahoe, Dan Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary C. Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, Inter State Surety Company, by A. B. Fairbank, Its Attorney in Fact.

This bond approved August 1, 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 12 is the order of the Board of County Commissioners for filing said petition and bond. Defendants Exhibit 13 is a letter of transmittal of said petition with reference to Drainage Ditch No. 1 and 2, to the State Engineer at Pierre, the material portions of which are as follows:

"August 4, 1916.

Homer M. Doerr, State Engineer,
Pierre, South Dakota.

Dear Sir:

I enclose herewith new drainage petition with reference to Drainage Ditches Numbers 1 and 2 and the spillway thereof, which have been ordered filed and transmitted to you. It is the especial wish of the County Commissioners that you view this drainage proposition with them at your earliest
322 convenience, as it is necessary that this improvement be made soon, so as to avoid further damage. The parties have agreed to abandon the Covell's Lake extension terminus, in case the drainage proposition is established in accordance with this petition, or a modification thereof.*****

Please give this matter your immediate attention, and advise as to when you can view this drainage proposition with the Commissioners.

Yours truly,

EOJ:M County Auditor."
Enc.

Defendants' Exhibit No. 14 are the minutes of the Board of County Commissioners of August 3, 1916, of adjournment from that date to August 14, 1916. Defendants' Exhibit 15 are the proceedings of the Board of County Commissioners, under date of August 14, 1916. Defendants' Exhibit 16 is the resolution of Board of County Commissioners for a survey of the territory to be drained by Drainage Ditch No. 1 and 2. Defendants' Exhibit 17 is the Surveyor's Report, the material portions of which are as follows:

"Report of Preliminary Survey of Said Proposed Drainage Ditch for the Territory now Partially Covered by Drainage Ditches Numbers 1 and 2, Sioux Falls, South Dakota.

To the Honorable Board of County Commissioners, Minnehaha County, South Dakota:

In accordance with the resolution of your Honorable Board dated August 14th, 1916, authorizing and directing a survey of the proposed drainage of the territory covered by drainage ditches numbers 1 and 2, as now established, and directing that the exact line or lines of said proposed drainage be established under the supervision of the State Engineer, I took up the work, and, as per your request, file herewith a limited report of the survey of such territory showing the exact line of the proposed drainage ditch as follows, to-wit:

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Section One

Commencing at a point 58 feet West and 1035 feet North of the Southeast Corner of Section 29, Township 102, Range 49, West of the 5th P. M., running thence South *****, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number one as now established and constructed.

Section Two.

Commencing at a point 1035 feet North and 58 feet West of the Southeast Corner of Section 29, Township 102, Range 49, the same being the commencement point of Section 1, hereinbefore described, running thence North *****.

Section Three.

Commencing at a point 1640 feet East of the center of Section 18, Township 103, Range 49, running thence North , the said line being the center line of said proposed drainage.

That in addition thereto, the Big Sioux River is to be straightened in Sections 17, 18 and 20, Township 103, North of Range 40, in order to afford better means of communication between the lower end of Section 3 of said ditch, and the upper end of Section 2 thereof, the same being intended to cover the exact location of drainage ditch number 2, as now established and constructed.

I further recommend that the Big Sioux River be straightened.*****.

All of the above cut offs to have a bottom width of 60 feet, and side slopes of one and one-half to one. A right-of-way 100 feet in width and one-half each side of the above described center lines will be required. The plans and speci-

fications for the proposed spillway on Section 9, of
324 Township 101, Range 49, will be furnished later.

Dated this 13 day of September, A. D. 1916.

Respectfully submitted, L. E. Stevens, Deputy State Surveyor. Filed in the office of the Auditor of Minnehaha County, S. D. this 13 day of September, 1916, Harry H. Howe, County Auditor, by E. H. Shenkle, Deputy.

Defendants' Exhibits 18 and 19 are the proceedings of the Board and the resolution of the Board fixing the exact line and width of Drainage Ditch No. 1 and 2, of September 13, 1916. Defendants' Exhibit 20 is the drainage ditch notice for Drainage Ditch No. 1 and 2. Defendants' Exhibit 21 is the affidavit of publication of drainage ditch notice, the material portion of which is as follows:

"Affidavit of Publication

C. L. Dotson, being first duly sworn, deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a Daily Newspaper of general circulation, printed and published in the City of Sioux Falls, in said County and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper and in charge of the advertising department thereof, and has personal knowledge of all facts stated in this affidavit, and that the notice and advertisement headed Drainage Ditch, a printed copy of which is hereunto attached, and made a part hereof, was printed and published in the said newspaper for ..... issues.

That the first publication of said notice in said newspaper aforesaid was on Saturday, the 16th day of September, A.
D. 1916, and that the succeeding publications were
325 severally on Saturday, the 23rd day of September A.
D., on Saturday, the 30th day of September, A. D. 1916; that the fees charged for the printing and publication of said notice and advertisement in said newspaper, as aforesaid, were ..... dollars and ..... cents, and for this affidavit, Twenty-five cents, and that the said fees for the printing and publishing of said notice and advertisement and for this affidavit, as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement inures

to the benefit of the publishers of the Sioux Falls Press; that no agreement or undertsanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper, as provided in Session Laws of 1903, and amendments thereto..... Filed in the office of the Auditor of Minnehaha County, S. D., this 30th day of Sept. 1916 Harry H. Howe County Auditor.

The material portion of which certificate of posting Drainage Ditch Notice, is as follows:

'I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby certify that on the 21 day of September, A. D. 1916, I posted three copies of the annexed Notice in three public places near the route of the proposed drainage mentioned therein, as follows, to-wit: One on the bridge on North Minnesota Avenue crossing Drainage Ditch Number One, in the City of Sioux Falls; one on the bridge in Berwick's Addition to the City of Sioux Falls, crossing Drainage Ditch Number One near Fifth Avenue; and one on the bridge crossing Drainage Ditch Number One on Section 29 in Mapleton Township; that I also posted one of said copies at the South Front Door of the Court House in the City of Sioux Falls, all in Minnehaha County .....
326 Filed in the office of the Auditor of Minnehaha County, S. D. this 23 day of Sept., 1916, Harry H. Howe, County Auditor."

Defendants' Exhibit 23 are the minutes of the Board of County Commissioners in relation to Drainage Ditch No. 1 and 2, of October 2 and 3, 1916, the material portions of which are as follows:

"October 2, 1916.

At the meeting in the County Court room, the Commissioners listened to arguments presented by those in favor of the drainage ditch, and the straightening of the Big Sioux River, and also to arguments against the straightening of said Big Sioux River, there being no objection to the establishment and construction of the main ditch project. The State Engineer, Homer Derr, recommended that the main drainage ditch, as petitioned for, be established and constructed with proper controlling gates and a sufficient spillway.

Claims for damages were filed as follows:

Kittery Realty Company	$2000.00
Margaret Finnegan	1000.00
James L. Finnegan	8000.00

The whole afternoon was taken up in the discussion of the drainage project, and the suggested straightening of the Big Sioux River. At the hour of five o'clock P. M. an adjournment was taken until ten o'clock A. M. on Tuesday, October 3, 1916."

"October 3, 1916.

Pursuant to adjournment, the Board convened at ten o'clock A. M., and in company with the State Engineer, Homer Derr, visited the site of the proposed spillway and control gate, at the head thereof. The Board then returned to the Commissioners' Room, and held a conference with the State Engineer with reference to said proposed drainage. Mr. C. T.
327 Charnock then moved the adoption [—] the resolution establishing said drainage, and that the vote be taken by districts. Mr. J. E. Johnson seconded the motion. Upon roll call.

A. G. Risty, District No. 1 voted yes.

J. E. Johnson, District No. 2 voted yes.

J. L. Fritz, District No. 3, voted yes.

C. T. Charnock, District No. 4, voted yes.

J. A. Jensen, District No. 5, voted yes.

The Chairman then declared the resolution adopted. The State Engineer was then requested to prepare and submit plans and specifications for the necessary spillway and control, or headgates, at his earliest convenience. * * * **

Mr. C. T. Charnock moved that the hearing on damages occasioned by the establishment of Drainage Ditch No. 1 and 2, be adjourned until Friday, October 6, 1916, at ten o'clock A. M., and be made a special order for that date. Motion seconded by J. A. Jensen, and carried unanimously."

Defendants' Exhibit 24 is the resolution of the Board of County Commissioners establishing Drainage Ditch No. 1 and 2 upon the petition of the City of Sioux Falls, F. I. Blackman, et al. Defendants' Exhibit 26 are the minutes of the Board of County Commissioners for October 6, 1916. De-

fendants' Exhibit 27 is a resolution of the Board of County Commissioners of October 6, 1916. assessing damages as compensation for lands taken in the construction of Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch No. 1 and 2.

Resolution Assessing Damages.

Whereas, the matter of assessment of damages caused by the establishment and construction of Drainage Ditches No. 1 and 2, was, on Tuesday, October 3, 1916, at a regularly adjourned meeting of the Board, deferred to and made a special order for Friday, October 6, 1916, at ten o'clock A. M.,
and the Board having met on said last named date,
328 and having heard and considered the claims for damages, and having taken into consideration the fact that the principal portion of said drainage ditch has already been constructed, and assessments for damages therefor having already been made and paid in the original construction of said Drainage Ditches No. 1 and 2, and that the principal part of the work to be done consists of building a proper spillway, flood or control gates, cleaning deepening and widening the channel of the said drainage ditches as now constructed, building levees and dikes where deemed advisable, and other improvements to said drainage system:

Now, Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the damages arising from the establishment of Drainage Ditch No. 1 and 2, including compensation for the lands to be taken for said drainage, be and they are assessed and awarded as follows, the same being in accordance with plats thereof, filed in connection with the original construction of Drainage Ditches No. 1 and 2:

To the Kittery Realty Company, for damages to Tract One (1), etc. * * * * *

Be It Further Resolved, that it is the judgment and determination of this Board that in consideration of the fact that damages were assessed and paid in the original construction of Drainage Ditch No. 1 and Drainage Ditch No. 2, for all damages sustained by each tract of land, or other property, through which the said drainage ditches and the present drainage ditch pass, as damages and compensation for the land taken by the route of such drainage, that no damages will accrue, or should be paid, by reason of the establishment and construction of said Drainage Ditch No. 1 and 2, except

as hereinbefore provided, and that the claim of Margaret Finnegan and James L. Finnegan for damages by rea-
329 son of the recommended straightening of the Big Sioux River, which straightening has not been considered and determined, be and the same are hereby disallowed, without passing upon the merits of said claims, in case it is determined to straighten said Big Sioux River, and said claims are refiled, and that no other damages will accrue to any person or property by reason of the establishment and construction of said Drainage Ditch, except as herein awarded.

Be It Further Resolved that a fund to be known as "Drainage Ditch No. 1 and 2 Fund", be and it is hereby established, and that the proceeds of any assessment, or assessments, hereafter to be made in this proceeding be and they are hereby pledged to such fund, and when such assessments are collected, it is ordered and directed that they be deposited to the credit of such fund, to be applied in the payments of the warrants to be issued on such fund, in the order of the registry of such warrants with the County Treasurer. It is ordered that the warrants to be issued on such fund draw six per cent., interest from date of issue. It is further ordered that, if any of the persons entitled to damages under this resolution will accept a warrant or warrants on such fund in lieu of money, then that warrants on such fund for the proper amounts be issued therefor to the persons entitled thereto, to be signed by the Chairman and countersigned by the Auditor, but if any person or persons will not accept a warrant upon such fund in payment of the damages herein awarded, then the Chairman of this Board, and the Auditor, are authorized to issue warrants on such fund, in such sums as may be found advisable, and to sell the same at not less than par, and out of the proceeds thereof, to pay the damages herein awarded, taking the receipts of the persons entitled thereto therefor. It is further ordered that all expenses in connection with said Drainage Ditch No. 1 and 2, hereafter to be incurred up to the time of the letting of the contract for the construction of said ditch, be paid by warrant upon such fund.

330 Be It Further Resolved that in case any person herein awarded damages will not accept the same, the Chairman of the Board is directed to tender him the amount thereof, and in case of his non-acceptance thereof, to deposit the same in the Sioux Falls, South Dakota, to the

credit of such person, and to give such person notice of such deposit.

Approved this 6 day of October, A. D. 1916, by the Board of County Commissioners of Minnehaha County, South Dakota.

By A. G. Risty, Chairman."

Attest:

County Auditor.

Defendants' Exhibit 28 are minutes of the Board of County Commissioners of December 16, 1916, relative to Drainage Ditch No. 1 and 2, passing a resolution fixing the exact line and width of drainage ditches straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, and fixing the time and place for hearing thereon, and defendants Exhibit 29 in said resolution, the material portions of which are as follows:

"Resolution.

Whereas, on September 3, 1916, this Board, by resolution duly adopted, established Drainage Ditch No. 1 and 2, but expressly reserved for further 'consideration and determination the question of the straightening of the Big Sioux River at the several points recommended in said Engineer's report, without passing upon the merits thereof, for some later date when the straightening of the Big Sioux River will be given more complete consideration covering the points recommended and other points requested at the hearing': and

Whereas, the Engineer, L. E. Stevens, has filed his supplemental report with reference to the straightening of the Big Sioux River, recommending narrower ditch than previously recommended, also recommending the extension of the straightening of the said Big Sioux River, and thereby varying the route of said drainage, together with maps and profiles; and

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Whereas, the Board has personally inspected the route of said proposed drainage, as described in said petition for Drainage Ditch No. 1 and 2, and as described in said Engineer's reports;

Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of the ditch straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, be and the same is hereby fixed as described in said Engineer's original

report, as amended by his supplemental report, and that the requisite right-of-way of said drainage ditch and dump space, be and the same is hereby fixed as described in said Engineer's report; and

Be It Further Resolved that it is deemed practicable and necessary to vary the route of said drainage occasioned by the proposed straightening of the said Big Sioux River, so that it will pass through other lands than those described in the original notice of hearing; and

Be It Further Resolved that the further consideration and hearing of said matter be adjourned to Saturday, the 30 day of December, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of said County, in the City of Sioux Falls, South Dakota, and the same is hereby fixed as the time and place for the hearing of the said petition with reference to the straightening of the said Big Sioux River, as recommended in the said Engineer's original and supplemental reports, and that notice thereof be given in accordance with the provisions of Section 4, 5 and 28, of Chapter 138 of the Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota. * * * * *

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332 Defendants' Exhibit 30 is a notice of hearing on the Sioux River cut-offs on Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch Notice.

Sioux River Cut-offs on Drainage Ditch 1 and 2.

Notice is hereby given that Saturday, December 20, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, filed August 3, 1916, for the establishment and construction of a, drainage ditch pursuant to the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909, insofar as said petition refers to the straightening of the Big Sioux River, as prayed for in said petition, and as recommended by the Engineer's original and supplemental reports. The consideration whereof having been deferred for further consideration, when Drainage Ditch No. 1 and 2 was established, and said meet-

ing having been adjourned for that purpose. The exact line and width of said ditch was determined by the action of said Board on December 16, 1916, and in general terms is as follows: * * * * *

The tract of country likely to be affected by the establishment and construction of said proposed cut offs in the Big Sioux River is in general terms described as all of the lands and property affected by the construction of Drainage Ditch No. 1 and 2, as established by resolution in these proceedings under date of October 3, 1916, and of record in the office of the County Auditor of Minnehaha County, South Dakota.

333 The separate tracts of land through which said proposed drainage will pass, and part of which will be required therefor, and for dump space, and the names of the owners of said tracts, as appears from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, on August 3, 1916, that being the time of filing said petition, are as follows: * * * * *

(Note. Plaintiff is not named nor is any of its property described in this notice.)

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have, why the said drainage should not be established and constructed, and all persons deeming themselves damaged by said proposed drainage, or claiming compensation for the lands proposed to be taken for said drainage, are hereby summoned to, present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 16 day of December, A. D. 1916.

BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY, SOUTH DAKOTA,
By A. G. Risty, Chairman."

Attest:
Harry H. Howe,
County Auditor.
(Seal)

Defendants' Exhibit 31 is the certificate of posting the aforesaid notice, the material portion of which is as follows:

"I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby specify that on the 20 day of December, A. D. 1916, I posted three copies of the annexed notice in three places near the route of the proposed drainage mentioned therein, as follows, to-wit:

One on the bridge over the Sioux River between Sections 29 and 32, in Mapleton Township; One on the bridge over the Sioux River on the North Half of Section 8, in Mapleton Township, and one on the bridge over the Sioux River between Sections 29 and 32, in Sverdrup Township; that I also posted one of said copies at the South Front Door of
334 the Court House in the City of Sioux Falls, South Dakota, all in Minnehaha County, South Dakota. * * * *

Defendants' Exhibit 32-A is the affidavit of publication of the aforesaid notice, the material portion of which is as follows:

"C. L. Dotson, being first duly sworn deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a daily newspaper of general circulation; printed and published in the City of Sioux Falls, in said County, and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper, and in charge of the advertising department thereof, and has personal knowledge of all the facts stated in this affidavit, and that the notice and advertisements headed Drainage Ditch Notice No. 1 and 2, a printed copy of which is hereunto attached and made a part hereof, was printed and published in said newspaper for ..... issues. That the first publication of said notice in said newspaper aforesaid, was on Wednesday the 20th day of December, A. D. 1916, and the succeeding publications were severally, on Wednesday, the 27 day of December, A. D. 1916. That the fees charged for the printing and publication of said notice and advertisement in said newspaper as aforesaid, were Ten Dollars and ....cents, and for this affidavit, Twenty-five Cents, and that the said fees for the printing and publishing of said notice and advertisement, and for this affidavit as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement, inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or

understanding for the division thereof has been made
335 with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper as provided in Session Laws of 1903, and amendments thereto. * * * *

The defendants' Exhibit 32 is the minutes of the Board of County Commissioners of August 10, 1917, adjourning said hearing until August 11, 1917, at which time the Board passed a resolution establishing said river cut-offs, a material portion of which resolution is as follows:

"Commissioners' Proceedings.

August 10, 1917.

Pursuant to resolution of July 27, 1917. adjourning and fixing the time of hearing upon the straightening of the Big Sioux River, under the petition upon which Drainage Ditch No. 1 and No. 2 was established, all members of the Board being present, and a delegation of farmers and property owners interested, Engineer L. E. Stephens having made and filed his report of the exact line and location of the several cut offs suggested and recommended, and the Board having heard the protests of those objecting thereto, and the petitioners in like manner having been heard, and the Board having heard the argument of counsel thereon, the further consideration thereof was adjourned to August 11, A. D. 1917, at two o'clock P. M."

"Commissioners' Proceedings.

August 11, 1917.

Pursuant to adjournment, The Board of County Commissioners convened at two o'clock P. M. All members of the Board being present, and after taking up and considering the project of straightening the Big Sioux River upon the petition for the establishment of Drainage Ditch No. 1 and 2, heretofore established, and the Board being fully advised
336 with reference thereto, it was moved by C. T. Charnock, and seconded by J. A. Jensen, that the following resolution be adopted:

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, pursuant to the resolution of this Board of October 3, 1916, establishing Drainage Ditch No. 1 and 2, and reserving the consideration and de-

termination of the question of the straightening of the Big Sioux River at several points recommended in the Engineer's report, that it is the determination of this Board that it will be conducive to the public health, convenience and welfare, and that it is necessary and practicable for the drainage of agricultural lands within the drainage, area of said drainage ditch No. 1 and 2; that the hereinafter described ditches straightening the Big Sioux River be established and constructed as a part of the drainage system hereinbefore established, and designated as Drainage Ditch No. 1 and 2.

Be It Further Resolved that the said ditches straightening the said Big Sioux River be, and the same are hereby established, with a bottom width of 20 feet; and a depth not to exceed the depth of the main channel of said Big Sioux River, with a right-of-way for ditch and dump space of 100 feet, one-half on each side of the center line along the lines of hereinafter and particularly described as follows. * * * * *

All of the foregoing Exhibits were offered and received in evidence.

Mr. Ward, as County Auditor of Minnehaha County, identified Defendants' Exhibits 2 and 3, and 33 to 42, both inclusive, as records and files of his office in relation to this drainage ditch proceeding, all of which were offered and received in evidence.

Defendants' Exhibit 2, being a petition signed by O. S. Thompson et al, to abandon the outlet of old Drainage Ditch No. 1 and for the establishment of a new outlet thereto, the material portion of which is as follows:

337 "To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

The undersigned petitioners respectfully represent that they are all residents of the County of Minnehaha, South Dakota, and that each of them is the owner of certain lands situated in said County, in the Valley of the Big Sioux River, all of which lands will be affected by the drainage herein mentioned and proposed.

Your petitioners further represent that it is necessary for the drainage of agricultural lands in the said Big Sioux River Valley, including all of the lands affected by Drainage Ditches No. 1 and 2, as the same have been established and constructed, that said ditches be repaired and put in proper con-

dition and that the same be cleaned, deepened and widened, and that the Levees, dikes and barriers thereof be remodeled, reconsructed and repaired in such places and to such extent as may be necessary in order for said ditches to carry off the surplus water and properly drain the lands affected thereby;

That it is also necessary to permanently close said Ditch No. 1 above the present spillway, or outlet, thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, in Township 101, of Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a Southeasterly direction, and to extend said ditch from such point, running thence in a Southwesterly direction, through Covell's Lake in the City of Sioux Falls, across the Southeast quarter of Section 5, the East Half of the Southwest Quarter of Section 8, the West Half of Section 17, the East Half of the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, about 40 rods
338 north of the bridge across said river commonly known as the "12th Street Bridge", situated on the section line between said Section 18 and Section 19.

Your petitioners further represent that the proposed maintenance and repair of said drainage ditches No. 1 and 2, and the extension of said Ditch No. 1, are necessary for the reasons that the present spillway and outlet of said Ditch No. 1, as now constructed and used, is impracticable for the purpose for which it was intended, and if allowed to remain in its present condition, will probably cause large damage to the owners of property adjacent thereto and affected thereby; that it is impossible to put said spillway or outlet in a condition to carry off the surplus water and properly drain the lands affected by said drainage ditches, without causing great damage to the owners of property as aforesaid; that for these reasons it is necessary to establish and construct a new outlet for said drainage ditches, which can be done by establishing and constructing the extension herein proposed.

Your petitioners further represent that the proposed repair and maintenance of said Drainage Ditches No. 1 and 2, and the establishment and construction of said proposed extension of or outlet to Drainage Ditch No. 1 will be conducive to the general health, convenience and welfare of the City of Sioux Falls, and of the inhabitants of the Big Sioux River Valley between the Cities of Sioux Falls, and Dell Rapids, and will prevent the annual loss of many thousand

acres of crops in said valley, and will prevent great damage to the lands in said territory, and to the buildings bridges, highways and other improvements thereon.

Your petitioners further represent that the territory likely to be affected by the proposed repairs to and maintenance of said drainage ditches, and the establishment and construction of the proposed extension to or outlet of said
339 drainage ditch No. 1 includes all of the lands in said Big Sioux River Valley that are affected by said Drainage Ditches No. 1 and 2, as the same have been established and constructed, and all of the lands in said valley between the cities of Sioux Falls and Dell Rapids that are subject to overflow by the Big Sioux River.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold."

Defendants' Exhibit 3, being the bond accompanying the petition of O. S. Thompson, the material portion of which is as follows:

"Whereas, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold have prepared and executed, and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition for drainage, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof;

Now, therefore, We, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold, as principals, and R. J. Huston and Iver R. Peterson, as sureties, do hereby undertake, promise and agree to and with the County of Minnehaha, in the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or the same is denied on appeal.

Dated at Sioux Falls, South Dakota, April 8th, 1916.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold, R. J. Huston, Iver R. Peterson.

I hereby approve the foregoing bond and the sureties thereto.

HARRY H. HOWE, County Auditor."

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340 Defendant's Exhibit 33, being the order for filing the petition of O. S. Thompson, et al, the material portions of which are as follows:

"Order for Filing Petition for Drainage.

Whereas, O. S. Thompson, and others, of the County of Minnehaha, South Dakota, have this day presented to this Board a petition for the drainage of lands in the Big Sioux River Valley, which lands have heretofore been drained by drainage ditches Nos. 1 and 2, as hereinbefore established and constructed, in which said petition is represented that it is necessary to permanently close said drainage ditch No. 1, above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast Quarter of Section 5, in Township 101, Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a Southeasterly direction, and to extend said ditch from such point running thence in a Southwesterly direction through Covell's Lake in the City of Sioux Falls, and across the Southeast Quarter of Section 5, the East Half and the Southwest Quarter of Section 8, the West Half of Section 17, the East Half and the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of said Section 18, about forty rods North of the bridge across said river, known as the Twelfth Street Bridge, situated on the Section line between Sections 18 and 19, all in said Township and Range, and said petition having been by this Board examined, and being found sufficient in form, and being accompanied by a proper bond, with sureties approved by the County Auditor:

Now, Therefore, It Is Ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that said petition be forthwith filed with the County Auditor, and a copy thereof be transmitted by said County Auditor
341 to the State Engineer."

Thereafter, on April 12, 1916, a copy of said petition was transmitted to the State Engineer at Pierre, South Dakota, and on May 3, 1916, a resolution was passed by the Board ordering a survey to be made for this proposed extension, and ordering the surveyor to report to the Board upon the length, size, width and depth of the ditch required for this proposed outlet. On May 24, 1916, the surveyor reported his survey, the exact line and width of the ditch, and the amount of right-of-way, together with the estimated cost of the same, and on June 9, 1916, the Board of County Com-

missioners, by resolution, fixed the exact line and width of the proposed outlet of Drainage Ditch No. 1 and designated the time and place for hearing the same, and designated June 29, 1916, as the time of hearing thereon, and ordered notice to be given. [One] June 10, 1916, notice dated on that day was published and posted as required by law.

Defendants' Exhibit 42 is the resolution of the Board establishing a drainage ditch as an outlet of Drainage Ditch No. 1 and the abandonment of the old outlet of Drainage Ditch No. 1, and the repair of Drainage Ditch No. 1 and Drainage Ditch No. 2, the material portions of which are as follows:

The matter of the petition of O. S. Thompson, and others, representing that it is necessary that drainage Ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, Township 101, Range 49, and that such ditch be extended from such point running thence in a Southwesterly direction through Covell's Lake, and terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in said Township, and that it is also necessary that drainage ditches No. 1 and 2 be repaired and put in
342 proper condition, coming on to be heard by the Board of County Commissioners at a meeting of said Board on Thursday, June 29, 1916, pursuant to notice heretofore given, and written objections thereto having been filed by the City of Sioux Falls, the South Dakota Central Railway Company and Catherine W. Peck, and others, and such objections having been presented orally by counsel for the various objectors, and the said petitioners having appeared personally and by counsel in support of said petition, and various parties having filed claims for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet, and said hearing having been adjourned to this 8th day of July, 1916, and this Board having fully heard and considered said petition and all matters, evidence and arguments presented in opposition to and in support of the same;

Now, Therefore, Be It Resolved that the repair and maintenance of said drainage ditches 1 and 2, and the establishment and construction of said proposed extension to or outlet of drainage Ditch No. 1 will be conducive to the public health, convenience and welfare, and it is necessary and practicable for draining agricultural lands, and it is so found.

Be It Further Resolved that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point on the West bank of Drainage Ditch No. 1, 1610 feet North and 58 feet West of the Southeast Corner of Section 5, Township 101, Range 49, where said drainage ditch swings Southeasterly from a Southerly direction, and that a new extension to or outlet of said drainage ditch, commencing at said point and running thence in a Southerly direction through Covell's Lake in the City of Sioux Falls, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in Township 101, Range 49, as described in the resolution adopted by the Board June 10, 1916, be constructed, and that such extension or outlet be and the same hereby is established.

343 Be It Further Resolved that drainage ditches No. 1 and 2 be repaired and put in proper condition, and that the same be cleaned, deepened and widened, and that the levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary, in order that said ditches may carry off the surplus water and properly drain the lands affected thereby, the amount and extent of such repairs to be determined by this Board after an inspection, and, if deemed necessary, a survey of said drainage ditches.

Be It Further Resolved that this Board proceed to consider the claims presented and filed by various persons for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet; that before the assessment of damages this Board personally inspected each tract of land or other property through which said extension or outlet will pass, and that the damages sustained by each tract of land or other property through which said extension will pass, and damages as compensation for the land taken for the route of such drainage be assessed by this Board at a regularly adjourned meeting.

Dated this 8th day of July, 1916.

* * * * * * * *

The material portion of the judgment in the case of Oluf O. Gilseth vs. A. G. Risty, and others, as County Commissioners of Minnehaha County, South Dakota, et al, Defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, Intervening Defendants, rendered by the Circuit Court of Minnehaha County, South Dakota, upon the

19th day of July, 1921, offered and received in evidence, is as follows:

"The Court having heard and considered the evidence introduced on behalf of the parties, and having heard the argument of counsel, and being fully advised in the premises, and having made and entered its decision in writing, con-
344 sisting of Findings of Fact and Conclusions of Law;

Now, Therefore, on motion of Messrs. E. O. Jones, R. H. Warren, and Porter & Bartlett, representing the defendants and interveners,

It is hereby Ordered, Adjudged and Decreed that the plaintiff's complaint herein be, and the same is hereby dismissed on its merits."

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345 P. H. EDMISON, being called as a witness on behalf of the defendants, testified in substance, as follows: (Tr. p. 236)

My name is P. H. Edmison. I live in Sioux Falls, and am in the transfer, building material and storage business, Manager of the Sioux Falls Warehouse Company. I had the contract for furnishing the cement used in the concrete work on the construction of the spillway on Ditch No. 1 & 2, during the Fall and Winter of 1917 and 1918. This cement was shipped from St. Louis. My contract with the Board of County Commissioners was to deliver this cement on the spur near the spillway North of the Penitentiary. In fulfilling that contract, I discussed with the agents of the Great Northern Railway Company and the Chicago, Rock Island & Pacific Railway Company of the City of Sioux Falls, the matter of delivering this cement on this spur. I discussed the matter with Mr. Pilcher, the Agent for the Chicago, Rock Island & Pacific Railway Company, as to his ability to deliver freight coming in over his line on this spur. He told me that he could not do it, as they had no way of getting it up there. Some cement which came in over the Chicago, Rock Island & Pacific Railroad was taken to the spillway by truck. (p. 237)

I arranged with the Great Northern Railway Company to deliver the cement that came in over their line on this spur near the Penitentiary for the spillway business, without extra charge on the freight rate to Sioux Falls. Defendants' Exhibits 52 to 65 inclusive, which are freight bills issued by the Great Northern Railway Company for cars of cement shipped from St. Louis, Missouri, to Sioux Falls, dated July 26, 1917,

to September 12, 1918, are the freight bills for the cars of cement which were delivered to the County of Minnehaha for its use in the construction of the spillway on Drainage Ditch No. 1 & 2, which cars I had arranged with the Agent of the Great Northern Railroad Company in the City of Sioux Falls, to be delivered at the spillway, and they were so deliv-
346 ered and I paid the Great Northern for its service.

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347 W. R. LARSON, being called as a witness in behalf of the defendants, testified in substance as follows: (Tr. p. 251).

My name is W. R. Larson. I had the contract with the Board of County Commisisoners to deepen and widen these drainage ditches in controversy. The work was done in 1918 and 1919. We started in May, 1918, at the Minnesota road bridge, about one thousand feet from the water works, right across the Sioux Falls & Watertown Railroad, with a trenching machine shipped from Chicago over the Great Northern Railroad into Sioux Falls. It was shipped to their freight depot, and then I made arrangements with their agent here to have it spotted to the side-track over by the water-works. From the bridge we worked North towards Renner, up until about September. In the process we widened, and deepened it, and threw up an embankment on one side. There was a dike on the other side. The following year we did work on this ditch with another machine brought from Sioux City over the Chicago, Milwaukee, & St. Paul Railway, and delivered at Renner. There being no agent at Renner, I arranged therefor, and paid the freight through the Sioux Falls Agent. Those machines extend up, in the air about thirty feet, and this ditch is about 1000 or 1500 feet from the Chicago, Milwaukee & St. Paul right-of-way, or line of railroad. (p. 253)

(Stipulation that intervening defendants are owners of ditch warrants to amount alleged in their answer.)

At this time make the record show that it is stipulated between the respective parties to these actions, that the intervening defendants are the owners of ditch warrants drawn on Drainage Ditch No. 1 & 2 to the amount alleged in their answers, which have been issued and are now unpaid. (Tr. p. 253).

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348 C. T. CHARNOCK, being called as a witness on behalf of the defendants testified in substance as follows:

My name is C. T. Charnock, I am one of the defendant County Commissioners in these actions; have lived in Sioux Falls about twenty-five years, and am familiar with the value of farm land in the vicinity of Sioux Falls, also the value of City property in the City of Sioux Falls. I have been over and am familiar with all the lands within the area of Drainage Ditch No. 1 & 2. Prior to fixing the apportionment of benefits thereon on June 10, 1921, I accompanied the Board of County Commissioners in making a personal inspection of all of the lands within the drainage area. The Board selected and determined the benefit to the unit adopted, which unit is situated about three and one-half miles North of Sioux Falls. We placed a value upon this land without the ditch, and a value upon it with the ditch. The difference between these values was the sum of $25.00 which, in our judgment, was the real beneficial value to this unit produced by the construction of this drainage ditch. The Board applied that unit to all the lands within the drainage area, and used the same method of determining the number of units of benefit to all of the lands affected. In applying this unit towards fixing the proportion of benefits to the Chicago, Milwaukee & St. Paul Railway Company, we first took into consideration the land belonging to the railroad company, the acreage, and we assessed that practically the same as abutting lands, and then we took into consideration the benefits to the grades and the culverts that could be done away with, and to tracks and bridges, etc. That was figured out by our Engineer. The amount or number of units was arrived at by figuring it out in dollars and cents, and then dividing the total amount by the benefit to the unit or twenty-five, thereby obtaining the number of units of benefit which was, in our judgment, received by this railroad company.

349 We pursued the same course in fixing the number of units of benefit to the Chicago, St. Paul, Minneapolis & Omaha Railroad Company; also to the Chicago, Rock Island & Pacific Railroad Company; also to the Great Northern Railroad Company. We used the [the] same method in arriving at the proportion of benefits which, in our judgment, the Northern States Power Company received from this drainage ditch. In fixing the proportion of benefits to the Northern States Power Company there were a number of different elements taken into consideration. First, was the dam at Schjodt's. We put that int to control the water there in the

river, and also controlling gates or wiers at Thompson's, and the cut-offs of the river. We also took into consideration the property here in Sioux Falls known as the hydro-electric plant. These benefits, were arrived at by the same process of figuring the total benefit and dividing the same by the value of the benefit to the unit. The number of units which were fixed against these various plaintiffs in these actions represented the judgment of the Board in fixing the proportion of benefits upon the showing that was made, and the computation of our Engineer. We adopted the same process in arriving at the number of units which were fixed against the City of Sioux Falls for benefits. We used the same process all the way through on all the property that was taken under the ditch here.

Cross-Examination.

The unit we used was one acre of agricultural land. In determining the benefit to the Northern States Power Company, the Board took into consideration the dam at Schjodt's, the purpose of which was to prevent the water from the Big Sioux River, where the River had broken through into the ditch, from being diverted into the ditch. The Power Company was objecting to the ditch taking its power. The same con-
350 dition is true with reference to the controlling gates at Thompson's. The agricultural land had a value placed upon it, and was computed by the acre. I don't mean to say that all the land was assessed at one price. They vary in price according to benefit. Referring to the property of these plaintiffs, the method pursued was to figure the benefit in dollars and cents. The property now before the Court was not computed on the acreage plan. When we were making this assessment, we placed everyone the same value on it.

We did not make any difference whether the property belonged to the City or individuals. In assessing the railroads, we took the land that the railroad companies owned into consideration first, then the railroad itself, and then the culverts and bridges. The acreage that the railroad companies owned was only one element taken into consideration, and it was all assessed upon the unit plan. We took in mileage but mileage was not the only element taken into consideration. We did not use the valuation of the railroads, but we used the valuation of the benefits that we thought the railroads would receive from it. The Board went over the proposition with the Engineer, and he figured out the method to use and it was approved by the Board. We accepted his figures. The Engineer figured the proportion of bridges that could be saved by di-

verting the water through the spillway, and that was computed in dollars and cents, and divided by twenty-five, which made so many units. The whole system was figured on that plan. All of the different elements of benefit were figured up and added together. The Engineer showed us what benefits this would be, what it would amount to, and that is the way we handled it, by the $25.00 unit, the same as we did the farms.

It was all figured out for us on paper. Then we took
351 the map and travelled over the entire system. The Engineer figured the savings to the bridges, the benefit to the road-bed, and the culverts and the land owned by the railroad. That was all taken in. Those are all the elements I remember.

Q. Now, Mr. Charnook, what was the basis upon which the streets of the City of Sioux Falls were figured on. What were the elements that entered into that?

A. If I remember right they were taken in about the same value as the property abutting.

Q. You mean that all of the streets within the drainage district were figured by the acreage and also other benefits?

A. We didn't figure the lots by the acre.

Q. I am not talking about lots, I am talking about streets?

A. When you get to the streets they are in where lots are laid out.

Q. I am asking about the city property or streets?

The Court: As I understand the witness, they did not consider that upon the acreage basis at all. Am I right?

The Witness: Yes sir.

Q. Upon what basis was the benefits figured?

A. It was figured on the valuation.

Q. Valuation? A. Yes.

Q. Upon the acreage valuation?

A. We figured if you kept the water off this lot you had benefitted it so many dollars.

Q. I am asking about the city streets.

A. I am telling you that we took the streets by the same value.

Q. And figured them in acre valuation?

A. No, not in acre valuation, lot valuation.

Q. Upon what basis?

352 A. I don't know as I can explain it so you can understand it.

Q. What benefits did you figure out that the city would derive to their streets from this spillway and ditch?

A. The drainage. Keeping the water off of them would be certainly a benefit to the streets as well as abutting property.

Q. Upon what basis, what theory?

A. I cannot tell you just how much .

Q. Upon what basis did you figure, for instance, Sherman Park?

A. I believe Sherman Park was run in by the acre.

Q. As agricultural land?

A. Somewhere near that.

Q. Was the streets that you just referred to also figured upon the basis of agricultural land?

A. Whenever they were on that, they were assessed along about the same as the property where the street was located.

Q. As agricultural land?

A. You wouldn't call city lots agricultural land?

Q. I am asking you what you done?

A. I am telling you we assessed the street along with the property where it laid.

Q. As agricultural land?

A. No, not as agricultural land.

Q. What about Phillips Park, how did you assess that?

A. There is only a portion of Phillips Park, I think, taken in. That is the north end.

Q. Upon what basis did you put that?

A. That was the same way.

Q. In fact, you assessed the city property, all of it, the same way you have described it here?

A. I think so.

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353 HERMAN RETTINGHOUSE, being called as a witness on behalf of the defendants, testified in substance as follows:

My name is Herman Rettinghouse. I am a civil engineer and reside in Sioux Falls. I graduated in 1881 and came to the United States in 1882, and in the following year engaged in engineering work; was employed by the Milwaukee, Mitchell and Western Railway, which is now a part of the Chicago & Northwestern system, as an assistant and gradually advanced into higher positions until 1893, at which time I engaged in private work in Ashland, Wisconsin, where I was city engineer for three years. Also was engineer for two railroads and in the fall of 1897 again engaged with the Chicago & Northwestern Railway as assistant engineer and was promoted to superintendent of bridges and building on the same road in 1900, in which capacity I served for five years;

and from 1905 to 1907 was employed by the Wisconsin Central Railway Company as division engineer; had charge of the engineering construction work and maintenance of the entire road, and on January 1, 1907, again engaged with the Chicago and Northwestern as division engineer of the Northern Iowa and Sioux City Divisions, which position I held until the spring of 1913, when I was made division superintendent of the Iowa and Minnesota division of the Chicago & Northwestern. I remained there until November, 1913, and was then promoted to chief engineer of the Chicago, St. Paul, Minneapolis and Omaha, a part of the Chicago & Northwestern system. I retired from that service on March 1, 1920, at which time I was placed on the pension roll because of my impaired health. Since April 1, 1920, I have been a resident of Sioux Falls and have engaged in private practice as consulting engineer and senior member of the firm of Chenoweth & Rettinghouse, up to the present time. My first experience in public drainage work was in 1905 in a project which was affecting the Wisconsin Central Railway and another similar project in Southern Wisconsin; January 1, 1907, while in the service of the Chicago & Northwestern as division engineer in Iowa, which comprised practically the entire state covered by that railroad, the drainage work was very extensive. It was the principal part of my duties to make myself familiar with and handle the drainage problems which came up constantly. During this time we had from one hundred to one hundred fifty drainage problems of various magnitudes. When I became chief engineer of the Omaha Railway, we had a number of drainage problems in the states of Wisconsin, Minnesota, South Dakota and Nebraska. It was my duty as chief engineer to make myself very familiar with them and to cover all the phases of the problems as to benefits, damages and the manner of assessing benefits and damages. In November, 1920, my firm was engaged by the Board of County Commissioners of Minnehaha County, to make a topographical survey of the district covered by Drainage Ditch No. 1 and 2 for the purpose of preparing a correct map and furnishing data to the Board as would enable it to place the proportional benefits on the land and interests affected. Defendant's Exhibit 1 is the map prepared by my firm, which shows the topography of the country adjacent to and affected by Drainage Ditch No. 1 and 2 of Minnehaha County. Drainage Ditch No. 1 and 2 at its initial point is not exactly in the Sioux River. A small creek connected with the Sioux River near the Southwest corner of Section 29, Township 104, Range 49. The initial point of that particular section which we term sec-

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tion No. 3 is located at that point, a matter of five or six hundred feet from the river proper. There are controlling works and gates there which enable the ditch to be closed off from the river or from the creek, or opened and at flood time part of the water taken out of the river. Section No. 3 is located along the lowest land west of the Sioux River. The
355 land is naturally down lower than the banks of the river proper, a great deal in some instances. The land west of the ditch gradually rises as you go away from the ditch until you get to the foothills. The surface water on the outside of this ditch can most assuredly get into the ditch. The ditch was constructed for the prime purpose of draining this section of the country and inlets have been made at various points, at roads and intervening points, to permit this surface water to drain into the ditch.

This third section terminates in connecting with the river on the east and west line of Section 18, Township 103, Range 49, about a thousand feet west of the east line of Section 18. This ditch connects with the river as stated and the river from that point to a point on the southeast quarter of Section 20 has been straightened at various points, being practically canalized. At the point spoken of there is a bayou or an old portion of the river bed, which is partly filled up along the north, due to the fact that the river has been straightened to the west of it, and Section No. 2 connects, with this bayou about eight hundred feet east of the river proper. The ditch then extends parallel to the Milwaukee railway to near the junction point of the South Dakota Central line. At that point it diverges to a distance of about sixteen or seventeen hundred feet, running practically that distance parallel and in a southerly direction until it intersects the old bed of Silver Creek. It then follows Silver Creek in a southeasterly direction, cutting out all bends in it until it reaches a point at or near the Section line between Section 28 and 29, and runs in a southerly direction about a thousand feet parallel to the Milwaukee railway again until it reaches a point about a quarter of a mile north of the city limits, from which point it runs in a southeasterly direction to its terminus in the spillway. Throughout Section 2 which is described, the ditch runs in the lowest part of the country east of the river and serves the purpose of a drainage ditch as well as for an overflow
356 from the river. It was put in for the dual purpose of serving as an overflow and as a drainage ditch. You will notice on the map that Silver Creek runs in a very circuitous route along the ditch and it terminates in this ditch, so that

the waters of Silver Creek are more quickly disposed of than before and it therefore assists in draining the land adjacent to the ditch and Silver Creek and the same is true of the lands between the ditch and the river. The ditch assists in draining territory which is tributary to Silver Creek, which has its source north of the initial point of Section 2 of the ditch. The dam at Schjodts is about eight hundred feet from the former end of the lateral ditch constructed there. This dam is about thirteen hundred feet from the present cutoff channel of the Sioux River. There are two controlling works; the one mentioned composed of a gate at the initial point of Section 3. At the initial point of Section 2 there is a concrete bridge with a wier under the same which permits the water to rise to a certain point before it enters into the ditch and thereby is retained in the river proper. This was installed for the purpose of controlling the rise of the water in the river. In making of the survey of which I had charge, I made frequent trips over the territory in order to familiarize myself with all the elements that might come into consideration, and particularly as to the relative benefits derived, bearing in mind that it was necessary to arrive at some certain basis so as to be able to make the proper recommendations to the Board. In going over the territory, I came to the conclusion that at the location of this unit, it was about as good an illustration as could be found along the entire district, and I selected this unit for my recommendation to the Board. On Section 2 of this district, which terminates in the Sioux River, there are openings left at all necessary points to drain off the surface water and carry it into the ditch. After we had made our report
357 to the Board and I can best illustrate it by reading the sentence, "We also submit as an aid in your work of equalizing the benefits, a complete list of all the lands with the acreage of each parcel and proportionate benefits. We have made a thorough investigation and have minutely looked over all of the affected lands. In consideration of the proportion of benefits, we have selected a particular tract for a unit, one acre, more particularly described later, in the west half of the northwest quarter of Section 29, Township 102, Range 49". Together with that report we submitted a recommendation as to the proportional benefits and after the board had received this report, we made a trip over the entire district lasting several days. We had one of the maps with us and we viewed all the lands and all of the other points where other benefits were to be proportioned. The particular percentges of the different parcels of land came under consideration and were pointed out, and if a dispute arose as to whether

or not it was the proper amount of percentage, it was corrected and agreed upon right there by the Board, so that at the conclusion of our inspection the Board was familiar with all of the facts of the situation as I was myself. We used this unit selected as one and compared the other real estate with it. It was decided by the Board that the acre in question was worth one hundred dollars prior to the improvements and that it was worth one hundred twenty-five dollars subsequent to the improvements. Therefore the actual value of benefit to the unit selected was twenty-five dollars. All the agricultural land was assessed in relation to this unit. Many of the lands were only 30 or 40% depending upon the amount of benefit derived, as compared with this unit, being one hundred per cent. There were other lands that were as high as three hundred and three hundred fifty per cent of this unit. I am familiar with the cost of construction and upkeep of highways. In arriving at the benefit to the highways within this drain-
358 age area we estimated the benefits in this way. There is a certain amount of annual maintenance necessary for any road, and there is more than that amount necessary under flood conditions. That is to say, a road that is periodically flooded as against a road that never is flooded. The difference in the estimated cost of maintenance was capitalized, or represented the interest on a certain sum of money, and we consider the capitalized portion as a real benefit. We then, after obtaining that result after making a great many calculations, taking into consideration the various locations, some of them benefitted more than others.

We divided the amount arrived at by the value of the unit of $25, thereby obtaining the number of units as a proportional benefit for these roads. The sum we divided by the unit represented the capitalized value to that part of the highway; we applied the same method to the streets and highways of the City of Sioux Falls. We did not apply the acreage basis to the city property, excepting possibly the grounds where the water works are located. In applying the benefit to the unit and what the Board took into consideration as elements of benefit to the Milwaukee Railway Company, we took into consideration the fact that in the first place there were practically three elements. First was the right-of-way on the acreage basis, which was estimated in proportion to the adjacent lands. Second, that it was possible to shorten or abandon certain bridges. In order to determine the benefits derived therefrom is simply a mathematical proposition. It costs a certain amount of money each year in order to maintain a bridge,

whether it is a pile bridge or a steel bridge. We know how long these structures will last. We figure the cost of a bridge and divide it by the number of years in order to get the amount that is necessary to be expended each year for replacement. Taking the amount in dollars and cents multiplied by the length of the bridge and divide that and capitalize that at 7%, which is the usual rate of interest, and that determines
359 the amount of benefit. This was the second element. The third element is the fact that by reason of the flooding of the territory in which railroads are located, washouts often occur. We obtained data and from my personal knowledge and experience I have a very good idea of what it costs to repair washouts periodically appearing and we estimated as close as possible how much it would amount to every year and capitalized that amount again.

Again as an additional element, a road-bed is solidified or made stronger by not being subject to floods. A road-bed that is constantly or for great lengths of time subjected to submersion is certainly weakened, and again, so far as humanly possible, we figured the amount of benefits in dollars and cents and after getting all of these results or capitalized amounts, we divided that by twenty-five as our measure and determined the number of units of benefit. That system and general method and plan was used to determine the amount of benefits that each railroad received from these separate elements. There were three elements of benefit so far as the Northern States Power Company is concerned. One of them was the fact that through the construction of the wier at the initial point of section 2 and through the construction of the dam commonly known as Schjodt's dam and I believe some dike work done at other points, the power company was assured of a constant flow of water or a normal stage of water. The second element, that through the diversion of a part of the water of the Sioux River through this drainage ditch, which has been estimated at from twenty-six hundred to three thousand second feet, as against a total flood condition of six thousand feet, and all the way from 6000 to 10000 second feet, a benefit was created in that much water being taken away from the tail race and lowering the available head at
360 the power company's plant. In determining what proportion that would be, I was largely guided by the report made by Mr. Link, in which the results of his investigation were given and the amount of second feet of water in flood stages of the river at certain periods mentioned. I was also dependent upon the information and investigation made by

Mr. Shenehon, who designed the spillway, and I came to the conclusion as a fair proportion of the waters diverted, we could assume one-third of the entire river from the end of section 2 in lowering the head of the hydro electric plant, through the flood waters; also the lay of the land opposite the hydro electric plant is such that all of the flood waters, after passing over the dam, must pass through the tail race. All these elements were considered in the determination of the benefits accruing to the Northern States Power Company.

Q. Just a moment, let me call your attention to certain cut-offs in the river. What if any?

A. I said there were three elements and I only mentioned two. The other is the straightening of the river which has been done to a large extent between the upper end of Section No. 2, at this point clear down to this point near the Watertown & Sioux Falls Railway. The velocity of the water was greatly increased of the waters flowing through the river, and it thereby shortened the flood period, in that the water passed through the river much quicker than it did before. The total amount of water that is collected in the initial point of these cutoffs is hastened down the river past the Northern States Power Company's Plant. The ditch takes one third out of the river. I have estimated it as closely as humanly possible at one-third, it may be more. These were the elements we considered in apportioning the benefits to the hydro electric plant. Using these elements, we estimated the amount that would be saved by the power company through the fact
361 that the head was not lowered to that extent and capitalized that amount. The power company, by by-passing these flood waters, would have a constant aggregate output of hydro electric power and in season other than flood seasons the controlling works and dams keep all the water in the river that should be there and pass it around over the power company's turbines, insuring to them a constant flow even at a low stage of water in the river. (Tr. p. 285) The Great Northern had 2.4 acres of right-of-way which the Board considered benefited by reason of this ditch. They have one-fifth of a mile of track, two bridges protected, and 315 feet approximately of bridge that might be abandoned. The Chicago, Rock Island and Pacific has 12-1/8 acres of right-of-way that is benefited, one mile of track and two bridges benefited to be shortened, together approximately 230 feet. The Chicago, Milwaukee and St. Paul Railway has 172 acres of right-of-way, 14.2 miles of track, two bridges protected, one bridge shortened one hundred feet and one bridge of 176 feet aban-

doned, all benefited thereby. The Chicago, St. Paul, Minneapolis and Omaha has two and one-fourth miles of track, 27 acres of right-of-way, 405 lineal feet of bridges abandoned and two bridges protected. These items I have mentioned, in my opinion, were benefitted by the construction of this ditch and the diverting of the water as I have testified. There were three elements in regard to the assessment of the city of Sioux Falls. First, the streets, estimated at about 14 miles of streets within the drainage district. They are benefited in the same manner as I have explained in regard to the county and town roads, although the benefits were more varied on account of the streets being built of different character.

The second item was the parks. We figured that from
362 the diversion of the flood, the annual maintenance of the parks was reduced, that is to say there was less work to maintain the grounds as compared with the ground that was flooded. Another item was the benefit to the water works. It seems to be a fact that through the placing of the spillway the life of the water works was saved, insofar as productiveness of the wells is concerned. Another item is that during flood conditions, the water works were unproductive. We have estimated a certain number of days each year that the water works were out of commission. These wells were flooded by surface water and made them unsanitary and unfit for drinking purposes. We figured the amount that that would bring and capitalized the amount same as the capitalization of the streets and parks and divided that amount by twenty-five in order to arrive at a certain number of units. From my experience and the facts and data that I have been able to gather, the benefits that I have mentioned are direct, benefits to the railroad companies and their properties by reason of the construction and maintenance of this ditch; and the benefits which I have outlined to the city and Northern States Power Company were direct benefits to them. After determining the amount of the units and actual amount of money necessary to be raised, that amount is divided by the number of units to produce the value of a unit; and by that process we reduce the actual value of the unit down proportionately to each party affected.

Q. You reduced the valuation down proportionately to each property affected whether it was railroad or ranch property? A. All treated alike.

Q. And that, in the final analysis will be the assessed benefit after being equalized? A. It will.

Q. Calling your attention to the fact that the river contin-

ues around the city for some miles beyond the outlet of the spillway, what is the effect of by-passing this water
363 upon adjacent lands, starting at the city limits on the north around this city until the ditch dumps the water back into the river. Is that a benefit or not?

A. It constitutes a direct benefit. The same benefit as to lands farther up the river.

Cross-Examination.

By Mr. Campbell:

When I speak of the ditch diverting something like three thousand feet of water, I have reference to the discharge capacity of the ditch at its lower end; I couldn't tell what proportion of the water came out of the river during the flood stage; I should think a majority of the water came out of the river; I don't know the capacity of the ditch at its upper end; we haven't figured that; the ditch does not divert water from the river at any other point than that; I do not know what the amount is that is diverted there; the wier that I speak of down here that controls the flood of the river is constructed to keep the water from going into the ditch at normal stage; if the ditch were not there, the water would go down the river just the same. The second element that I said I took into consideration, that is, the diversion of the flood of the water would lower the tail race of the Northern States Power Company at flood times to the extent of the water that was diverted; I couldnt' tell you how much that would be; I couldn't tell you how many kilowatt hours of output the plant would gain by reason of that diversion; that is a matter in hydro-electric engineering that I have not attempted to qualify; the value of that increased head would be measured by the value of the increased output from the hydro-electric plant; this answer is based upon the assumption that it is cheaper to produce electric current from a hydro-electric plant than from a steam plant.

364 By Mr. Grantham:

I didn't know I determined the capacity of the stream; we have several cross sections taken at various points of the ditch and the river as well; I [could'] tell you whether I have a cross-section of the ditch at about the point where the ditch that runs to the spillway is fed by the river; we have taken cross sections of every half mile; the ditch is not uniform all the way; I have no idea at all of the size of the stream; in testifying here that the ditch carries one-third of the water, I was basing my conclusion upon the investigations made; I determined on my survey the high water mark; the [heighth]

above the banks of the stream of the high water varies at various points; the dotted line here on the map shows the high water line; at an elevation of 1438, the [heighth] of the high water line is about ten feet above the banks of the river; the water at that point would be about 8000 feet wide on the surface;! it is impossible for anyone to tell you off-hand just what the average depth of water would be there without showing cross-sections at every point. I have no idea.

Q. How did you determine the capacity or amount of water carried if you didn't know the amount of water in the stream? A. I was not engaged for that purpose.

Q. You don't know as a matter of fact the amount of water that is carried down the stream in flood time? A. I do not.

Cross-Examination of Herman Rittenhouse for Rock Island Railroad,

By Mr. Fairbank:

There was an assessment placed against the Rock Island Railroad for benefit for the maintenance of its tracks, and that was the mile of track. That is the track below the city, between the city and the bridge crossing the river, and
365 then the two bridges I say can be shortened 230 feet. On the bridge southwest of town it was to be shortened 120 feet on the west side, and the bridge here in town was to be shortened 110 feet. That would take out one span on the south side of the bridge.

Defendants rest.

Endorsed: Statement of Evidence filed in the District Court on Jan. 10, 1923.

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366 (Approval of statement of evidence by District Judge.)

The above named appellants having presented and filed in this Court their statement of the evidence in the above entitled cause, and the above named respondents having filed their objections thereto and asking that part of said statement be stricken and said respondents' statement of said evidence be substituted in lieu thereof, and the appellants having filed their objections to said substituted statement of said respondents, and said differences having been submitted to the above named court, and said statement having been made up and completed in conformity with the directions or said
367 Court,

Now Therefore, It Is Ordered that said statement so made in conformity with the order of this Court and hereto

attached be and the same is hereby approved as a true and complete statement of the evidence in this cause.

By the Court:

JAS. D. ELLIOTT, Judge.

Attest:

(Seal of Court) Jerry Carleton, Clerk.

Endorsed: Filed in the District Court on Jan. 10, 1923, at 2. P. M.

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368 (Clerk's Certificate to Transcript.)

United States of America,
Southern Division,
District of South Dakota—ss.

I, Jerry Carleton, Clerk of the District Court of the United States of America, in and for the District of South Dakota, do hereby certify and return to the Honorable the United States Circuit Court of Appeals, for the Eighth Circuit, that the foregoing, consisting of 367 pages, numbered consecutively from 1 to 367, inclusive, is a true and complete transcript of all of the record, process, pleadings, orders and final decree as enumerated in the Praecipe of the parties appellant and the Praecipe of the party apellee to this cause filed herein, directing the Clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original Citation, together with the affidavit of service thereof, and in addition thereto a copy of said Praecipes and all written opinions of the Court filed in said cause.

Seal
U. S. Dist. Court,
Dist. of South Dakota.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, in the said District, this 15th day of March, A. D. 1923.

JERRY CARLETON, Clerk.

Filed Mar. 20, 1923. E. E. Koch, Clerk.

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246 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Order of Submission in causes Nos. 6312 to 6317, inclusive.)

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1923.

Monday, December 17, 1923.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6312. vs.
Chicago, Rock Island and Pacific Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6313. vs.
Chicago, Milwaukee and St. Paul Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6314. vs.
Chicago, St. Paul, Minneapolis and Omaha Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6315. vs.
Northern States Power Company.

247 Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6316. vs.
City of Sioux Falls.

and

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6317. vs.
Great Northern Railway Company.

These causes Nos. 6312, 6313, 6314, 6315, 6316 and 6317, having been called for hearing in their regular order, upon application of counsel for the respective parties the time for oral argument was enlarged to five hours, and thereupon argument was commenced by Mr. N. B. Bartlett for appellants, continued by Mr. A. B. Fairbank for the appellee Chicago, Rock Island and Pacific Railway Company, by Mr. C. O. Bailey for the appellees Chicago, Milwaukee and St. Paul Railway Company, Chicago, St. Paul, Minneapolis and Omaha Railway Company and the City of Sioux Falls, by Mr. Ed L. Grantham for the appellee Chicago, Milwaukee and St. Paul Railway Company, by Mr. Harold E. Judge for the appellees Northern States Power Company and the Great Northern Railway Company, and concluded by Mr. E. O. Jones for appellants.

Thereupon, these causes were submitted to the Court on the transcripts of the records from said District Court and the briefs of counsel filed herein.

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248 (Opinion in Causes Nos. 6312 to 6317, inclusive.)

United States Circuit Court of Appeals Eighth Circuit.

December Term, A. D. 1923.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6312. vs.
Chicago, Rock Island and Pacific Railway Company, a corporation, Appellee.

December Term, A. D. 1923.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6313. vs.
Chicago, Milwaukee & St. Paul, Railway Company, Appellee.

December Term, A. D. 1923.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,

No. 6314. vs.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, Appellee.

249 December Term, A. D. 1923.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,

No. 6315. vs.

Northern States Power Company, Appellee.

December Term, A. D. 1923.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,

No. 6316. vs.

City of Sioux Falls, Appellee.

December Term, A. D. 1923.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,

No. 6317. vs.

Great Northern Railway Company, Appellee.

Mr. N. B. Bartlett and Mr. E. O. Jones for appellants.

Mr. A. B. Frairbank (Mr. Edward S. Stringer, Mr. Thomas D. O'Brien and Mr. Alexander E. Horn with him on the brief), for appellee in No. 6312.

Mr. C. O. Bailey and Mr. E. L. Grantham (Mr. H. H. Field, Mr. J. H. Voorhees, Mr. P. G. Honegger, Mr. T. M. Bailey and Mr. C. O. Bailey, Jr., were with them on the brief), for appellee in No. 6313.

250 Mr. C. O. Bailey (Mr. R. L. Kennedy, Mr. J. H. Voorhees, Mr. P. G. Honegger, Mr. T. M. Bailey and Mr. C. O. Bailey, Jr., were with them on the brief), for appellee in No. 6316.)

Mr. Harold E. Judge (Mr. R. M. Campbell was with him on the brief), for appellee in No. 6315.

Mr. C. O. Bailey (Mr. Roy B. Marker was with him on the brief), for appellee in No. 6316.)

Mr. Harold E. Judge for appellee in No. 6317.

Before Kenyon, Circuit Judge, and Trieber and Dyer, District Judges.

Statement.

In the year 1907 the Board of County Commissioners of Minnehaha County, South Dakota, acting under the drainage statutes of that State, established and had constructed a drainage ditch known as Drainge Ditch No. 1, bottom width of forty feet, at an expense of $46,600.00. This ditch was north of Sioux Falls and ran first in a southerly direction from its initial point; thence easterly past the pumping station of the City of Sioux Falls; thence southeasterly about one thousand feet to the Big Sioux River near the north limits of Sioux Falls. It passed through a ridge and descended approximately one hundred feet in the terminal thousand feet. A spillway was constructed to carry the water down the descent. This ditch was approximately three miles in length and there was a spur 670 feet long extending northwest into a bayou about two thousand feet south of the initial point.

In 1910 the Board of County Commissioners established another drainage ditch known as Drainage Ditch No. 2, which extended north from the northern terminal of Drainage Ditch No. 1, for a distance of about twelve miles. This ditch likewise had a forty-foot bottom and was constructed at a cost of $81,106.19. These two ditches, making in fact one continuous ditch, drained certain agricultural lands, and traversed the land north of the City of Sioux Falls near the gravel bed from which the city obtained its water supply. It also passed near the State Penitentiary lands and emptied into the Big Sioux River north of the falls in said river.

251 In the year 1916 there was a breaking of the river through the natural barrier into the bayou drained by the lateral branch. This coupled with the large volume of water passing through these ditches made it impossible for

the spillway to carry the same, and it was washed out and destroyed. The water therefore being uncontroled descended from the steep bluff to the level of the Big Sioux River, and serious damage was threatened to various interests. There was danger that the Big Sioux River which flowed through the City of Sioux Falls would be diverted from its course and flow through these ditches cutting off the water supply of the City of Sioux Falls, injuring the Northern States Power Company, and depriving it of its water power.

The Board of County Commissioners attempted to devise some plan to reconstruct the spillway and to protect these various interests from the threatened damages.

April 8, 1916, certain parties filed a petition with the Board of County Commissioners asking that that portion of Drainage Ditch No. 1 containing the old spillway be closed and abandoned, and the course of said ditch extended in a southerly direction thorugh Covell's Lake to the Big Sioux River; and said Board did pass a resolution that said Drainage Ditch No. 1 be permanently closed above the present spillway or outlet thereof.

August 3, 1916, a petition of F. L. Blackman and other parties was filed entitled, "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to said Draintage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporation Benefitted Thereby." This petition was transmitted by he Board to the State Engineer, and on August 14, 1916, a survey was ordered.

September 13, 1916, a report of the survey was made and filed by the engineer in charge. A resolution was thereupon adopted by the Board fixing the line and width of said new proposed ditch in the exact location of old ditches No. 1 and No. 2, and providing for the time and place of hearing the petition. Notice was published for three successive weeks describing the route of the proposed drainage, and the tract of country likely to be affected thereby, in the general terms provied by the statute; also the separate tracts of lands
252 thorugh which the proposed ditch would pass, and the names of the owners of said tracts. Such notice informall persons affected by the proposed drainage to appear at such hearing and show cause why the same should not be established. Upon the return date of the notice the commissioners adopted a resolution purporting to establish the so-called

Drainage Ditch No. 1 and 2, and providing for the reconstruction of the spillway.

No appeal was taken from this order establishing the purported new project.

The commissioners then caused Ditches No. 1 and No. 2 to be cleaned out, widened, deepened and diked so as to increase the carrying capacity; caused the spillway to be reconsructed, and certain portions of the Big Sioux River to be straightened. This work cost approximately $255,000.00, and drainage warrants were issued to be paid out of taxes assessed against the property determined to be benefited within the area of the purported new Drainage Ditch No. 1 and 2. The largest holders of these warrants are interveners in this action.

In April, 1919, notice was published of a hearing upon the matter of equalizing benefits resulting from said Drainage Ditch No. 1 and 2, and this was the first intimation that certain of appellees had that benefits might be assessed against them. The property of some of the appellees was not covered by the notice. However, the proceedings under this notice were abandoned.

June 10, 1921, appellant Board by resolution fixed a proportion of benefits in units, which had been decided upon as a fair method of arriving at the same, on Drainage Ditch No. 1 and 2, and designated Monday August 1, 1921, at the office of the County Auditor, as the time and place for a hearing on the question of equalizing benefits, and caused notice of such hearing to be published as provided by the statute. Under the unit system adopted by the Board upon recomendation of their engineer, the various appellees had units allotted against them as follows:

Chicago, Rock Island & Pacific Railway Co., out of a total of 32,549.62 units,	839.45
Chicago, Milwaukee & St. Paul Railway Co.,	1681.
Chicago, St. Paul, Minneapolis & Omaha Railway Co.,	839.45
Northern States Power Co.,	5351.63
Great Northern Railway,	613.85
City of Sioux Falls,	3147.95

253 The amount due on warrants issued for this work at the time the actions were brought was about $300,000.00. The total units of benefit aggregate 32,549.62, so each unit of benefit amounts to slightly in excess of $9.00. If no changes had been made by the Board, had they been permitted to pro-

ceed, the amounts charged against various appellees would have ranged from $50,000.00 against the Northern States Power Company to substantially $6,000.00 against the Great Northern Railway Company.

Appellees brought suit to restrain appellants from proceeding further with the equalization of said purported benefit and from levying any assessment upon their property to pay therefor. Some of the appellees had no property in original Ditch District No. 1 and No. 2; others of appellees did have, and some difference is made in the contention of those not having property in the original Ditch District and those who did have, but the issues in the main were the same as to all the parties.

All of the appellees contended in the trial court that the South Dakota drainage law was unconstitutional, violating the Fourteenth Amendment to the Constitution of the United States; that is also violated Sections 2 and 3 of Article 6 of the Constitution of the State of South Dakota. Some of the appellees contended that the Board exceeded its powers in what it attempted to do, in that the same was not for the drainage of agricultural lands, but being for other public purposes, could only be carried on by the corporate authority of drainage district entities established for that purpose, which had not been done, and that consequently the proceedings were void.

Others of the appellees contended that the proceeding seeking to establish Drainage Ditch No. 1 and 2 was a subterfuge to impose liability on new territory to pay for the maintenance of the former ditches, and that the proceedings were for maintenance and repair of the old drainage ditch and were not carried on as provided by Section 8470 of the Code of South Dakota relating to assessments for the maintenance of drainage already establised; that Drainage Ditch No. 1 and 2 was not a new ditch and not a new enterprise.

Further claim is made by the railorad appellees that the South Dakota drainage law is unconstitutional so far
254 as respects assessments of railroad property, in that it provides for the giving of no notice whatever of the apportionment and equalization of benefits to railroad companies.

All appellees claim that the attempted assessments upon their property are arbitrary, unjust and illegal, and constitute a discrimination so palpable and arbitrary as to amount to a

denial of the equal protection of the law; and that the proceedings create a cloud upon their title.

It was the position of appellants on the other hand that the statutes referred to were constitutional; that the Federal Court in equity had no jurisdiction because there was a complete remedy at law; that there was no equitable question involved; no irreparable injury shown; no facts sufficiently plead to show any threatened cloud upon title; that the amount involved was not sufficient to give jurisdiction; that the bringing of the suit was premature; that Ditch No. 1 and 2 was legally established as a new drainage project under the statutes of South Dakota, and that the Board of County Commissioners had full jurisdiction to do each and every act which they performed.

The Trial Court held that Section 8461 of the Revised Statutes of South Dakota, being the statute particularly attacked as unconstitutional, gave sufficient notice and opportunity to be heard before an assessment became a lien against the property, and was constitutional. The Court also held that the proceedings of the commissioners were proceedings for the maintenance of the original Ditches No. 1 and No. 2; that there was no abandonment of the old ditches; that the formation of the new ditch was a pretense and subterfuge carried on for the purpose of compelling property outside of the original Ditches No. 1 and No. 2 to share the burden of the repair and maintenance of these ditches, and held that the proceedings of the commissioners with relation to Ditches No. 1 and No. 2, by attempting to constitute a new drainage district and calling it District No. 1 and 2, were void.

The Court further found that the complaints presented a real and substantial question under the Constitution of the United States; that the amount involved was in excess of $3,000.00 exclusive of interest and costs, and that each complainant stated a case in his bill cognizable in equity in the Federal Court; and that there was no adequate remedy at law.

Also found that diversity of citizenship existed as to
255 all appellees, except as to the City of Sioux Falls; also that the method of attempted assessment was discriminatory and arbitrary. The injunctions as prayed were granted.

Kenyon, Circuit Judge, after stating the facts as above, delivered the opinion of the Court.

It is earnestly contended by appellees that the entire South Dakota drainage law is unconstitutional, not only as violative

of the due process clause of the Fourteenth Amendment of the Federal Constitution, but also of Sections 2 and 13 of Article 6 of the South Dakota Constitution. The constitutional questions raised are grave, serious and doubtful. Their determination is not necessary to the solution of these cases. Therefore, under the well-established rule that Federal Courts will not pass upon the constitutionality of statutes unless absolutely necessary, we leave the questions aside. Howat et al. vs. State of Kansas, 258 U. S. 181; Weyman-Bruton Co. vs. Ladd, 231 Fed. 898; Allen, U. S. Atty., vs. Omaha Live Stock Commission Co. et al., 275 Fed. 1.

The orginal Drainage Ditches No. 1 and No. 2 were properly established for the drainage of agricultural lands. When the spillway washed out the maintenance of the ditches was impaired. Not only that, but the situation was fraught with grave consequence to many interests. The steep bluff was being torn away by the uncontrolled waters; the waterworks and water supply of the City of Sioux Falls, as well as the penitentiary lands of the State, were endangered. A not improbable result of the Big Sioux River breaking through the natural barrier into the lateral ditch would be the entire diversion of its waters from their natural channel causing them to flow through staid ditches and empty into the river north of the city, leaving Sioux Falls with an intermittent dry river bed.

The Board of County Commissioners under these conditions took steps to remedy the situation, and upon petition filed stating its object in its caption as follows: "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to said drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefitted Thereby," proceeded to establish what is termed Drainage Ditch No. 1 and 2, Minnehaha County, South Dakota.

256 Appellees who have property within the area of the original Drainage Ditches, No. 1 and No. 2, insist that the proceedings established a new Drainage Ditch known as No. 1 and 2, which is also the position taken by appellants. Other appellees claim that the work was in truth and in fact a project for the repair of Drainage Ditches No. 1 and No. 2. The Court held that the forming of the new ditch was a pretense and subterfuge resorted to for the purpose of attempting to burden appellees with the cost of maintenance of ditches theretofore constructed; that the Commissioners did not act

as by law provided for the maintenance and repair of the ditches and that the proceedings attempting to establish the new drainage ditch were void. We think the Court was correct in this holding. It clearly expressed the situation as follows:

"Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and maintenance of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage Ditch No. 1 and 2 was ever established and has no existence.

"I am of opinion that the proceedings of the Board of Commissioners in the repair and maintenance of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the City of Sioux Falls, are void. Entertaining this view it follows that plaintiffs' prayer for an injunction should be granted." (Record, p. 90, Case No. 6313).

The proceedings, regardless of how designated, were in fact for repair and maintenance, and were governed as to assessments to pay for the same by Section 8470 of the South Dakota Statutes, which section is as follows:

"Assessments for Maintenance. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportion determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of
of county commissioners. Such assessments shall be
257 made as other assessments for the construction of
drainage, certificates may be issued thereon and assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance or may be collected directly by the board of county commissioners. (Sec. 13, ch. 98, 1905; Sec. 13, ch. 134, 1907.)"

There is no provision in this statute for the taking in of other lands to help bear the assessment of burdens created in maintaining the original drainage. This was the statute un-

der which the Board of County Commissioners could have provided for payment of maintenance and repairs to the established ditches.

Section 8489 provides for a method of abandonment of drains under certain circumstances and the construction of new ones in the same location. Said statute is as follows:

"Invalid or Abandoned Proceedings. If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate therefrom, but the board shall in any case notify all persons interested
to show cause why the determination of the board
258 thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by the board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons. (Sec. 33, ch. 134, 1907.)"

The proceedings establishing Drainage Ditches No. 1 and No. 2 have never been set aside or abandoned under this statute. It is true a small portion of old Ditch No. 1 was abandoned by the resolution adopted in the Covell's Lake proceeding, but the ditches were in no way abandoned. The Covell's

Lake proceeding was itself abandoned and the ditches were left as they originally were, so it is apparent that the action of the Board was not taken under Section 8489. Either the proceedings were to repair and maintain ditches already constructed, or they were to take care of a situation resulting from their imperfect or inadequate construction. By reason of the water of the river breaking through into the lateral threatening a change of the river's course and the possible destruction of State lands, a situation was presented, not with relation to the drainage of agricultural lands, but rather to the failure of the ditches, due to inadequate or imperfect construction, to carry the increased flow of water. In other words, the project, if an entirely new one, was not for the drainage of agricultural lands. The Court said in his opinion: "Pursuant to this provision of the constitution, the legislature of the state has provided for the drainage of agricultural lands; but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands 'for any public use.'" We are satisfied that under the South Dakota Constitution, Section 6, Article 21, drainage of lands for any public use other than the drainage of agricultural lands, must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Whichever way, therefore, the matter is viewed, the Board was acting without legal authority in its apportionment of benefits and threatened assessment of taxes.

259 Appellants challenge the jurisdiction of the Court, claiming there was a plain, adequate and complete remedy at law; that there was no equity in the bill; that action was premature and that the necessary jurisdictional amount was not involved. These in their order.

It is fundamental that equity cannot give relief where there is a plain, adequate and complete remedy at law. It is provided by the Federal Judicial Code, Compiled Stat. 1918, Section 1244 as follows:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (R. S. Sec. 723. March 3, 1911, c. 231, Sec. 267, 36 Stat. 1163.)"

It must be a remedy as certain, complete, prompt and efficient to attain the ends of justice as that in equity. Monmouth Inv. Co. et al. vs. Means, 80 C. C. A. 527; McMullen Lumber Co. vs. Strother et al., 69 C. C. A. 433; Morgan vs. Beloit, City

and Town, 74 U. S. 613; McConihay vs. Wright, 121 U. S. 201; Tyler vs. Savage, 143 U. S. 79; Boise Artesian Hot and Cold Water Company vs. Boise City, 213 U. S. 276; Greene, Auditor, et al., etc., vs. Louisville & Interurban Railroad Co., 244 U. S. 499; Coler et al., vs. Board of Com'rs of Stanly County et al., 89 Fed. 257.

It must be a remedy on the law side of the Federal Court. A remedy in the State Court that can not be pursued in the Federal Court is not an adequate remedy. Sheffield Furnace Co. vs. Witherow, 149 U. S. 574; Smyth vs. Ames, 169 U. S. 466, 516; United States Life Ins. Co. in City of New York vs. Cable, 98 Fed. 761; Brun et al. vs. Mann, 151 Fed. 145.

The question is, has party the adequate remedy at law in the Federal Court?

In Reagan vs. Farmers' Loan and Trust Co., 154 U. S. 362, 391, the Court said:

"Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another States may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded
260 by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal Courts."

It has been held that where the State statute provided an action at law against the county for the recovery of sums paid on account of invalid taxes that the same constitutes a plain, speedy and adequate remedy at law. Union Pac. R. Co. vs. Board of Com'rs of Weld County, Colo., 217 Fed. 540. The Supreme Court of the United States has held that the North Dakota statute permitting actions respecting title of the property or accruing on contract to be brought against the State the same as against a private person does not clearly allow an adequate remedy; and there, injunction restraining defendants from taking steps to enjoin certain taxes, was upheld. Wallace et al. vs. Hines, Director General of Railroads, et al., 253 U. S. 66. There was no such proceeding as discussed in Union Pac. R. Co. vs. Board of Com'rs of Weld County, Colo., supra, in the South Dakota statutes.

The only remedy was to appear before the Board of County Commissioners (claimed by appellees to be acting without authority,) and then appeal from their finding to the State Court. Such was not the adequate remedy contemplated by the Federal statute.

While the frequent exercise of equity jurisdiction is in staying the collection of taxes illegal in whole or in part, a suit in equity will not lie to restrain the assessment or collection of a tax on the sole ground that it is illegal. There must be special circumstances bringing the case under some recognized head of equity jurisdiction. The right to such equitable relief must be clear where it is asked to restrain the collection of a State tax.

In Hannewinkle vs. Georgetown, 15 Wall. 547, 548, it is said:

"It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits or some cause presenting a case of equity jurisdiction."

In Union Pacific Railway Company vs. Cheyenne, 113 U. S. 516, 525-526, the rule is clearly laid down by the
261 Court:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of

equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in courts of equity.' This statement is in general accordance with the decisions of this court as well as of many State Courts."

See also Dows vs. City of Chicago, 78 U. S. 108; State Railroad Tax Cases, 92 U. S. 575; Ogden City vs. Armstrong, 168 U. S. 224; Pittsburgh &c Railway vs. Board of Public Works of W. Va., 172 U. S. 32; Singer Sewing Mach. Co. vs. Benedict, 229 U. S. 481; Ohio Tax Cases, 232 U. S. 576.

In Keokuk & Hamilton Bridge Co. vs. Salm et al., 258 U. S. 122, the alleged invalidity consisted in discriminatory overvaluation. There was no claim of absolute illegality in the assessment. Appellant had a remedy with the Board of Review to correct the assessment, and the court said that resort to the suit to prevent either a sale for an illegal tax creating a cloud upon title or other irreparable injury had no basis.

262 In Union Pacific R. Co. vs. Board of Com'rs of Weld County, 217 Fed. 540, this Court said with reference to the casting of a cloud upon real property creating an "equitable circumstance" that the remedy which the statute prescribes will dissipate any such cloud and says, "Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief are not applicable, when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the courts shall hold to have been illegally exacted." There is no such provision in the South Dakota statute.

In Boise Artesian Hot and Cold Water Company vs. Boise City, 213 U. S. 276, it was held that equity should not enjoin the collection of a tax on the ground of cloud on title when the tax can only be collected in suit at law in which the defense of its illegality is open, and further it not appearing that the tax is a lien on any of complainant's property.

In Indiana Manufacturing Co. vs. Koehne, 188 U. S. 681, certain assessments upon shares of stock in a corporation

were involved. The Court found that as there was no lien created on real estate there was no cloud on title.

It is well settled that an assessment that will put a cloud on title gives rise to equitable jurisdiction unless there is an adequate remedy at law. Union Pacific Railway Co. vs. Cheyenne, 113 U. S. 516; Greene, Auditor, et al., etc., vs. Louisville & Interurban Railroad Company, 244 U. S. 499.

Section 8463 of the South Dakota Statutes provides for the Board of County Commissioners fixing the proportion of benefits of proposed drainage among the lands affected.

Section 8464 provides for the Board making an assessment against each tract and property affected, and this is collectible by the Treasurer's office. Clearly the assessment would create a cloud upon the title. Fixing the proportion of benefits being preliminary to the assessment and a part of the machinery of assessment, likewise, we think, creates a cloud upon the title and gives equity jurisdiction. Shelton vs. Platt, 139 U. S. 591; Ohio Tax Cases, 232 U. S. 576; Hopkins et al. vs. Walker et al., 244 U. S. 486.

Was the case prematurely brought? It is claimed that inasmuch as the Board of County Commissioners had not assessed the taxes complained of consequently the suit is premature.

263 In Western Union Telegraph Co. vs. Howe et al., 180 Fed. 44, it was held by this court that the suit was prematurely brought because the Telegraph Company did not pursue the remedy afforded by law to have its assessment corrected by the State Board of Equalization. That was not a case, however, where it was claimed that the entire proceedings were without authority and illegal, as is the case here. The jurisdiction to act was not questioned.

In Keokuk & Hamilton Bridge Co. vs. Salm et al., 258 U. S. 122, the question involved was the amount of the tax. It was not claimed that the proceedings were illegal.

In the late case of Milheim et al. vs. Moffat Tunnel Improvement District et al., 262 U. S. 710, there was no question of jurisdiction of the taxing body as there is here. Plaintiff's property was by legislative act placed within the taxing district.

The proceeding here involved, being without authority, the situation is quite different from where the only question involved is the inequality of taxes levied by a board having

jurisdiction to act. The actions, we are satisfied, were not premature.

Appellants urgently insist that it does not appear from the record that the amount in controversy, exclusive of interest or costs, exceeds the sum or value of three thousand dollars, and that the statements in the various complaints of appellees so alleging are false, and stated with the fraudulent purpose of imposing upon the jurisdiction of the Federal Court; that no tax has in fact been assessed; that the apportionment of benefits is tentative and subject to correction, and that there is no way of determining what the amount of the assessment against the respective appellees would have been had the proceedings not been interrupted by the injunctions; and that there is in fact no sum whatsoever in controversy between the parties hereto.

It has been held that future, undetermined, unaccrued or unspecified taxes cannot be taken into consideration to give jurisdiction; that the court cannot engage in speculation as to such taxes. Holt vs. Indiana Manufacturing Company, 176 U. S. 68; New England Mortgage Security Co. vs. Gay, 145 U. S. 123; Citizens' Bank vs Cannon, 164 U. S. 319; Washington and Georgetown R. R. Co., vs. District of Columbia, 146 U. S. 227; also that where there is a suit to enjoin collection of a tax the amount of the tax is the test of jurisdiction. Linehan Ry. Transfer Co. vs. Pendergrass, 70
264 Fed. 1; Eachus vs. Hartwell et al., 112 Fed. 564; Washington and Georgetown R. R. Co., vs. District of Columbia, 146 U. S. 227; Board of Trustees of Whitman College vs. Berryman et al., 156 Fed. 112; Citizens' Bank vs. Cannon, 164 U. S. 319; City of Ottumwa, Iowa, vs. City Water Supply Co., 119 Fed. 315.

It has also been held that where the complaint alleges the amount in controversy to equal the jurisdictional requirement and the contrary does not appear to a certainty from the evidence, that the jurisdiction will be sustained. Maffet vs. Quine, 95 Fed. 199; Von Schroeder vs. Brittan, 93 Fed. 9.

What is the situation here? Each one of the appellees is threatened with an assessment of more than three thousand dollars. The Northern States Power Company is threatened with one of fifty thousand dollars. And further, certain appellees who have no property within the original Drainage Districts No. 1 and No. 2 are brought into the district and made liable to future assessments for maintenance and repair of ditches. It appears from the record that the Board of Coun-

ty Commissioners had fixed against the different appellees the proportion of benefits on a unit basis. It is without question that the County Commissioners have issued approximately $255,000.00 worth of warrants for this work, and that the amount due thereon is about $300,000.00. It is a matter then of mere mathematical calculation to arrive at the threatened assessment against each one of appellees.

Exhibit "C" is the notice to the various parties against whom proportions of benefits have been fixed. It provides as follows, to-wit: "All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed as stated, and the said determination of said Board made final." If no action whatever were taken by appellees the amounts would be final, and under these circumstances we believe the amount in dispute in each case exceeds the jurisdictional requirement. The claim of amount is evidently made in good faith, and not for the mere purpose of giving the Federal Courts jurisdiction. We do not believe that where the Board has passed a resolution fixing benefits which exceed the jurisdictional amount and are the basis of a proposed assessment, and which parties claim are fixed by the Board without authority, that because said Board may equalize the benefits or even find that no benefit exists the parties must wait until the final action of the Board. It is
265 suggested that the Board may so equalize benefits that the jurisdictional amount will not be involved, but as the matter stood when the case was brought each appellee was threatened with the levying of a tax for more than the jurisdictional amount, and some of the necessary steps had already been taken.

As the proportion of benefits had been fixed subject to change by the Board only if appellees should convince them that their conclusion was erroneous, and in view of the claim in apparent good faith in each of the bills that the amount involved exceeded the jurisdictional amount, we hold, from a careful survey of the entire record, that the necessary amount existed in each case to give jurisdiction to the Federal Court.

All bills of complaint raise questions under the Federal Constitution that are substantial and not merely colorable. Hence the Court has jurisdiction exclusive of diversity of citizenship, which existed as to all appellees except the City of Sioux Falls, necessary amount being involved, to determine all questions in the record, and it has not lost jurisdiction by omitting to decide the constitutional ones. Siler et al., etc.

vs. Louisville & Nashville R. R. Co., 213 U. S. 175; Ohio Tax Cases, 232 U. S. 576; Louis. & Nash R. R. Co. vs. Finn, 235 U. S. 601; Greene, Auditor, et al., etc., vs. Louis. & Interurban R. R. Co., 244 U. S. 499.

Appellants plead estoppel against all of the appellees, and claim that appellees are not in position to maintain their actions, for the reason that as to some of the railroad companies the engineering departments have been in close touch with the drainage ditch proceedings; that some of them were assessed for benefits received upon the construction of the original drainage ditches in the same territory, received benefit thereby, and have not protested before the bringing of this action. As to some of the appellees it is claimed that their officers showed interest in the construction work and encouraged the Board of Commissioners to do the work; that some of the appellees, for instance, the Chicago, Milwaukee & St. Paul Railway Company, hauled men and materials used in the construction work, and stopped trains between stations to unload men and materials. As to the City of Sioux Falls, it is claimed by way of estoppel, that under due authority the Mayor and City Auditor signed the petition for the project.

266 There can certainly be no just claim of estoppel as to those appellees whose property was not within the area of the original Drainage Ditch No. 1 and No. 2. As to the other appellees, the decree related only to the property outside of the original assessment areas of Drainage Ditch No. 1 and No. 2. So we are to consider the situation as bearing on the question of estoppel only as to the property outside of the original assessment areas up to the time of the notice of the fixing of benefits. The various appellees as to such property had no notice when the acts constituting the alleged estopped took place, that the same was to be affected by the drainage construction or would be assessed for the cost thereof. Hence the claimed acts of agents and officers of appellees would not constitute estoppel. The situation is quite different from that presented in Gilseth vs. Risty, 193 N. W. 132—at least as to all appellees except the City of Sioux Falls. We do not pass on the question of estoppel as to any appellees, as to assessments that may be made on their property within the original area of Ditch No. 1 and Ditch No. 2, for the purpose of maintaining such ditches.

Other questions are presented which we think are not involved in the determination of these cases. The decree of the trial court in each case is affirmed.

Filed March 18, 1924.

267 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1923.
Tuesday, March 18, 1924.

A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., intervening defendants, Appellants,
No. 6312. vs.
Chicago, Rock Island and Pacific Railway Company, a corporation.

Appeal from the District Court of the United States for the District of South Dakota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Chicago, Rock Island and Pacific Railway Company, a corporation, have and recover against A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., for intervening defendants, the sum of Twenty Dollars for its costs herein and have execution therefor.

March 18, 1924.

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268 (Petition for Appeal to Supreme Court, U. S., Assignment of Errors and Allowance of Appeal.)

(Petition for Appeal and Allowance thereof.)

To the Honorable Presiding Justice, or any of the Judges of the Circuit Court of Appeals of the United States, for the Eighth Circuit.

Now comes the above named appellants, by their solicitors, and complain that in the record and proceedings, and also in the rendition of the Decree of the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Louis, in the State of Missouri, in the above styled and numbered cause, on the 18th day of March, A. D., 1924, affirming the Decree of

the United States District Court, for the District of South Dakota, Southern Division, in said cause, manifest error has intervened, to the great damage of the petitioners. In substance, said errors are these:

1. Appellee was given said relief by collateral attack, by means of a Bill of Equity, when it had an adequate remedy at law which it could pursue, at its election, either in the Courts of the State of South Dakota, or in the Federal Court.

2. It was given the relief aforesaid, despite the fact that the record shows without dispute that the appellants, the Board of County Commissioners, in establishing the said new project, and in attempting to obtain said contribution from appellee, acted strictly in accord with the statutes of the State of South Dakota governing the establishment of such new project.

3. Appellee got said relief, though, in addition to the fact that the said Board had in fact thus complied with said statutes of the State of South Dakota, it was the settled law of said State at the time the Circuit Court of Appeals
269 acted as aforesaid, that the doings of said Board with reference to the aforesaid project were in compliance with the statutes of South Dakota, as construed by the highest court of that State. It was further settled at said time by the highest court of the State of South Dakota, that the very project at bar was the formation of a new drainage district, or ditch. And the Circuit Court of Appeals erred in disregarding the interpretation of the applicable statutes of the State of South Dakota as formulated by the highest court of that State, and substituting its own interpretation for that of said highest court of that State.

4. The Circuit Court of Appeals erred in granting the relief which it did grant and affirm, because neither the pleadings nor the evidence warranted such relief, or any relief, and because its finding that appellee was entitled to the relief which it obtained, is contrary to the pleadings and to the evidence, and contrary to and unwarranted by the law.

5. Said Circuit Court of Appeals erred also for the reasons set out in the assignments of error filed herewith.

The appellee invoked the jurisdiction of said United States District Court, as set out in its bill of complaint, on the ground that it, the appellee, was a citizen of the State of Illinois; that the appellants were citizens of the State of South Dakota, and that more than $3,000.00, besides costs, was actu-

ally in controversy. It did not ivoke the jurisdiction solely on the aforesaid grounds, but, in addition, asserted in its bill of complaint that appellants were not proceeding in accordance with the requirements of the applicable statutes of the State of South Dakota; that if it were assumed they were acting in compliance with said statutes, such statutes themselves were unconstitutional and void, and violative of the Constitution of the United States, and amendments thereto, and that the action of appellants was depriving appellee of its property without due process of law, in violation of said Constitution and amendments thereto.

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Therefore, your appellants and petitioners say that this cause and matter is not one in which the decision of the said Circuit Court of Appeals of the United States is made final, and say further that the controversy between appellants and appellee involves an actual controversy over more than One Thousand Dollars besides costs.

Wherefore, petitioners pray for an allowance of the appeal, to the end that the cause may be carried to the Supreme Court of the United States, and petitioners pray for a supersedeas of said judgment, and such other process as is required to perfect the appeal prayed for, to the end that the errors therein may be corrected.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Solicitors for Appellants.

Appeal and supersedeas allowed, and bond fixed at the sum of One Thousand and no/100 Dollars ($1000.00), conditioned as the law provides, this 31 day of May, A. D., 1924.

WM. S. KENYON,
Judge of the Circuit Court of Appeals of the United States, for the Eighth Circuit.

Assignments of Error.

Now on this 31 day of May, 1924, comes A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, by their solicitors, Benj. I. Salinger, Elbert O. Jones and Norman B. Bartlett, and in connection with their petition for appeal to the Supreme Court of the United States, say that in the Findings, Judgment and Decree entered in the above cause on the 18th day of March, 1924, manifest

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error has intervened, to the injury, wrong and prejudice of these appellants, and that the same is erroneous and unjust to appellants;

1. Because the Circuit Court of Appeals failed to follow the construction of the South Dakota Constitution and Statutes as pronounced by the highest court of the State, and did its own construing of said State law, and based its affirmance of the Decree of the District Court on a construction on its own part, which is in conflict with the construction of the highest court of the State.

2. Because it was based on the reasoning that appellant Board had no authority to make an assessment, except in aid of a drainage project to drain agricultural lands, and that said Board had no authority in law to establish a drain, except for the drainage of agricultural lands.

This is erroneous, and the interpretation of the Constitution and Statutes by the Circuit Court of Appeals is erroneous, because it is, and for a long time has been, the settled law of South Dakota, as declared by the highest court of the State in construing its said Constitution and statutes, that a Board such as appellant Board is, is, by such Constitution and statutes, authorized to establish and construct a drain for a public purpose, and that such public purpose included, but was not limited to, the drainage of agricultural lands, and that such authority existed as to such drainage as the very one at bar is, and it is undisputed in the evidence that one object of this project was to drain agricultural lands.

3. Because it is not only a fact that the highest court of the State has ruled, in construing the Constitution and Statutes of the State of South Dakota, that the drainage ditch at bar was lawfully established, and that the acts of ap-
272 pellant Board were lawful, but the record shows both facts without dispute; and the Circuit Court of Appeals' affirmance is despite such ruling and despite said state of the evidence.

4. Because there is no evidence in the record to show any fraud or subterfuge on behalf of the appellant Board, or anyone at all, in the establishment of this new drainage ditch, and there is absolutely no evidence in the record that appellee was prevented from making a full and fair defense to such establishment in the proceedings had upon notice given by the appellant Board, by which this new drainage ditch was established. Unless appellee was by some subterfuge pre-

vented from making a full defense to the establishment of this project at the time of its establishment, the mere statement now that it was established by suberfuge, is of no avail to it in this collateral attack.

5. Because the affirmance was based on an interpretation of the statutes of South Dakota by the Circuit Court of Appeals that such statutes did not permit or authorize appellant Board of County Commissioners to establish and construct a new drainage ditch over the line of two older ditches, which new project contained a materially larger area than the combined areas of such old ditches, and called for cleaning out, widening, deepening and diking of the older ditches, to double their former capacity, the construction of river cut-offs to accelerate the flow of water therein, and the installation of a new and larger spillway, all at a cost of more than double the cost of the original ditches; which interpretation was contrary to the interpretation given to such statutes by the highest court of the State of South Dakota in this very drainage project.

6. Because the statutes of South Dakota, as interpreted by the highest court of the State, permit and authorize
273 the appellant Board to establish over the line of one or more old drainage ditches, a new drainage project, containing a materially larger drainage area than the combined area of such old ditches, with additional river cut-offs, new and larger spillway, and a cleaning out and deepening, widening and diking of the old ditches, to double their former capacity, at an expense of more than double the cost of the original ditches; and the undisputed evidence in this case shows the proceedings of the appellant Board sufficient under such statutes to establish and construct such new drainage project, and make an apportionment of benefits for the payment of the cost thereof, and did not warrant the finding and conclusion of said Circuit Court of Appeals that said proceedings were in fact for repair and maintenance, only.

7. Because it is based on the holding and reasoning that appellant Board had acted without authority from, and had not complied with, the provisions of the statutes of South Dakota, regulating the maintenance and repair of ditches already established. The appellees, City of Sioux Falls, Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul Minneapolis & Omaha Railway Company, conceded that the project at bar was the creation of a new ditch and a new project. That fact is established by the undisputed

evidence as against all of the appellees. It is undisputed in the evidence that there was a full compliance with every statute dealing with the establishment of a new ditch. Therefore, the affirmance was given because there had been a failure to comply with statutes that had nothing whatever to do with the establishment of a new ditch, or assessing for the cost of its construction. The court disregarded that the relevant statues had been complied with and based its action wholly on the fact that statutes that had no application had not been complied with.

8. Because the appellant Board to whom had been delegated by the statutes of South Dakota the authority
274 to determine the purpose and character of this drainage project had, after notice and hearing, determined that this drainage project, among other things, was for the benefit of the public health, welfare and convenience, and was necessary and practicable for draining agricultural lands, from which determination no appeal was ever taken; and the highest court of the State of South Dakota has held in interpreting such statutes, that such determination is final, no appeal from the same ever having been taken.

9. Because the notice dated September 15, 1916, and the hearing held pursuant thereon, on October 2, 1916, was a notice to, and an opportunity to be heard by appellee on the formation of this new drainage project with an enlarged area subject to benefits, and that appellee's property was included therein, and gave to it its day in court, and its opportunity to contest the establishment of said drainage project, the legality thereof, the necessity therefor, the character and purpose thereof, and it having waived the same and defaulted therein, and not having appealed from said determination, is bound thereby.

10. Because what was in effect done was to restrain legislative action on the part of the appellant Board acting in a legislative capacity under delegation from the legislature of the State. The Legislature itself could have, by enactment of a statute, done everything the Board did, or was proposing to do, and it should be conceded that the legislature could not have been enjoined from enacting such a statute. The only difference is that the Board was bound to give certain notices and hearings before any assessment could become a lien, and the Board did what it was bound to do.

11. Because the proceedings at bar were proceedings in rem, for the purposes of taxation, and dealing in this matter,

or any review of the same, involves property rules
275 over which the courts of the State are the final authority and both resident and non-resident property owners must, at least in the first instance, resort to and exhaust the remedies provided by the statute in the state tribunals for reviewing such controversies before they may enter either th State or the Federal Courts at all.

12. Because, although where a resident of a state may enter the courts of a state, one who has diversity and a controversy involving more than $3,000.00 need not submit himself to those state courts, but may at his election enter the federal courts, yet in a proceeding in rem, like a drainage project, the resident of the State must first submit to administrative review, and may not enter the courts of his State without first exhausting such administrative review, and the non-resident cannot disregard such administrative review and have his proceedings in rem reviewed in the first instance in the federal courts. The non-resident can enter the federal court only when the resident of the State can enter the state court.

13. Because the injunction was granted on the reasoning that one should not be compelled to appear at the hearing to equalize apportionments, for the reason that it would be had before said Board, and said Board had no authority whatever to act; that one should not be compelled to submit to a hearing before a mere trespasser. This disregards, first, that the mere assertion that the Board was without authority did not justify the failure to appear at said hearing, and, second, it disregards the decisions of the highest court of the State that the Board was acting on full authority, and, third, it appears by the undisputed evidence that they had full authority.

14. Because the hearing enjoined was one to be had for the purpose of equalizing a tentative estimate, only,
276 which had been made by the appellant Board. This estimate was not final, and additional acts by the Board were necessary after such hearing was held before any tax, assessment or servitude could become operative. Manifestly the holding of such hearing could not give rise to a multiplicity of suits as against these appellees, no matter how many suits might arise as to other parties. Manifestly the proposal to hold such hearing [hearing] cast no cloud on title, because other acts by the Board were necessary before any amount that was finally fixed could become a tax, assessment or servitude upon its property, and there was no evi-

dence at all that there would result irreparable injury to appellee. This is especially applicable to the appellee City of Sioux Falls, and to the four railway company appellees, because even if an assessment had been made and a tax levied it would have created no lien upon their property.

15. Because appellee made no case under any acknowledged head of equity jurisdiction, and, in the essence, based its claim for relief upon the assertion that it was threatened with exaction of an illegal tax. At any rate, there could be no right to have equitable relief until such time, if ever, as the threatened tax was about to be collected by taking from appellee the title to the lands affected by the assessment. Up to that time, nothing could happen more than to exact a sum of money for taxes which were illegal taxes, and for that wrong, or threatened wrong, the law provided an adequate remedy either in the state or federal courts.

16. Because, if, as is contended by the Circuit Court of Appeals, the appellants acted utterly without authority of law, and were therefore naked trespassers, that fact gave appellee an adequate remedy at law in either the federal or state courts, at their election, to-wit: to sue in trespass—hence appellee's bill in chancery should not have been entertained. If, on the other hand, the acts of the appellants were in all
277 respects lawful, the appellee was not entitled to any remedy, either at law or in equity.

17. Because, assuming that appellee could enter the federal court at all, it had at all times a plain, adequate and complete remedy at law in the premises in said courts, by appealing from the establishment of the ditch to the Circuit Court of the State, and thence removing the entire controversy involved, including the making of assessments, to the law side of the federal courts, where a trial de novo could be had. Instead, appellee lodged a bill of complaint seeking an injunction.

And while it may be true appellee has waived its right to this appeal from the establishment of the ditch, that does not alter the fact that it had no right to enter a court of equity on the ground that though it had at one time the right to thus appeal to and have review in the federal court and a trial de novo there on the law side, by its default and waiver, it had voluntarily lost that right.

The right to enter chancery cannot be created by waiving or failing to exercise an adequate remedy at law.

Passing that, the appellee had the right to appeal from the action of the appellant Board as to apportionment of benefits directly to the Circuit Court of the State, and thereupon to remove this very controversy for review on the law side of the Federal District Court, and there have a trial de novo.

18. Because, assuming for the sake of the argument, that the District Court and the Circuit Court of Appeals had authority to pass upon the merits, both of them erred in finding for the appellee, in that there is absolutely no evidence to support the contention of the appellee on the merits, that is to say, there is no evidence whatever that the appellant Board ever did anything whatsoever in the premises other than
what it was authorized to do by the Constitution and
278 statutes of the State of South Dakota. And, in addition to this being the state of the evidence, the highest court of the State, construing said Constitution and statutes of the State, has ruled in a way that is binding upon said federal courts, that in truth and in fact, appellants acted on full authority, and in every way in compliance with the requirements of said Constitution and statutes of the State of South Dakota.

19. Because appellee was not entitled to any relief for the reason that it was given legal notice by the notice dated September 15, 1916, of the proposed formation of this new drainage project, containing an enlarged benefited area, which was about to be established, and that its property was included therein, and that appellee was granted a hearing upon such facts on October 2nd, 1916, and appellee waived such hearing, with full knowledge that it was bound by all subsequent action of the appellant Board which necessarily followed in the premises; and, in addition thereto, appellee stood by, and without any objection on its part to said proceedings, saw the expenditure of over a quarter of a million dollars, for the payment of which appellee is charged with knowledge that the same must be made out of the property benefited, included in which class is appellee's, and in addition thereto, appellee actively aided and abetted said work as the same progressed, and made no protest, and it is now estopped from questioning the legality of said proceedings.

Wherefore, appellants pray that the said Findings, Judgment and Decree of the said Circuit Court of Appeals be reversed, and that such further orders and proceedings be had as law and justice may require, and that this case may be

remanded, and such relief given to appellants as may be their due.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

279 (Endorsed): Filed in U. S. Circuit Court of Appeals, May 31, 1924.

(Bond on Appeal to Supreme Court, U. S.)

Know All Men By These Presents:

That we, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, as principals, and the Southern Surety Company, of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the Chicago, Rock Island and Pacific Railway Company, (a corporation) Appellee, in the above cause, in the sum of One Thousand Dollars ($1,000.00), conditioned that, whereas, on the 18th day of March, A. D. 1924, in the Circuit Court of Appeals of the United States, for the Eighth Judicial Circuit, in a suit pending in that Court upon appeal, wherein the Chicago, Rock Island and Pacific Railway Company, a corporation, was plaintiff and appellee, and A. G. Risty, et al., as County Commissioners, etc., et al., were defendants and appellants, numbered on the Docket as No. 6312, a Decree was rendered against the said A. G. Risty, et al., as County Commissioners, etc., et al., appellants, and the said A. G. Risty, et al., as County Commissioners, etc., et al., having obtained an appeal to the Supreme Court of the United States, and filed a copy thereof in the office of the Clerk of this Court, to reverse the said Decree, and a citation directed to the said appellee, citing and admonishing it to be and appear at a session of the United States Supreme Court, to be held in the City of Washington, D. C.;

Now if the said A. G. Risty, et al., as County Commissioners, etc., et al., shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then
280 the above obligation to be void, else to remain in full force and virtue.

A. G. RISTY,
Signing for all the Appellants.
Principals.

(Seal) SOUTHERN SURETY COMPANY OF DES MOINES, IA.,
By H. B. Charnock, Attorney-in-Fact.
Surety.

The foregoing bond is hereby approved.

May 31, 1924.

WM. S. KENYON,
Judge of the United States Circuit Court of Appeals, for the Eighth Circuit.

* * * * * * * *

(Certified copy of Power of Attorney issued to Mr. H. B. Charnock by the Southern Surety Company of Des Moines, Iowa, etc., attached to original bond.)

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 31, 1924.

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281 Citation.

United States Circuit Court of Appeals, Eighth Circuit.

A. G. Risty et al. as County Commissioners, et al., Appellants,
No. 6312. vs.
Chicago, Rock Island and Pacific Railway Company, a corporation, Appellee.

United States of America, To Chicago, Rock Island and Pacific Railway Company—Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Chicago, Rock Island and Pacific Railway Company, a corporation, is complainant and A. G. Risty et al. as County Commissioners et al. are defendants, and in which case the said defendants perfected an appeal to the Circuit Court of Appeals, Eighth Circuit, an appeal has been allowed to the said A. G. Risty et al. to the United States Supreme Court. You are hereby cited and admonished to be and appear in said court at Washington, D. C. sixty days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable William S. Kenyon, Judge of the United States Circuit Court of Appeals, Eighth Circuit, this 31st day of May, A. D. 1924.

WM. S. KENYON,
Judge of the United States Circuit Court of Appeals, Eighth Circuit.

Service of the within Citation this 2nd day of June, A. D., 1924, at Sioux Falls, South Dakota, is hereby acknowledged.

O'BRIEN, HORNE & STRINGER,
BOYCE, WARREN & FAIRBANK,
Counsel for Appellee.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No. 6312. A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island & Pacific Railway Company. Citation on Appeal to Supreme Court, U. S., and acknowledgment of service. Filed Jun. 5, 1924, E. E. Koch, Clerk.

---

282 (Praecipe for Transcript an Appeal to Supreme Court, U. S.)

The Clerk of the above named Court is hereby directed to prepare and certify a transcript of record in the above entitled case for the use of the Supreme Court of the United States by including therein the following:

1. The printed transcript of record filed in your court.

2. Appropriate reference to the hearing held at St. Louis in the Circuit Court of Appeals.

3. The opinion of the Circuit Court of Appeals in this cause except the title thereof.

4. The decree of the Circuit Court of Appeals, except the title thereof.

5. Petition for appeal and order allowing the same, except the title thereof.

6. Assignments of error.

7. The bond on appeal and approval, except the title, and the powers of attorney, verification and authentication which may be shown by sufficient memoranda.

8. Citation in appeal and admission of service thereof.

9. Memoranda as to the praecipe filed.

10. Clerk's certificate.

Dated at Sioux Falls, South Dakota, this 3 day of June, 1924.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jun. 5, 1924.

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283 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of South Dakota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for appellants, in a certain cause in said Circuit Court of Appeals wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Chicago, Rock Island and Pacific Railway Company was Appellee, No. 6312, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixth day of June, A. D. 1924.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 30,416. U. S. Circuit Court Appeals, 8th Circuit. Term No. 451. A. G. Risty et al., as county commissioners, et al., appellants, vs. Chicago, Rock Island and Pacific Railway Company. Filed June 16th, 1924. File No. 30,416.

(4401)

(30,417)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 452

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS, ET AL., APPELLANTS,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 28, 1924

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1923, of said Court, before the Honorable William S. Kenyon, Circuit Judge, and the Honorable Jacob Trieber and the Honorable David P. Dyer, District Judges.

Attest:
(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twentieth day of March, A. D. 1923, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of South Dakota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Chicago, Milwaukee and St. Paul Railway Company was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (Affidavit of Service of Citation.)

In the District Court of the United States for the District of South Dakota, Southern Division.

Chicago, Milwaukee & St. Paul Railway Company, Plaintiff,
vs.
A. G. Risty, et al., Defendants,
and
Minnehaha National Bank et al, Intervening Defendants.

District Court of the United States
District of South Dakota—ss.

W. C. Welsh, being first duly sworn on oath, deposes and says: That he is a citizen and elector of the State of South Dakota. That he served the hereto attached citation in the above entitled cause upon the above named plaintiff on the 8th day of December, 1922, in the city of Sioux Falls, South Dakota, by then and there handing to and leaving with C. O. Bailey, its solicitor, a true copy of said citation.

W. C. WELSH.

Subscribed and sworn to before me this 8 day of December, 1922.

(Notarial Seal) DOUGLAS S. ELLIOTT,
Notary Public, South Dakota.

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2 Citation.

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, Milwaukee & St. Paul Railway Company, Plaintiff,
No. 99. vs. In Equity.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial & Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter, Intervening Defendants.

United States of America to the above named Plaintiff, Chicago, Milwaukee & St. Paul Railway Company—Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Chicago, Milwaukee & St. Paul Railway Company is complainant and A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, are defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., are intervening defendants an appeal has been allowed the above named defendants and intervening defendants therein to the Circuit Court of Appeals, Eighth Judicial Circuit. You are hereby cited and admonished to be and appear at said Court at the City of St. Paul in the State of Minnesota sixty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable James D. Elliott, Judge of the United States District Court for the Southern Division, District of South Dakota, this 25 day of November, 1922.

JAS. D. ELLIOTT, Judge.

Service of the foregoing Citation, by receipt of copy, at Sioux Falls, South Dakota, is hereby admitted this ..... day of ....., A. D., 1922.

. . . . . .

Solicitor for Chicago, Milwaukee & St. Paul Railway Company, Plaintiff.

Endorsed: Filed in the District Court on Dec. 13, 1922 at 2 P. M.

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5 In the District Court of the United States of America, in and for the Southern Division of the District of South Dakota.

Chicago, Milwaukee & St. Paul Railway Company, Plaintiff, No. 99 S. Div. vs. In Equity.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants.

Be It Remembered, that on the 25th day of July, A. D. 1921, there was filed in the above entitled court, on behalf of the plaintiff, a Bill in Equity; which said Bill in Equity, excluding the verification and Exhibit A, is in words and figures the following, to-wit:

6 (Bill of Complaint.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, Milwaukee & St. Paul Railway Company, Plaintiff,
vs.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock as County Commissioners of Minnehaha County, South Dakota; Fred E. Ward as Auditor of Minnehaha County, South Dakota; and J. O. Anderson as Treasurer of Minnehaha County, South Dakota, Defendants.

The plaintiff, a corporation of the state of Wisconsin and a resident and citizen of said state of Wisconsin, brings this its bill of complaint against A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as auditor of Minnehaha County, South Dakota, and J. O. Anderson, as treasurer of Minnehaha County, South Dakota, residents and citizens of the state of South Dakota and of the southern division of the district of South Dakota, and respectfully shows unto the court:

First.

That the plaintiff is and was during all of the times hereinafter mentioned a corporation organized and existing un-

der and by virtue of the laws of the state of Wisconsin, and a resident and citizen of the said state of Wisconsin within the meaning and intent of the laws conferring jurisdiction upon the district court of the United States.

Second.

That the defendants, A. G. Risty, J. A. Jensen, C. W.
7 Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, Fred E. Ward, and J. O. Anderson, are each of them residents and citizens of the state of South Dakota and of the southern division of the district of South Dakota within the meaning and intent of the laws conferring jurisdiction upon the district courts of the United States.

Third.

That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, and C. T. Charnock are the duly elected, qualified and acting county commissioners of the county of Minnehaha, in the State of South Dakota and constitute the board of county commissioners of said county of Minnehaha; that the defendant, G. W. Tyler, is a duly elected and qualified commissioner of said county of Minnehaha, and claims to be the legal commissioner of said county in place of said Chris Olson; that the defendant, Fred E. Ward, is the duly elected, qualified and acting auditor of the said County of Minnehaha, and that the defendant, J. O. Anderson, is the duly elected, qualified and acting treasurer of the said county of Minnehaha.

Fourth.

That the Legislature of the State of South Dakota at the ninth session thereof enacted a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Convenience or Welfare", which purported act was approved by the Governor of the State of South Dakota on March 7, 1905, and which purported act is commonly known as Chapter 98
of the Session Laws of South Dakota of 1905; that
8 subsequently and at its tenth session the Legislature of the State of South Dakota re-enacted said Chapter 98 of the Session Laws of 1905 by enacting a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Convenience or Welfare or Whenever it Shall be

Necessary or Practicable for Drainage of Agricultural Lands", which purported law was approved by the Governor of the State of South Dakota February 21, 1907, and which purported law is commonly known as Chapter 134 of the Session Laws of South Dakota of 1907; that by said Chapter 134 of the Session Laws of 1907 the Legislature of the State of South Dakota attempted to re-enact said purported law known as Chapter 98 of the Session Laws of 1905, together with amendments thereto; that subsequently the Legislature of the State of South Dakota at the Sixteenth Session thereof re-enacted said Chapter 134 of the Session Laws of 1907 with amendments thereto and that such re-enactment is contained in the South Dakota Revised Code 1919, as Sections 8458 to 8491 inclusive thereof; that at its special session in the year 1920, the Legislature of the State of South Dakota amended sections 8464, 8471, [84] 8472 and 8473 of said Revised Code by Chapter 46 of the laws of the second special session of 1920; that a copy of the purported law of the State of South Dakota known as Chapter 98 of the Session Laws of 1905 as amended and re-enacted as Chapter 134 of the Session Laws of 1907, and as amended and re-enacted as Sections 8458 to 8491 of the South Dakota Revised Code, 1919, and amended
9 at the second special session of 1920 is hereto attached, marked "Exhibit A", and made a part hereof.

Fifth.

That prior to the year 1916 the Board of County Commissioners of the said County of Minnehaha established within said County a drainage ditch known as "Drainage Ditches No. 1 and No. 2", which drainage ditches were designed for the purpose of draining upwards of twenty thousand acres of agricultural land situated in Townships 101, 102, 103 and 104 North, of Range 49, West of the Fifth Principal Meridian, in the said County of Minnehaha; that said drainage ditches were established pursuant to and under the provisions of said purported Law known as Chapter 134 of the Session Laws of South Dakota of 1907, and extended for a distance of several miles through said townships, and were fully completed prior to the year 1916; that an assessment for the cost of the construction of said drainage ditches No. 1 and No. 2 was prior to the year 1916 made; and that all matters connected with the construction of said ditches and with the assessment of the costs thereof were fully completed prior to the year 1916.

Sixth.

That the land drained by said drainage ditches No. 1 and No. 2 is situated in the valley of the Big Sioux north of the city limits of the city of Sioux Falls, which city is a municipality of upwards of twenty-five thousand inhabitants; that the Big Sioux River flows in a southerly direction through said townships 101, 102 and 103 north of said Range 49, West of the Fifth Principal Meridian, and that the City of Sioux Falls is situated in said Township 101; that after entering said township 101 at the northern boundary line thereof the said Big Sioux River flows in a southerly direction to the vicinity of the southern boundary line of said township and then flows in an easterly direction for a distance of some miles and then in a northerly direction through the said City of Sioux Falls and towards the north line of said township and then continues in an easterly direction until it passes out of said township over the eastern line thereof; that in its course in a northerly direction through the City of Sioux Falls the said Big Sioux River passes over a series of falls aggregating approximately ninety feet; that the city water supply of the said City of Sioux Falls is situated in a graveled bed extending over a considerable area in said townships 101 and 102 north of the city of Sioux Falls; that the penitentiary of the State of South Dakota is situated north of the said City of Sioux Falls, and that said penitentiary and the lands belonging thereto are situated in said townships 101 and 102.

Seventh.

That the Big Sioux River has its source in Lake Pelican adjoining the City of Watertown in the County of Codington and State of South Dakota, which City of Watertown is situated approximately one hundred miles north of the City of Sioux Falls; that from the said City of Watertown the said Big Sioux River flows in a generally southerly direction but with many crooks and bends through the counties of Codington, Hamlin, Brookings and Moody to the City of Sioux Falls, in the County of Minnehaha, and that the said Big Sioux River during its southward course drains a large area of territory both eastward and westward of its channel.

Eighth.

That said drainage ditches No. 1 and No. 2 were, when completed prior to the year 1916, of sufficient capacity to drain the agricultural land adjacent thereto and which was

assessed for the cost of construction of said ditches; that subsequent to the construction of said ditch various drainage projects were initiated under said purported law of the state of South Dakota, (Exhibit A hereto) for the purpose of draining large areas of agricultural lands along the valley of the Big Sioux River in the counties north of the city of Sioux Falls; that said drainage projects, as plaintiff is informed and believes, operated to drain into the Big Sioux River (or to accelerate greatly the flow into said river of waters naturally draining therein) the water from an area of upwards of one hundred thousand acres of land and to dump upon the lands lower down in the channel of the Big Sioux River a vast amount of additional water at any time of freshet or
11 unusual rainfall; that some of said drainage projects have been carried to completion and that others are in various steps of construction and that work upon the unfinished drainage projects is being done and the same are being brought to completion; that by reason of the construction of said drainage projects north of the said county of Minnehaha vast volumes of water are in times of freshets conveyed to the lands drained by said drainage ditches No. 1 and No. 2 and the lands adjacent thereto and have converted the lands drained by said drainage ditches No. 1 and No. 2 and the lands adjacent thereto into a reservoir for the surplus flood waters of the valley of the Big Sioux River north of the said county of Minnehaha.

Ninth.

That as originally constructed said drainage ditches No. 1 and No. 2 emptied into the Big Sioux River through a ditch constructed across the land immediately north of the City of Sioux Falls, which ditch was between the City of Sioux Falls and the graveled bed from which said city obtained its water supply, and emptied into the Big Sioux River in the Northeast portion of the City of Sioux Falls and north of the series of falls situated upon said river along its course through the said City of Sioux Falls; that subsequent to the construction of said drainage ditches No. 1 and No. 2 and about the years 1915 and 1916 the vast volumes of water accumulating as aforesaid in the valley of the Big Sioux River and upon the lands drained by said drainage ditches caused the outlet of said drainage ditches into the Big Sioux River, as aforesaid, to wash out a channel upon the land through which said outlet was constructed to such an extent that there arose im-

minent danger that the course of the Big Sioux River
12 would be changed so that all of the water in the channel of said river would be diverted through said drainage ditches and the outlet thereof, and a new river channel formed by said ditches which would cause the water in said river to cease flowing through its proper and natural channel and over the series of falls in the City of Sioux Falls, and to flow instead through said drainage ditches and the outlet thereof into the Big Sioux River at a point north of the City of Sioux Falls; that such diversion of the channel of the said Big Sioux River threatened to cause enormous damage to property in the said City of Sioux Falls situated along the channel of said river, and to destroy the water power obtained from said river at the falls thereof, and also to destroy the municipal water supply of the said City of Sioux Falls by draining the water from the gravel bed from which said municipal water supply is obtained.

Tenth.

That the change in the channel of the Big Sioux River into said drainage ditches No. 1 and No. 2 and through the outlet thereof into the Big Sioux River at a point north of the city of Sioux Falls if the same had been allowed to continue and become permanent would have operated to relieve the lands drained by said drainage ditches and the lands adjacent thereto of the superabundance and surplus of water flowing upon said lands and that for the purpose of draining the lands adjacent to and drained by said drainage ditches No. 1 and No. 2 no action of any kind was necessary, excepting to permit the water to flow unhindered through said drainage ditches No. 1 and No. 2 into the Big Sioux River and to allow a new river channel to be formed by the natural force of the water flowing through the same.

Eleventh.

That the board of county commissioners of the said county of Minnehaha for the purpose of avoiding the threatened change in the channel of the Big Sioux River and for the purpose of preventing the drainage of the gravel bed from which the city of Sioux Falls obtains its municipal water sup-
13 ply and for the purpose of preventing the injury to the property owners of the city of Sioux Falls which would be caused by the change in the channel of the Big Sioux River and to prevent the destruction of the water power at the falls of the Big Sioux River in the city of Sioux Falls, caused to be constructed in the summer of the year 1916 various

dams and gateways at various places along said drainage ditches No. 1 and No. 2, made changes in the channel of the Big Sioux River along the course of said drainage ditches and constructed a spillway at the outlet of said drainage ditches into the Big Sioux River; that said construction work was done not for the purpose of bringing about the drainage of agricultural lands, nor for the drainage of any lands for any public use, nor of the lands situated within the drainage area of said drainage ditches No. 1 and No. 2 for the purpose of accelerating the flow of the surplus water from said area, but for the purpose of controlling and retarding the flow of said water so that the same should not wash out a new channel for the Big Sioux River to the damage and injury of the city of Sioux Falls and of its property owners and to the destruction of its water power and its water supply; that the effect of said work has not been to drain the lands situated in the area of said drainage ditches No. 1 and No. 2 but to prevent the drainage of said lands by penning up the flood waters upon said lands until they would gradually pass into the Big Sioux River without danger of changing the channel of said river; that in consequence of the construction of said dams, gateways and spillway and of the making of the various cutoffs and changing of the river channel, the lands of the property owners in said drainage area have for the past crop seasons since the year 1915 been greatly damaged and the crops grown thereon have been annually destroyed or greatly damaged by reason of water being retained
14 thereon through the construction of said dams, gateways, and cut-offs, the changing of the river channel and the construction of said spillway; that instead of having been benefited by the construction of said works the lands of the property owners within the area of the drainage district of said drainage ditches No. 1 and No. 2, as plaintiff is informed and believes, were decreased fully fifty per cent over the value which the same would have been worth had said work not been done and had said drainage ditches been left as originally constructed.

Twelfth.

That there has been expended by the board of county commissioners of said Minnehaha county upon the construction of ditches, dams, gateways and other work as aforesaid, and upon the construction of said spillway upon the outlet of said drainage ditches No. 1 and No. 2 a sum in excess of Two Hundred Fifty-five Thousand Dollars ($255,000.00) for which said sum the said board of county commissioners has issued

drainage warrants, and that there is due for principal and interest upon said warrants a sum, as plaintiff is informed and believes, in excess of Three Hundred Thousand Dollars ($300,000.00), that of said sum of money so spent as aforesaid, by the said board of county commissioners approximately sixty per cent (60%) has been expended in the construction of said spillway, dams and retaining gates, designed not for the purpose of the drainage of agricultural lands, but solely for the purpose of controlling and retarding the flow of water, through the outlet of said drainage ditches No. 1 and No. 2 into the Big Sioux River for the purpose of preventing a change in the channel of said river and of preventing the drainage of the gravel bed through which the said city of Sioux Falls obtains its water supply; that as plaintiff is informed and believes, more than Thirty-five per cent (35%) of said moneys expended by the said board of County commissioners has been expended for the purpose of constructing ditches for the straightening of the channel of the Big Sioux River, and that less than Five Per cent (5%) of said moneys has been expended for any purpose legitimately connected with the construction or maintenance of said drainage ditches No. 1 and No. 2.

Thirteenth.

That prior to the construction of said spillway, dams, retaining gates and other work and straightening of the channel of the Big Sioux River, no petition, therefore, signed by one or more owners of land likely to be affected was ever made or presented to the board of county commissioners of the said county of Minnehaha, excepting that on or about the 3d day of August 1916, there was filed in the office of the County Auditor of the said county of Minnehaha a purported petition signed by F. L. Blackman, and other persons, which said petition purported to be a petition "to reconstruct and improve drainage ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway and outlet to said drainage ditches No. 1 and No. 2, and to pay therefor, by assessment upon the property, persons and corporations benefited thereby". That upon the filing of said purported petition the county commissioners of said county of Minnehaha did not transmit a copy of the same to the state engineer of the State of South Dakota; that the said board of county commissioners of the said county of Minnehaha did not accept the proposed route of said drainage ditches and did not cause a survey of said drainage ditches to be

made by a surveyor; that no survey of the same was ever made under the general supervision of the state engineer of the state of South Dakota, or otherwise, prior to the
16 construction thereof; that no surveyor's report in writing was made to the said board of county commissioners; that no surveyor's report or copy of any map or plan made or filed by said surveyor was furnished to the said state engineer prior to the beginning of said work; that the said board of county commissioners of said Minnehaha County did not file with the said purported petition its determination of its cost, length and width of the drainage improvement furnished in said petition; that the said board of county commissioners did not fix a time and place for a hearing of said petition and did not give notice thereof; that none of the proceedings of the said board of county commissioners in the matter of the said drainage petition have been recorded and indexed in any book ketp for that purpose in the office of the auditor of said county of Minnehaha; that no drainage district for the purpose of the construction of said spillway, dams, retaining gates, ditches and other work has ever been constructed or established.

Fourteenth.

That prior to the construction of said spillway, dams, retaining gates, ditches and other work the board of county commissioners of said Minnehaha County did not fix the proportion of benefits of the proposed drainage among the lands affected and did not appoint a time and place for the equalization of the same and did not give notice of said equalization either by publication or posting, and did not make any assessment for the proportioning of benefits against each tract of property affected and did not make any assessment for the payment of damages caused by the construction of said spillway, dams, retaining gates and ditches and did not provide any moneys for the payment of such damages.

17 Fifteenth.

That prior to the construction of said spillway, dams, retaining gates, ditches and other work, the said Board of County Commissioners of Minnehaha County did not prepare plans and specifications therefor, and did not file plans or specifications therefor in the office of the County Auditor of the said County of Minnehaha, and did not let contracts upon competitive bids for the construction of said spillway, dams, retaining gates, ditches and other work; that prior to the construction of said spillway the said Board of County Com-

missioners did advertise for competitive bids for the construction of the spillway in accordance with certain plans therefor; that bids were received by the said Board of County Commissioners for the construction of a spillway in accordance with such plans, and that the same were rejected by the said Board of County Commissioners, and subsequently the said Board of County Commissioners adopted a new and amended plan for the construction of an entirely different form of spillway, and without advertising for bids for such construction made a contract for the construction of said spillway in accordance with said new and amended plan with the Sioux Falls Construction Company, under which said contract the said Sioux Falls Construction Company constructed such spillway upon the cost plus plan; that under said contract the said Sioux Falls Construction Company was paid the entire cost of the construction of said spillway, together with nine per cent (9%) of the total cost added; that the cost of the construction of said spillway under said cost plus plan was, as plaintiff is informed and believes, upwards of one hundred fifty thousand dollars ($150,000.00) for which said sum drainage ditch warrants upon said drainage ditches No. 1 and No. 2 were issued by the said Board of County Commissioners of Minnehaha County to the said Sioux Falls Construction Company, and to other persons.

Sixteenth.

That on or about the 20th day of November, 1920, the Board of County Commissioners of said Minnehaha County entered into a certain contract with Albert J. Chenoweth and Herman Rettenhouse, co-partners as Chenoweth & Rettenhouse, whereby the said Board of County Commissioners employed the said Chenoweth & Rettenhouse to make a topographical survey showing the lands benefitted and subject to assessment for the payment of the cost of said spillway, dams, retaining gates, ditches and other work, and that by said contract the said Board of County Commissioners agreed to pay the said Chenoweth & Rettenhouse for said survey the sum of Seven thousand five hundred dollars ($7,500.00) to be paid in drainage ditch warrants drawn on drainage ditches No. 1 and No. 2; that the said Chenoweth & Rettenhouse thereupon proceeded to make the purported survey of the lands purported to be subject to assessment for the construction of said spillway, dams, retaining gates, ditches and other work; that the said Chenoweth & Rettenhouse made and filed a report with the said Board of County Commissioners, in which report they made a

purported proposed distribution of benefits; that a copy of said proposed distribution is hereunto annexed, marked "Exhibit B" and made a part hereof.

Seventeenth.

That on or about the 10th day of June, 1921, the said board of county commissioners of the said county of Minnehaha adopted a purported notice of the time and place for equaling the proportioning of benefits for the construction of said spillway, dams, retaining gates, ditches and other work and caused the same to be published on July 13, 1921, and on July 20, 1921, in the Sioux Falls Daily Argus Leader, the official newspaper of the said county of Minnehaha; that a copy of said drainage notice is hereunto annexed, marked Exhibit C, the proportion of benefits assessed against the plaintiffs is
1681 units, out of a proposed total of 32549.62 units,
19 and that upon the basis of such apportionment the assessment against plaintiff and its property will be in excess of the sum of Fifteen Thousand Dollars ($15,000.00) that the said board of county commissioners of said Minnehaha County are threatening to and will, as plaintiff is informed and believes, unless enjoined by this court, make an apportionment of benefits upon plaintiff of 1681 units and will make an assessment thereon against plaintiff and its property in the sum in excess of Fifteen Thousand Dollars ($15,000.00), and that the defendant, Fred E. Ward, as county auditor of the said county of Minnehaha, will spread such assessment upon the books of his office and that the defendant, J. O. Anderson, as treasurer of the said county of Minnehaha, will proceed to collect the same pursuant to the provisions of said purported statute Exhibit A.

Eighteenth.

That the plaintiff is a corporation engaged in the operation of a line of railroad in the said county of Minnehaha; that all of its property in said county of Minnehaha consists of its right-of-way, station grounds, line of railroad, bridges, culverts and other property employed in the maintenance and operation of its line of railroad; that it is not the owner of any agricultural land in said county of Minnehaha other than that required for its right-of-way; that it is not engaged in any agricultural operations and that the construction of said spillway, retaining gates, dams, ditches and other work done as aforesaid by the board of county commissioners of the said county of Minnehaha conferred no benefits upon the plaintiff or its property; that of the property belonging to the plain-

tiff no part except such as are specified under the heading "Benefits to Roads, Railroads, etc." in said notice, Exhibit C, formed a part of the original area of said drainage
20 ditches No. 1 and No. 2 for which an assessment was made at the time the same was originally constructed and that all other property belonging to the plaintiff and mentioned in said notice consists of property upon which an apportionment of benefits is now for the first time sought to be made; that no portion of the property of plaintiff upon which an apportionment of benefits is now sought to be made for the first time is subject to overflow or is in danger of damage by overflow or is situated within or adjacent to any lands subject to overflow or is drained to any extent by said spillway and other improvements or benefited thereby.

Nineteenth.

That this action is a suit of a civil nature to resist and prevent an assessment upon the property of plaintiff under the pretended authority of a purported act of the Legislature of the state of South Dakota claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000.00) and is the amount of said purported assessment, to-wit: a sum in excess of Fifteen Thousand Dollars ($15,000.00).

Twentieth.

That the costs of the board of county commissioners of said Minnehaha County in constructing said spillway, dams, retaining gates, and ditches, were unauthorized under the constitution and laws of the state of South Dakota, and that the same have never been approved by the State Engineer
21 of the state of South Dakota; that no benefits have accrued to plaintiff or its property by the construction of said spillway, dams, retaining gates, and ditches, and by the other work done as aforesaid upon the property, in the drainage area of said drainage ditches No. 1 and No. 2, but that the same have been and are a positive damage to the property of plaintiff.

Twenty-First.

That the board of county commissioners of Minnehaha County under the drainage law and under the [constitional] provisions of Section 6, Article 21 of the State Constitution is wholly without authority, save and except to provide drain-

age for agricultural lands; that the improvements made and the work done were not for such purpose, nor did the plaintiff receive nor will the plaintiff receive any special benefit not shared in by the general public therefrom; that in the doing of the work and in the making of the improvements and incurring the indebtedness the board of county commissioners of Minnehaha County was wholly without jurisdiction and the obligations created, for the payment of which assessment is attempted to be made under the purported drainage law, are wholly void and that no assessment under the purported law of the state of South Dakota can lawfully be made or the proceeds thereof applied to the payment of said indebtedness.

Twenty-Second.

That said purported statute of the state of South Dakota, "Exhibit A" hereto, is unconstitutional and void, in that the same is in violation of Section 2 of Article VI. of the Constitution of the State of South Dakota, and in that the same is in violation of the Fourteenth Amendment of the Constitution of the United States; that said Statute, "Exhibit A", is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area, and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad company and other corporation, and upon the property of municipal and quasi-municipal corporations, and upon platted property in cities and villages. Said purported law, "Exhibit A", is further unconstitutional and void in that the same provides for an assessment against property without the right of the property owner to be heard thereon and without notice of any character to the property owner; that if said apportionment of benefits be made as threatened by the said board of county commissioners of said Minnehaha County, and as is provided in said notice, "Exhibit C", the same will constitute the taking of the property of plaintiff and of the
22 other property owner affected by said notice without due process of law; that a cloud will be placed upon the title of the plaintiff to its real property situated within said drainage area [effected] by said notice, "Exhibit C" and that there will result a multiplicity of suits and that plaintiff and other property owners [effected] will suffer irreparable injury.

Wherefore, plaintiff prays judgment that the defendants and each of them, their agents, servants, employes, attorneys,

and successors in office, and each and every one of them, be forever restrained and enjoined from proceeding further in the making of an apportionment of benefits upon the property of plaintiff for the construction of said spillway, dams, retaining gates, ditches, and for the other work done, as aforesaid, by the board of county commissioners in the area of said drainage ditches No. 1 and No. 2 and restrained and enjoined from making any assessment upon the property of plaintiff for the cost of the construction of said spillway, dams, retaining gates, ditches, and other work, or any part thereof, and from proceeding in any manner under said purported statute, "Exhibit A" in the construction of any work in the area of said drainage ditches No. 1 and No. 2 and from doing any act looking toward the apportionment of benfits for any work heretofore done in the area of said drainage ditches No. 1 and No. 2, and from doing any act tending towards the making of an assessment for the cost of any such work heretofore done, and from in any manner proceeding under said purported law, "Exhibit A", in the doing of any work heretofore done in the area of said drainage ditches No. 1 and No. 2; that the defendant, Fred E. Ward, as auditor of the said county of Minnehaha, be forever restrained and enjoined from making
23 any apportionment of benefits for work done, as aforesaid in the area of said drainage ditches No. 1 and No. 2, and from making any assessment therefor, and from certifying any assessment therefor to the county treasurer of the said county of Minnehaha; that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as county commissioners of the said county of Minnehaha, and their successors in office be forever restrained and enjoined from fixing a proportion of benefits for the construction of said spillway, dams, retaining gates and ditches upon the property of plaintiff and upon the property of the other property owners named in said notice, "Exhibit C", and forever restrained and enjoined from making any assessment against plaintiff, or its property, or against the property of any other property owner in the area of said drainage ditches No. 1 and No. 2 and for the cost of said work; that the defendant, J. O. Anderson, as treasurer of Minnehaha County, South Dakota, and his successors in office, be forever enjoined and restrained from filing any assessment and from collecting any assessment against the property of plaintiff, or of the other property owners named in said notice, "Exhibit C", upon any assessment for the construction of said spillway, dams, retaining gates and ditches; that the said purported statute of the state of South Dakota, "Exhibit C", hereto, be

adjudged and decreed to be unconstitutional and void; that all acts of the board of county commissioners of said county of Minnehaha and of the state engineer of the state of South Dakota heretofore done in connection with the construction of said spillway, dams, retaining gates and ditches be adjudged and decreed to be illegal and void; that it be adjudged and decreed that no benefits have resulted to plaintiff from the construction of said spillway, dams, retaining gates, and ditches and that no apportionment of benefits or assess-
24 ment of damages ever be made against plaintiff or its property therefor.

That pending the issuance of a perpetual injunction herein, this Honorable Court grant an interlocutory injunction herein restraining the defendants herein, their agents, servants and employes and each and every of them from doing any of the above mentioned acts until the final hearing herein or until the further order of this court; that before the hearing and determination of plaintiff's application for an interlocutory injunction this Court grant a temporary restraining order restraining the said defendants, their agents and servants and each [of] every of them, from doing any of the above mentioned acts until the hearing and determination of plaintiff's application for an interlocutory injunction herein.

The plaintiff further prays that a subpoena of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, individually and as County Commissioners of the County of Minnehaha in the State of South Dakota, and to Fred E. Ward, individually and as auditor of the said county of Minnehaha, and to J. O. Anderson, individually and as Treasurer of the said County of Minnehaha, thereby commanding them and each of them on a day certain therein to be named to be and appear before this Honorable Court, and then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular, the premises and to perform and abide by such order, direction or decree as may be made in the premises, and that on final hearing hereof said order of injunction may be made perpetual. Plaintiff further prays for such other and further

relief as shall to Court seem just, proper and equitable, and for its costs and disbursements herein.

25

ED. L. GRANTHAM and
C. O. BAILEY
Solicitors for Plaintiff.

H. H. Field
of Counsel.

26

Exhibit B.

Proposed Distribution of Proportional Benefits.

	District or Division	Acres	Units	Percent of total.	
1.	Farm lands north of City Limits and North of South Line of Sec. 12-101-50	13,271.09	10862.30	33.4%	$103,191.85
2.	City Lots and Town of Renner lying north of above line.	81.20	42.52	0.1%	403.94
3.	Farm land and tracts south of above line,	2,065.23	2958.45	9.1%	28,105.28
4.	City lots south of above line,	361.60	1372.52	4.2%	13,038.94
5.	City of Sioux Falls,		3147.95	9.7%	29,905.52
6.	Minnehaha County,		2518.36	7.7%	23,924.42
7.	Township roads,		1573.98	4.8%	14,952.81
8.	Railroads,		4721.91	14.5%	44,858.15
9.	Northern States Power Company,		5351.63	16.5%	50,840.49
	Totals,	15,722.12	32549.62	100.0%	$309,221.40

In the above calculation the Value of One Unit is taken at $9.50.

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27 (Exhibit C, Pages from "The Daily Argus-Leader" of July 20, 1921, containing notice of Board of County Commissioners of County of Minnehaha as to time and place for equalizing the proportion of benefits for construction of spillways, dams, etc.)

CHART

TOO

LARGE

FOR

FILMING

28 Endorsed: Filed in the District Court on Jul. 29, 1921, at 9 A. M.

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29 (Order granting leave to Minnehaha National Bank of Sioux Falls et al., to intervene and be made parties defendant.)

The matter of hearing the show cause order heretofore issued out of this Court at the instance of the Minnehaha National Bank of Sioux Falls, South Dakota, et al, to the above named plaintiff and defendants in the above entitled cause, coming on regularly for hearing before this Court, at the court room thereof, in the Federal Building, in the City of Sioux Falls, South Dakota, the said plaintiff appearing by its attorneys of record, and he said defendants appearing by their attorneys of record, and the said petitioning interveners appearing by their attorneys, Porter & Bartlett, and after hearing of said matter, it is hereby

Ordered and Adjudged that the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, said petitioning interveners, petition be granted, and the said Minnehaha Nation Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Hartford, South Da-
30 kota, The Colton State Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, the Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, H. E. Donahoe, and W. G. Porter, be and they are hereby made parties defendant to this cause of action, and they are hereby given until the 25th day of August, 1921, at Ten o'clock A. M. thereof, within which time to file their answer to plaintiff's bill of complaint herein, and to make a return to plaintiff's show cause order herein.

And good cause appearing therefor, it is further likewise Ordered that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock

as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, have and they are hereby granted until August 25th, 1921 at Ten o'clock A. M. to file their answers to plaintiff's bill herein, and to make a return to plaintiff's show cause order herein.

And it is further Ordered that the hearing of said show cause order be and the same is hereby adjourned to August 25th, 1921, at Ten O'clock A. M.

Dated this 11th day of August, A. D. 1921.

By The Court:

JAS. D. ELLIOTT,
Judge of the District Court.

Attest:
Jerry Carleton,
Clerk of the District Court.

(Seal of the Court)

Endorsed: Filed in the District Court on Aug. 19,
31 1921, at 2 P. M.

And afterwards, to-wit, on the 1st day of September, A. D. 1921, there was filed in the office of the clerk of said court, Answer of Defendants that the Title of the Case, Paragraphs A, B, C, D and F of defendants' Special Answer, Introduction and Paragraphs First to Twenty-second inclusive, of defendants' General Answer, Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII XIII, XIV and XV of defendants' Affirmative Defense, the Prayer, Petition of F. L. Blackman and others to reconstruct and improve drainage ditches No. 1 and 2, the Order for filing said Petition, the Resolution for survey under said Petition, the Resolution fixing the exact line and width of the ditch and fixing the time and place for hearing said Petition, and the Resolution establishing Drainage Ditch No. 1 and 2, all as contained in said Answer of Defendants, are in words and figures the following, to-wit:

32 (Answer.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, Milwaukee & St. Paul Railway Company, Plaintiff,

vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of

Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha, County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, W. G. Porter, Intervening Defendants.

Comes now the above name defendants, A. G. Risty, et al., and for their answer to plaintiff's bill of complaint in the above entitled action, admit, deny and allege as follows:

A.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint, allege that said bill does not state any matter of equity entitling plaintiff
33 to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against the said defendants in that said plaintiff has a plain, adequate and complete remedy at law.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

B.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint and the allegations contained in paragraph twenty-two thereof, to-wit: "That there will result a multiplicity of suits and that the owners affected will suffer irreparable injury", are not truly stated or alleged in good faith and are stated with the false and fraudulent purpose of imposing upon the jurisdiction of this court and they are therefore fictitious and fraudulent. And

said defendants say there are no other actions at law or in equity pending or threatened against said plaintiff and that said plaintiff has a plain, adequate and complete remedy at law, all of which these defendants allege to be true and plead the same in bar to said bill.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

C.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint, allege that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this Court in that this suit is wholly based upon the alleged existence of a federal question and diversity of citizenship, and that the amount sued for and the value of the subject matter as alleged in said bill is not truly stated or alleged in good faith. That
34 the allegation of plaintiff's bill show it as being "a suit of a civil nature to resist and prevent an assessment upon the property of this plaintiff under the pretended authority of a purported act of the legislature of the State of South Dakota, claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00) and is the amount of the threatened assessment, to-wit: a sum in excess of Fifteen Thousand Dollars ($15,000.00)", are false and stated with a false and fraudulent purpose of imposing upon the jurisdiction of this Court and are therefore fictitious and fraudulent. And said defendants say that the amount involved, or value of the subject matter in this suit, does not exceed the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs; that said bill of complaint upon its face shows that under the drainage law referred to in paragraph four thereof the amount of the assessment, or the amount in controversy herein, has not been, and cannot be, determined until after the equalization thereof provided for in such statute and until such equalization, the amount to be hereinafter assessed, if any, by said Board of County Commissioners or by the Courts of the State of South Dakota, to which an appeal is taken, as provided for by said law is purely speculative, is uncertain and undeterminable at this time by said plaintiff, this court, or anyone at all, and is dependent entirely upon the showing made by this plaintiff at such hearings and determinations

provided for by said law, as to the amount of benefits received by this plaintiff; and that no sum has been or can be assessed and determined against the plaintiff's property until such equalization of the proportion of benefits has
35 been had, and at which hearings this plaintiff is permitted to make his showing therein and the amount of benefits, if any, which plaintiff does receive are thereafter equalized and fixed by said Board or Court and the amount so fixed is then extended and assessed against the property of said plaintiff, and not otherwise, all of which these defendants aver to be true and set up the same in bar of plaintiff's bill of complaint herein.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

D.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint herein, allege that on or about December 4, 1920, an equity suit was instituted in the Circuit Court within and for Minnehaha County, in the State of South Dakota, the same being a Court of general jurisdiction and having jurisdiction over the subject matter there presented by one Oluf O. Gilseth, whose lands are affected by the construction of drainage ditch No. 1 & 2 and against which lands the proportion of benefits for the construction of said ditch has been proportioned upon the same basis and in like manner as the proportion of benefits upon the lands of this plaintiff as hereinafter set forth, which action was brought by the said Oluf O. Gilseth, for himself and as representing an informal organization of farmers and others who are similarly situated, against the defendants herein, the Board of County Commissioners of Minnehaha County, South Dakota, and other persons, which action was instituted with full knowledge, approval, acquiescence and consent of the plaintiff herein, its officers, agents and attorneys, and in which said cause the same facts are alleged and relied on in plaintiff's bill of complaint as herein set forth, and which said bill of complaint prayed that said defendants be
36 forever enjoined and restrained from making or attempting to make any proportion of benefits upon the property of the plaintiffs herein, or the property of other property owners within the drainage area of the drainage ditches No. 1 and No. 2 for the costs and construction of said spillway, dams, retaining gates or other work, and be forever restrained and enjoined from levying any assessment upon the property of the plaintiff or upon the property of

other property owners in said drainage area for the payment of the costs of the construction of said spillway, dams, retaining gates or other work, for the reason and upon the grounds that the law under which said drainage ditch was established and constructed was in controvention of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States, to which said bill of complaint said defendant Board of County Commissioners and these intervening defendants set up and relied upon the same facts and defense as are hereinafter set forth; that said action came on for trial before said Circuit Court of Minnehaha County, South Dakota, with the full knowledge, acquiescence, consent and approval of plaintiff and at which trial plaintiff was entitled to be heard and was represented by its attorneys on the 31st day of January 1921, evidence was introduced upon said hearing on behalf of said plaintiff and these defendants and after the taking of evidence therein was closed and thereafter upon the facts there presented, and in the trial of which the plaintiff could have and did participate, said Court made findings and conclusions and judgment thereon dismissing said action upon its merits. That a duly exemplified copy of said bill of complaint, answer, findings, conclusions and judgments are hereto attached, marked "Exhibit B", and made a part hereof, all of which these defendants allege to be true and plead the same in bar.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

* * * * * * * * * *

37 F.

Comes now the above named defendants, A. G. Risty, et al, and for answer to plaintiff's bill allege that this suit does not really and substantially involve a controversy within the jurisdiction of this court, in that this suit involves the determination of facts and matters controlled and governed by the drainage statute of South Dakota, mentioned in plaintiff's bill of complaint and which by its provisions creates and provides its own special tribunal with exclusive original jurisdiction to try and determine the questions necessarily involved therein, and which are attempted to be presented for litigation in this action, and that, until such determination by said special tribunal so provided for, this court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, and that said special tribunal has not fully determined the matters and things herein presented for determination.

All of which these defendants allege to be true and plead the same to the jurisdiction of this Court.

Wherefore, defendants pray that plaintiff's bill of complaint be dismissed with costs.

G.

Comes now the above named defendants, A. G. Risty, et al, and for their further answer to the allegations contained in plaintiff's bill of complaint, admit, deny and allege as follows:

First.

That these defendants admit Paragraph I of said bill.

Second.

That these defendants admit Paragraph II of said bill.

Third.

That these defendants admit Paragraph III of said bill.

38 Fourth:

These defendants, answering said bill of complaint, admit that the Legislature of the State of South Dakota, at its Tenth Session enacted a law entitled: "An Act for the Establishment, Construction and Maintenance of Drainage and Levies in Counties, Whenever such Drainage shall be Conducive to the Public Health, Convenience or Welfare, or Whenever it shall be Necessary or Practicable for the Drainage of Agricultural Lands", which law was approved by the Governor of the State of South Dakota on February 21st, 1907, said law being Chapter 134 of the Session Laws of South Dakota of 1907, and that subsequently thereto, the Legislature of the State of South Dakota, in the years 1909, 1911, 1915 and 1917, enacted laws amendatory thereto, and in 1919 re-enacted said law and amendments thereto, as Sections 8458, to 8491, inclusive, of the South Dakota Revised Code for 1919, and thereafter and in the years 1920 and 1921, enacted amendments thereto, which law and amendments now constitute the drainage laws of the State of South Dakota, and specifically deny each and every other allegation of said paragraph.

Fifth.

These defendants answering the Fifth paragraph of complainant's bill, deny that the Board of County Commissioners of Minnehaha County, South Dakota,

established a drainage ditch known as "Drainage Ditch No. 1 and No. 2", as therein alleged, but allege the fact to be that in the year 1907 the Board of County Commissioners of Minnehaha County, upon the petition of William H. Lyon, accompanied by a proper bond, approved by the County Auditor, and after due notice and other procedure pursuant to and under Chapter 134 of the Laws of 1907 of the State of South Dakota, established Drainage Ditch No. 1 commencing at a point named in the Southeast Quarter (SE¼) of Section Twenty-nine (29), Township One Hundred two (102), Range Forty-nine (49), running thence about two (2) miles directly South, thence in a Southeasterly course about a mile, cutting through the rim of the natural ridge or bluff just North and East of the State Penitentiary in the City of Sioux Falls, and descending about one hundred (100) feet following the slope of the hill, and terminating in the Big Sioux River on the Northeast Quarter (NE¼) of Section Nine (9), Township One Hundred One (101), Range Forty-nine (49), which said drainage ditch was constructed so as to have a bottom width of forty (40) feet, except where the same cut through the bluff and descended into the Big Sioux River, where a thinly lined concrete gutter or spillway, with sufficient capacity only to carry the water that was planned to come through the said ditch, was constructed, but the terminal thereof was never safely or securely anchored and established, and that thereafter and before the construction of said Drainage Ditch No. 1 had been completed, one Iver R. Peterson and numerous other persons, filed their petition in regular form, accompanied by a proper bond duly approved by the County Auditor, with said Board of County Commissioners, asking and praying that the said Drainage Ditch No. 1 be extended Northward several miles through the Valley of the Big Sioux River, to drain other agricultural lands therein situated; the said petition was found sufficient in form, and was ordered filed and referred to the State Engineer, and a resolution for survey regularly adopted thereon, and thereafter, and upon the Engineer's written report of said survey, by resolution, the exact line and width of said ditch extension was fixed, and after due notice and hearing, said petition was allowed, and resolution adopted by the Board of County Commissioners establishing said drainage ditch, and designating it as "Drainage Ditch No. 2", extending from the North end of Drainage Ditch No. 1, hereinbefore described, Northward about twelve (12) miles to a point near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, and said drainage ditch was thereafter constructed,

which ditch so constructed, tapped the Big Sioux River in two places, and the assessment for the costs and expense of the construction thereof was duly spread upon the lands benefited within the territory embraced within the initial point in Dell Rapids Township, and the terminal point in Section Nine (9) of Sioux Falls Township; and further answering said Paragraph V, these defendants admit that prior to the year 1916 assessments were duly spread upon the lands determined to be benefited by the construction thereof, and such assessments collected, but deny each and every other allegation in said paragraph contained.

Sixth.

These defendants answering the sixth paragraph of complainant's bill, admit the allegation contained in said paragraph, but allege the fact to be that in addition to the lands drained lying North of the City of Sioux Falls, the said Drainage Ditches No. 1 and No. 2 also drained, affected and benefited lands lying West and South of said City and also the lands adjacent to said River through and in said City of Sioux Falls were drained, affected and benefited thereby.

41 Seventh.

These defendants answering the Seventh Paragraph of the complainant's bill, allege that they are without knowledge as to the facts therein set out, and therefore deny the same.

Eighth.

These defendants answering Paragraph VIII of the complainant's bill, specifically deny that Drainage Ditches No. 1 and No. 2 were ever completed prior to the year 1916, or of sufficient capacity to drain the agricultural lands adjacent thereto, and as to the other allegations in said paragraph, these defendants allege that they are without knowledge of the facts therein stated, and therefore deny the same.

Ninth.

These defendants answering the Ninth paragraph of complainant's bill, admit the statements therein made, but in explanation thereof, allege the further facts to be that after the construction of said spillway, as above described, the capacity of said ditches were increased by the rapidly flowing waters therein, eroding the banks and widening said Ditch No. 1 to nearly twice its original width of forty feet; the natural barrier which originally prevented the waters of the Big Sioux

River from flowing into said Ditch No. 1 near its initial point, except in flood times, eroded and wore away and permitted a large part of the water from the Big Sioux River to flow uncontrolled directly into said ditch and through the same to said spillway, which said spillway did not have the capacity to safely carry all of the flood waters that came to it through said ditch; that by reason of the foregoing facts said ditches became out of repair, and filled with sand bars and mud, and other obstructions, and that, owing to the tortuous course of the Big Sioux River through the district drained by said Ditches No. 1 and No. 2, the said river and said ditches were inadequate to carry away the flood waters and properly drain the lands within the area of said drainage ditches during flood seasons; that on or about the 15th day of March, 1916, during a spring flood, said spillway and outlet for said drainage ditches, as above described, was washed out and destroyed, so that the waters passing through said ditches and outlet, were wholly uncontrolled; that at the place where said spillway had been constructed, the waters descend-
42 ed to the basin of the Big Sioux River over a steep bluff by a drop of approximately of the height of one hundred feet, and that after the washing out and destruction of said spillway and outlet, the waters from said ditches washed out a deep gorge in the bluff, and tore away and destroyed the adjacent land to the extent of several acres; that said outlet and spillway were located in the immediate vicinity of State lands belonging to the State of South Dakota, and in the immediate vicinity of the State Penitentiary, and also of the City Water Works of the City of Sioux Falls, by means of which water works the said City was supplied with water from gravel beds immediately adjacent to said drainage ditches, and that by reason of the washing out of said spillway and of the uncontrolled waters of said ditches, the said lands of the State of South Dakota, the State Penitentiary and the water works and water supply of the said City of Sioux Falls, as well as the properties of private citizens in the vicinity of said outlet and spillway, were greatly imperiled and endangered; that there was imminent danger of the waters of the Big Sioux River being entirely diverted from their natural course into Drainage Ditch No. 1 and through the said spillway and outlet, and the water power of the Big Sioux River immediately above the mouth of said drainage ditches thereby destroyed, to the great and irreparable damage of many private property owners.

Tenth.

These defendants answering the Tenth Paragraph of the complainant's bill, specifically deny the facts therein stated, and each and every allegation thereof.

Eleventh.

These defendants answering the Tenth paragraph of the complainant's bill, hereby specifically deny the same, and each and every allegation thereof, and in explanation of the facts attempted to be therein set out, allege that upon the oc-
43 currence of the destruction of the original spillway as hereinbefore set out in the Ninth paragraph hereof, that thereupon the Board of County Commissioners of said Minnehaha County took immediate steps to control the said waters coming through said drainage ditches, by means of dams across said drainage ditches above said spillway, and by driving piling therein, and were so employed when, on or about the 21st day of March, 1916, one Charles Kaufman, and other persons owning property within the area of said Drainage Ditch No. 2, brought an action in the Circuit Court of Minnehaha County, South Dakota, to restrain said Board from so proceeding to control the waters of said drainage ditches, and obtained an order against said Board, requiring them to show cause why an injunction should not be granted, which said order came on for hearing before the said Court on the 25th day of March, 1916, and the said Court thereupon denied said application for said temporary injunction, whereupon said action was dismissed, the same being Circuit Court
44 File of Minnehaha County No. 15708, which is hereby referred to and made a part hereof.

That on or about April 1, 1916, and because of the conditions above described, the plaintiff in the last mentioned suit and a large number of his neighbors, similarly situated and affected by said drainage ditches perfected an informal local organization and appointed a committee of eight members to look after their interests with reference to repairing said drainage ditches, and to urge before the Board of County Commissioners, such improvements as seemed advisable.

That thereafter and on or about the 8th day of April, 1916, several persons representing said local organization or committee, including some of the said plaintiffs in said last mentioned suit, filed a petition and bond with the said Board of County Commissioners praying that the outlet and spill-

way to said drainage ditches as originally established and constructed, be closed up and abandoned, and that a new outlet for said ditches be provided by diverting the waters thereof at a point above said spillway, as originally constructed, in a Westerly direction through Covell's Lake, and thence back into the Big Sioux River above the said City of Sioux Falls, upon which said petition the said Board caused a survey to be made, with the approval of the State Engineer, and a surveyor's report to be filed, and a hearing had upon said petition, after notice, as required by law upon which hearing numerous property owners within the territory affected thereby, appeared before said Board and filed objections to the said proposed proceedings, and filed numerous large claims for damages by reason of said proposed change of outlet, and that upon said hearing, on July 8th, 1916, said Board made an order allowing the prayer of said petition, and established said Covell's Lake outlet, and abandoned said outlet and spillway as originally established and constructed; that thereupon numerous conferences were had between the petitioners in said proceeding last
45 above referred to, and the said objectors and property owners owning lands within the area of said Drainage Ditches No. 1 and No. 2, and that it was agreed at said conferences that the proceedings upon said petition last above referred to should be abandoned, and the same were abandoned accordingly, and that a new petition should be filed and new proceedings instituted for the re-establishment of said Drainage Ditches No. 1 and No. 2 and the reconstruction and improvement thereof, and the re-establishment and the reconstruction of the outlet to said ditches, and for the establishment and construction of a new spillway to properly control and take care of the waters flowing through said drainage ditches, and for the enlargement of said drainage district so as to embrace all of the property benefited thereby, extending from the Northern end of said territory included in said Drainage Ditches No. 1 and No. 2, following the course of the Big Sioux River around the City of Sioux Falls, and extending as far down said river as the mouth of said spillway and outlet to said drainage ditches, where the waters thereof were discharged into the Big Sioux River, below the said City of Sioux Falls, and that thereafter, and in accordance with said agreement, and with the consent and acquiescence of this plaintiff, a new drainage petition and bond, approved by the County Auditor, were filed with the Board of County Commissioners, by the City of Sioux Falls, F. L. Blackman, and other persons who owned lands within the area

of and that was assessed for the cost of construction of said Drainage Ditches No. 1 and No. 2, praying for the establishment and construction of a new drainage ditch in the exact location of said original ditches, and the re-establishment and construction of a substantial spillway and outlet therefor, together with several cut-offs or ditches, straightening and canalizing the channel of the Big Sioux River ad-
46 jacent thereto, so as to improve and increase its carrying capacity, and praying that the assessment area be increased to cover said new territory benefited, pursuant to said agreement, which said petition being found sufficient in form by said Board of County Commissioners, was, on August 3, 1916, ordered filed and referred to the State Engineer, who, with the said Board of County Commissioners, on August 4, 1916, inspected the route of said drainage, and had several conferences with the said persons interested as aforesaid, including this plaintiff, and authorized and ordered a survey to be made by Engineer L. E. Stevens, under the supervision of the State Engineer, which said survey was accordingly made by said L. E. Stevens, who, on September 13, 1916, filed his written report with said petition, and thereupon the said Board of County Commissioners fixed the exact route and width of said drainage, and the time and place of hearing thereon, and caused notice of hearing to be given according to law and upon the return date fixed in said notice, after due hearing, and upon the approval and advice of the State Engineer, and without objection upon the part of the plaintiff herein, or any other person, upon October 3, 1916 found said proposed drainage, as petitioned for, to be conducive to the public health, convenience and welfare, and necessary and practicable for draining agricultural lands, and thereupon, by resolution duly adopted, re-established said drainage ditch in the exact location of the original ditches, and fixed the damages caused by the construction thereof, and designated it as "Drainage Ditch No. 1 & 2", and no appeal was taken from such order establishing said "Drainage Ditch No. 1 & 2", and said order so establishing said Drainage Ditch No. 1 & 2 is now in full force and effect.

Twelfth

These defendants answering the Twelfth paragraph of the complainant's bill, admit that the Board of County Commissioners of Minnehaha County have expended ap-
47 proximately Two Hundred and Fifty-five Thousand Dollars ($255,000.00) in, payment for work done and material furnished in the construction of ditches, dams, gate-

ways and the spillway upon said Drainage Ditch No. 1 and 2, for which drainage ditch warrants upon Drainage Ditch No. 1 and 2 Fund have been issued, payable only out of the assessments to be hereafter levied upon the lands and properties benefited by the construction of said ditch, and there is now due thereon, for principal and interest, about Two Hundred and Ninety Thousand Dollars ($290,000.00) and hereby specifically deny each and every other allegation in said paragraph contained, but further allege that the drainage warrants above referred to were issued, only upon duly verified claims, duly presented, audited and allowed by the County Commissioners, and report of the allowance of the same duly published in said Commissioners' proceedings, as provided by law.

48 Thirteenth

These defendants answering the Thirteenth paragraph of complainant's bill, hereby admit that on or about the 3rd day of August, 1916, a petition was filed in the office of the County Auditor of the County of Minnehaha, duly signed by the City of Sioux Falls, by George W. Burnside, its Mayor, and duly attested by Walter C. Leyse, City Auditor, F. L. Blackman, and others, which petition was for the purpose of re-constructing and improving Drainage Ditches No. 1 and No. 2, in Minnehaha County, South Dakota, and to construct a new spillway and outlet to Drainage Ditches No. 1 and No. 2, and to pay therefor by assessments upon the property, persons and corporations benefited thereby, but these defendants specifically deny each and every other allegation, matter and thing contained in said Thirteenth paragraph, but allege the facts to be as stated and set forth in the Eleventh paragraph of this Answer, and further allege that all acts negatived in said paragraph Thirteen, were duly taken, done and performed, upon due notice, as required by the laws of the State of South Dakota.

Fourteenth:

These defendants answering the Fourteenth paragraph of complainant's bill, specifically admit the same, except the allegation "and did not make any assessment for the payment of damages caused by the construction of said spillway, dams, retaining gates and ditches, and did not provide any moneys for the payment of such damages", which is hereby specifically denied, and the fact is alleged to be that the Board of

County Commissioners did, by resolution, assess the damages sustained by each tract of land, or other property through which the said ditch passes, and the damages as compensation for the land taken for the route of said drainage, and did settle said damages by issuing drainage warrants therefor, which were duly accepted by the persons determined to be entitled to such damages.

49 Fifteenth:

These defendants answering the Fifteenth paragraph of complainant's bill, hereby specifically deny each and every allegation in said paragraph contained, as therein alleged, and allege the facts in relation thereto to be as follows: That immediately after the establishment of "Drainage Ditch No. 1 & 2", as hereinbefore described, the said Board of County Commissioners, acting under said newly established Drainage Ditch No. 1 & 2, proceeded to dike, clean out, enlarge and re-construct original Drainage Ditches No. 1 and No. 2, and the additional river cut-offs were constructed, and the outlet and spillway of said drainage ditches re-built in a more substantial and permanent manner, upon plans approved by the State Engineer; that in the course of the construction of said spillway, plans were prepared under the supervision of the State Engineer, and approved by him on May 7, 1917, and bids for the construction thereof asked for by legal notice, and upon the opening of said bids and a consideration thereof, it was, by resolution of the Board, determined that the "spillway for which bids have been received for 'Drainage Ditch No. 1 & 2' can be constructed for less money than the amount of any bid submitted therefor", and it was "therefore ordered that the Board of County Commissioners cause such spillway to be constructed, hire the necessary labor, machinery, tools and appliances, and a superintendent to oversee the construction thereof, and purchase all necessary material for such construction, without letting a contract for the entire construction thereof", and the Board thereupon proceeded to construct said spillway in accordance with said determination, ordered the necessary material for the construction thereof, and employed the Sioux Falls
50 Construction Company to furnish the necessary labor, superintendent and supervision of the construction thereof, and to furnish the necessary machinery, tools, etc, to be used in said construction.

From the determination of the Board that it would build said spillway without letting a contract therefor, and by buying the necessary material therefor, and employing the Sioux

Falls Construction Company to furnish the necessary labor, machinery, tools, superintendent and supervision thereof, one William H. Lyon, being the original petitioner in the construction of original Drainage Ditch No. 1, appealed to the Circuit Court of Minnehaha County, South Dakota, which appeal came on for hearing before the Court on the 14th day of July, A. D. 1917, and the court, after full hearing and consideration of the evidence introduced on behalf of the appellant and the Board, dismissed said appeal, holding that it appeared that the "decision appealed from is one that rests in the sound judgment of the Board of County Commissioners, and is not a proper subject for review by the Court"; that the proceedings upon said appeal are contained in File No. 16405 of the Circuit Court of Minnehaha County, South Dakota, which file and proceedings are hereby referred to and made a part hereof.

That thereupon the said spillway and outlet to said Drainage Ditch No. 1 & 2 was immediately re-constructed in a more substantial manner in accordance with the determination of said Board of County Commissioners, under the supervision of the State Engineer of the State of South Dakota, at a cost of more than One Hundred Thousand Dollars ($100,000.00); that the soil at the place where said outlet and spillway are constructed is of peculiar formation; that beneath the
51 surface at said point are found deep quicksands, the extent of which was at said time unknown to said Board of County Commissioners; that by reason of the necessity for immediate action in the construction of said spillway, and on account of the difficulties to be encountered in the construction thereof, it was impossible to prepare fully completed working plans at the time said work was commenced, but that the working plans had to be modified and adapted to the difficulties encountered as the work progressed, and that thereupon and by reason thereof, and with the approval and under the supervision of the State Engineer, the said Board of County Commissioners employed one F. C. Shenehon, a competent civil and [hydralic] engineer, to prepare working plans and to superintend the construction of said spillway as the work progressed, and that said working plans were so prepared by said Shenehon, and said spillway re-constructed under his immediate supervision and the supervision and approval of the State Engineer, in a substantial and adequate manner, and that the same, as so constructed, has ever since said time been in operation, and for the past three years has safely controlled and cared for the waters flowing

through said drainage ditches, and protected the properties adjacent thereto, as aforesaid, from injury and damage by reason of the said waters, and the same is now in successful operation.

These defendants further allege that the records and proceedings in the establishment and construction of Drainage Ditch No. 1 & 2, on the petition of F. L. Blackman, the city of Sioux Falls, and other persons, referred to in Paragraph Fifth hereof, except the lengthy notices, are hereunto annexed, marked Exhibit "A", and made a part hereof, and that all of said proceedings were taken and had after due and legal notice, as required by law, which notice specifically named the plaintiff herein, and cited it to show cause why said drainage ditch should not be constructed as petitioned for.

52 Sixteenth:

These defendants answering the Sixteenth paragraph of complainant's bill, hereby specifically admit the facts therein set out, except the allegations that said "Chenoweth & Rettinghouse were to be paid in Drainage ditch warrants on Drainage Ditch No. 1 and No. 2", and except the further allegation that they "made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereto annexed, marked Exhibit "B", and made a part hereof", which allegations are hereby specifically denied, and the facts are alleged to be that the said Chenoweth & Rettinghouse were paid in drainage warrants drawn on Drainage Ditch No. 1 & 2 Fund, and that said Exhibit "B" referred to, is merely an analysis or resume or deduction drawn from the facts set out in the report, merely for the purpose of showing the results shown by the proportion of benefits recommended.

Seventeenth.

These defendants answering the Seventeenth paragraph of complainant's bill, deny that said Board of County Commissioners, on the 10th day of June, 1921, adopted a purported notice of time and place of equalizing the proportioning of benefits for the construction of said spillway, etc., as therein alleged, but allege the fact to be that for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to

base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum
53 of about Two Hundred and Fifty-five Thousand Dollars ($255,000.00), in payment of the labor, material, etc., used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commissioners, did, on the 10th day of June, 1921, by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and indirect benefits that accrue by the construction of said drainage, taking a particular tract as a unit for comparison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law, to this plaintiff, at which time and place, the apportionment fixed as to the plaintiff's property and other property, will be equalized, and the assessment will be later extended and spread on said equalization, but the defendants have no knowledge of the total number of units or sum in dollars that will finally be equalized and assessed against said plaintiff's property. The defendants further allege that the notice, in addition to being published, as stated, was also posted according to law, and deny the balance of said paragraph.

54 Eighteenth.

These defendants answering the Eighteenth paragraph of complainant's bill, admit that the plaintiff is a corporation engaged in the operation of a line of railroad in the said County of Minnehaha, and that all of its property in said County of Minnehaha consists of its right-of-way, station grounds, lines of railroad, bridges, culverts and other property owned and used in the maintenance and operation of its line of rail-

road, but specifically deny each and every other allegation, matter and thing in said paragraph contained.

Nineteenth.

These defendants answering the Nineteenth paragraph of complainant's bill, specifically deny the same.

Twentieth.

These defendants answering the Twentieth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

Twenty-first.

These defendants answering the Twenty-first paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

Twenty-second.

These defendants answering the Twenty-second paragraph of complainant's bill, specifically deny the same and each and every allegation thereof.

These defendants further answering complainant's said bill, and by way of affirmative defense, allege:

55 I.

That said proceedings of the said Board of County Commissioners so taken and had in the establishment and construction of said Drainage Ditches No. 1 and No. 2, and in the assessment and equalization of the proportion of benefits, and in the assessment of the cost thereof upon the lands benefitted thereby, were taken and had after due and legal notice as required by law, and that said ditches were so established and constructed in accordance with said proceedings.

II.

These defendants further allege that, as originally constructed and established, the outlet and spillway to said Drainage Ditches No. 1 and No. 2 were incomplete and insufficient to properly control and carry away the waters from said drainage ditches; that said ditches had become out of repair, and filled with mud and sand, and otherwise obstructed, and that owing to the tortuous course of the channel of the Big Sioux River through the district drained by said Ditches No. 1 and No. 2, the said River and the said ditches were inadequate to carry away the flood waters and properly

drain said lands within the area of said drainage ditches, and that during or about the month of March, 1916, the said spillway and outlet to said drainage ditches was washed out and destroyed, so that the waters passing through said ditches were wholly uncontrolled; that at the place where said spillway had been constructed, the waters descended to the basin of the Big Sioux River over a steep bluff by a drop approximately of the height of about one hundred feet, and that after the washing out and destruction of said spillway and outlet, the waters from said ditches washed out a deep
56 gorge in said bluff, and tore away and destroyed the adjacent land to the extent of several acres; that said outlet and spillway were located in the immediate vicinity of State lands belonging to the State of South Dakota and in the immediate vicinity of the State Penitentiary, and also of the City Water Works of the City of Sioux Falls, by means of which water works the said City was supplied with water from gravel beds immediately adjacent to said drainage ditches, and that by reason of the washing out of said spillway and of the uncontrolled waters of said ditches, the said lands of the State of South Dakota, the State Penitentiary and the water works and water supply of the said City of Sioux Falls, as well as the properties of private citizens in the vicinity of said outlet and spillway, were greatly imperiled and endangered; that there was imminent danger of the waters of the Big Sioux River being entirely diverted from their natural course through the said spillway, and the water power of the Big Sioux River immediately above the mouth of said drainage ditches destroyed, to the great and irreparable damage of many private property owners; that thereupon the Board of County Commissioners of said Minnehaha County took immediate steps to control the said waters coming through said drainage ditches, by means of the dams across said drainage ditches above said spillway and by driving piling therein, and were so employed when, on or about the 21st day of March, 1916, one Charles Kaufmann, and other persons owning property within the area of said drainage ditches, and representing the property owners within the area of said Drainage Ditch No. 2, brought an action in the Circuit Court of Minnehaha County, South Dakota, to restrain said Board from so proceeding to control the waters of said drainage ditches, and obtained an order against said Board requiring them to show cause why an injunction should not be granted, which said order came on for hearing before said Court on the 25th day of March, 1916, and the said court thereupon denied said

application for said temporary injunction, whereupon
57 said action was dismissed, the same being Circuit Court File of Minnehaha County No. 15708, which is hereby referred to, and by reference made a part hereof.

III.

That thereafter and on or about the 8th day of April, 1916, some of the said plaintiffs in said last mentioned suit, and others, filed a petition and bond with the said Board of County Commissioners, praying that the outlet and spillway to said drainage ditches be closed up and abandoned, and that a new outlet for said ditches be provided by diverting the waters thereof at a point above said spillway, as originally constructed, in a Westerly direction through Covell's Lake, and thence back into the Big Sioux River, above the said City of Sioux Falls, upon which said petition the said Board caused a survey to be made, surveyor's report to be filed, and a hearing had upon said petition, after notice, as required by law, upon which hearing numerous property owners within the territory affected thereby appeared before said Board and filed objections to the said proposed proceeding, and filed numerous large claims for damages by reason thereof, and that upon said hearing, on July 8, 1916, said Board made an order allowing the prayer of said petition, and established said Covells' Lake outlet, and abandoned said outlet and spillway as originally established and constructed, on Drainage Ditch No. 1; that thereupon numerous conferences were held between the petitioners in said proceeding last above referred to, and the said objectors and property owners owning lands within the area of said Drainage Ditches No. 1 and No. 2, and that it was agreed at said conferences that the proceedings upon said petition last above referred to should be abandoned, and the same were abandoned, accordingly, and that a new petition should be filed and new proceedings insti-
58 tuted for the re-establishment of said Drainage Ditches No. 1 and No. 2, and the re-construction and improvement thereof, and the re-construction of the outlet to said ditches, and for the establishment and construction of a new and more permanent and substantial spillway to properly control and take care of the waters flowing through said drainage ditches, and for the enlargement of said drainage district, so as to embrace all of the property benefited thereby, extending from the Northern end of said territory included in said Drainage Ditches No. 1 and No. 2, following the course of the Big Sioux River around and through the City of Sioux Falls, and extending as far down said river as the

mouth of said spillway and outlet to said drainage ditches, where the waters therefrom were discharged into the said Big Sioux River below the said City of Sioux Falls, and that thereafter, and in accordance with said agreement, a new drainage petition and bond were filed by the City of Sioux Falls, F. L. Blackman, and other persons who owned land within the area of and that was assessed for the cost of construction of said Drainage Ditches No. 1 and No. 2, praying for the establishment and construction of a new drainage ditch in the exact location of said original ditches, and the construction of a new and more permanent and substantial spillway and outlet therefor, together with several new cut-offs or ditches straightening and canalizing the channel of the Big Sioux River adjacent thereto, so as to improve and increase its carrying capacity, and praying that the assessment area be increased to cover said new territory, pursuant to said agreement, which said petition being found sufficient in form by said Board of County Commissioners, was, on August 3, 1916, ordered filed and referred to the State Engineer, who, after receiving said petition, with the said Board of County Commissioners, inspected the route of said drainage,
59 and had several conferences with the said persons interested as aforesaid, and authorized a survey to be made by Enginer L. E. Stevens, under the supervision of the State Engineer, which said survey was accordingly made by said L. E. Stevens, who, on September 13, 1916, filed his written report of said survey with the County Auditor, and thereupon the said Board of County Commissioners, by resolution duly adopted, fixed the exact route and width of said drainage, and the time and place of hearing, and caused notice of hearing to be given according to law, and upon the return date fixed in said notice, after due hearing, and upon the approval and advice of the State Engineer, and without objection from the plaintiff herein, or anyone, upon October 3, 1916, found said proposed drainage to be conducive to the public health, convenience and welfare, and necessary and practicable for draining agricultural lands, and thereupon, by resolution duly adopted, established said drainage ditch, and fixed the damages caused by the construction thereof, and designated it as "Drainage Ditch No. 1 & 2", and no appeal was taken from such order establishing said Drainage Ditch No. 1 & 2, and the same is now in full force and effect, and that thereupon and thereunder said original Drainage Ditches No. 1 and No. 2 were immediately diked, cleaned out, enlarged and re-constructed, and the additional river cut-offs were constructed and the outlet and spillway of said drainage

ditches re-built in a more substantial and permanent manner, upon plans approved by the State Engineer; that in the course of the construction of said spillway, plans were prepared under the supervision of the State Engineer, and approved by him on May 7, 1917, and bids for the construction thereof asked for by legal notice, and upon the opening of said bids and a consideration thereof, it was, by resolution of the Board, determined that the "spillway for which bids have been received for 'Drainage Ditch No. 1 & 2' can
60 be constructed for less money than the amount of any bid submitted therefor", and it was "Therefore ordered that the Board of County Commissioners cause such spillway to be constructed, hire the necessary labor, machinery, tools and appliances, and a superintendent to oversee the construction thereof, and purchase all necessary material for such construction, without letting a contract for the entire construction thereof", and the Board thereupon proceeded to construct said spillway in accordance with said determination, ordered the necessary material for the construction thereof, and employed the Sioux Falls Construction Company to furnish the necessary labor, superintendent and supervision of the construction thereof, and to furnish the necessary machinery, tools, etc, to be used in said construction.

IV.

From the determination of the Board that it would build said spillway without letting a contract therefor, and by buying the necessary material therefor, and employing the Sioux Falls Construction Company to furnish the necessary labor, machinery, tools, superintendent and supervision thereof, one William H. Lyon, being the original petitioner in the construction of original Drainage Ditch No. 1, appealed to the Circuit Court of Minnehaha County, South Dakota, which appeal came on for hearing before the Court on the 14th day of July, A. D. 1917, and the Court, after full hearing and consideration of the evidence introduced on behalf of the appellant and the Board, dismissed said appeal, holding that it appeared that the "decision appealed from is one that rests in the sound judgment of the Board of County Commissioners, and is not a proper subject for review by the Court"; that the proceedings upon said appeal are contained in File No. 16405 of the Circuit Court of Minnehaha County, South
61 Dakota, which file and proceedings are hereby referred to and by reference made a part hereof.

V.

That thereupon the said spillway and outlet to said Drainage Ditch No. 1 & 2 was immediately re-constructed in a more substantial manner in accordance with the determination of said Board of County Commissioners, under the supervision of the State Engineer of the State of South Dakota, at a cost of more than One Hundred Thousand Dollars ($100,000.00); that the soil at the place where said outlet and spillway are constructed is of peculiar formation; that beneath the surface at said point are found deep quicksand, the extent of which was at said time unknown to said Board of County Commissioners; that by reason of the necessity for immediate action in the construction of said spillway, and on account of the difficulties to be encountered in the construction thereof, it was impossible to, prepare fully completed working plans at the time said work was commenced, but that the working plans had to be modified and adapted to the difficulties encountered as the work progressed, and that thereupon and by reason thereof, and with the approval and under the supervision of the State Engineer, the said Board of County Commissioners employed one F. C. Shenehon, a competent civil and hydraulic engineer, to prepare working plans and to superintend the construction of said spillway as the work progressed, and that said working plans were so prepared by said Shenehon, and said spillway re-constructed under his immediate supervision and the supervision and approval of the State Engineer, in a substantial and adequate manner, and that the same, as so constructed, has ever since said time been in operation, and for the past three years has safely
62 controlled and cared for the waters flowing through said drainage ditches, and protected the properties adjacent thereto, as aforesaid, from injury and damage by reason of the said waters, and the same is now in successful operation.

VI.

These defendants further allege that the records and proceedings in the establishment and construction of Drainage Ditch No. 1 & 2, on the petition of F. L. Blackman, the City of Sioux Falls, and other persons, referred to in Paragraph III hereof, except the lengthy notices, are hereunto annexed, marked Exhibit "A", and made a part hereof, and that all of said proceedings were taken and had after due and legal notice, as required by law, which notice specifically named the plaintiff herein, and cited it to show cause why said drainage

ditch should not be established and constructed as petitioned for.

VII.

These defendants further allege that in the assessment of Drainage Ditch No. 2, hereinbefore referred to, resolutions were adopted assessing and equalizing the proportion of benefits thereunder upon and including all of the land assessed for the construction of Drainage Ditch No. 1, and other lands, including the lands and property rights of the plaintiff herein, but making due allowance for the assessment already made upon the lands within the area of the original district of Drainage Ditch No. 1 thereby treating and consolidating said two ditches as Drainage Ditch No. 2; that all of the proceedings herein referred to required to be recorded and indexed in a book kept for that purpose in the County Auditor's office,

63 were so recorded and indexed.

VIII.

And the defendants, further answering complainant's bill, admit that they entered into a contract with Chenoweth & Rettinghouse, civil engineers, to make and perfect a topograhical survey of all the lands lying between the City of Dell Rapids and the outlet to said spillway and drainage ditch, lying within the valley of the Big Sioux River, and that said survey was necessary and was made in order that said defendant Board might advisedly make an apportionment of and fix the benefits to the lands and properties affected by reason of the benefits derived by said plaintiff and others like situated, by reason of the diking, cleaning out, reconstruction and improvement made upon said drainage ditch, the river cut-offs and new spillway and outlet to said ditches; and further allege that the original petition for said drainage ditch, river cut-offs and spillway, hereinbefore mentioned, was a compromise between the said petitioners therefor and others affected thereby, as hereinbefore set forth, and that the making and filing of said petition, accompanied by a bond, as provided by law, which was duly approved by the County Auditor of Minnehaha County, South Dakota, transmisssion of a copy thereof to the State Engineer, the inspection of the proposed route of said drainage project, the causing and ordering of a survey thereof to be made by a competent surveyor under the supervision of said State Engineer, the surveyor's report thereon, the filing of the same by the Board with said petition, said Board's determination of the exact length and line and width of said drainage improvement, and the order and resolution of said Board fixing

a time and place for hearing said petition, and the giv-
64 ing of notice thereof, the establishment of said drainage district and project by resolution and order of said Board upon said hearing, and the subsequent notice given to all parties interested, of the establishment of the cut-off ditches, including the plaintiff herein, and the final establishment thereof, and all work done and performed upon said ditches and river cut-offs ditches, and the establishment and construction of said spillway and work done thereon, and the manner of doing the same, and all other work done and performed upon said drainage ditch, cut-offs and spillway, were done and performed by said defendant Board, with the notice, actual knowledge, acquiescence, approval and consent of the plaintiff herein, its officers, agents and servants, and all others like situated, and said plaintiff and all others like situated during all the time said ditch, river cut-offs and spillway were being established, layed out and constructed, had notice and actual knowledge that payment therefor was to be made by special assessments against the lands and properties of said plaintiff affected thereby, and the lands of others like situated, and that there was no other provision of law or method of making such payment, and said plaintiff and none other of said parties took any legal steps to stop or prevent the establishment of, or work performed upon said ditches, river cut-offs or spillway, or the issuance of certificates of indebtedness or drainage warrants therefor, which said parties had notice and actual knowledge of, were to be taken up and paid only by said special assessments as aforesaid; and that said plaintiff and others like situated are now,
and since 1918 have been receiving large and continu-
65 ing benefits to their lands and properties affected, by reason of said reconstruction and construction of said drainage ditch, river cut-offs and spillway, under the said reestablishment as Drainage Ditch No. 1 & 2.

IX.

These defendants further allege, as instances of the notice and special knowledge, approval and co-operation of the plaintiff with these defendants, as the Board of County Commissioners, in the establishment and construction of said Drainage Ditch No. 1 & 2, that the plaintiff, the Chicago, Milwaukee & St. Paul Railway Company in the proceedings establishing the original Ditch No. 2, hereinbefore described, appealed from the resolution equalizing the proportion of benefits to the Circuit Court, and transferred said case to the United States District Court, District of South Dakota, Southern Di-

vision, and therein stipulated on January 3, 1912, that its proportion of the cost of the construction of said Drainage Ditch No. 2, as then constructed, was the sum of Eight Thousand Five Hundred Dollars ($8,500.00), according to said stipulation filed in the United States Circuit Court File No. 621, hereby referred to and by reference made a part hereof; that said plaintiff was by name summoned in the published notice, dated September 15, 1916, to appear and show cause why said Drainage Ditch No. 1 & 2 should not be established and constructed; that said Drainage Ditch No. 1 & 2 lies parallel and adjacent to the right-of-way of said plaintiff's railroad track for several miles North of the City of Sioux Falls, and the officers, agents and servants of plaintiff saw the work of diking, cleaning and repairing said ditch and spillway construction as it progressed, during several months in the years 1917 and 1918; that by special arrangement with the defendant Board, the plaintiff hauled and unloaded rock and other material to places agreed upon, to be used in constructing dams upon said ditch, and hauled laborers from Sioux Falls to such work, and stopped its trains at appointed places along said ditch to let off and take on said laborers, while engaged upon constructing said dams, and it was paid for said services by accepting Drainage Ditch Warrants on Drainage Ditch No. 1 & 2 Fund; that the said plaintiff also transported one of the dredges used in cleaning said Drainage Ditch to Renner, South Dakota, to be used in such ditch cleaning work, and such agents and servants at all times knew such work upon said ditch was being done in plain view from the trains passing along said ditch, as said work progressed.

66 X.

The defendants, further answering, allege that heretofore and on June 17th, 1920, said defendant Board of County Commissioners, at a regularly adjourned meeting, adopted a resolution and gave notice to the plaintiff herein and all others like situated, and all persons owners of the separate tracts of land through which said drainage ditches and river cut-offs now pass, as appears from the records of the office of the Register of Deeds on the date of the filing of the said petition herein, and also the present owners thereof, to show cause before the said defendant Board of County Commissioners on the 19th day of July, 1920, at two o'clock P. M., at the office of the County Auditor, in the Court House, in the City of Sioux Falls, Minnehaha County, South Dakota, if any they had, why all the acts, orders and resolutions of said Board heretofore had, done, passed and performed in relation

to said Drainage Ditch No. 1 & 2, as now established and constructed, including said river cut-offs and spillway at the terminal point thereof, all of which acts and doings of said Board, and resolutions and orders passed in relation thereto, were fully set forth in said notice, should not be ratified, approved and confirmed by said Board, referring to the files of said proceedings for further particulars; why a competent surveyor should not be employed to make a complete survey of said drainage area for the purpose of levying an equalization of benefits and assessment for its costs, and that all acts and orders of, said Board thereinbefore set forth in said notice in the laying out, establishment, construction and completion of said drainage ditch project, designated Drainage Ditch No. 1 & 2, as in said notice set forth, and as now constructed and completed, be made the final determination of said Board therein and thereon.

67 XI.

That said notice was duly published for two consecutive weekly issues of the Sioux Falls Daily Press, and true copies thereof posted in three public places along and near the route of said drainage ditch; that on the return day thereof, several persons appeared before said Board at the time and place designated in said resolution and notice, but no written objections to said show cause order and notice were filed with said Board, or at all, and thereupon said Board took said matter under advisement and adjourned until the 4 day of August, 1920, at which time said Board duly convened and passed their resolution therein, wherein it resolved and ordered among other things: "That a competent surveyor be employed and a complete survey made of the lands lying in the Big Sioux River valley between the City of Dell Rapids and the terminals of said drainage ditch and project, and tributary to and benefited by said drainage ditch and project, for the purpose of fixing the proportion of benefits of said drainage among the lands affected and benefitted thereby", which said resolution and order was thereupon filed in said ditch proceedings in the office of the County Auditor; that more than thirty days have elapsed since the passage of said resolution and determination of said Board, and no appeal from said resolution, order and determination of said Board has been taken by the said plaintiff herein, or any one at all, and the time for appealing therefrom has now elapsed and expired; that thereafter said Board presented said matter to the State Engineer, in whose opinion it was necessary

that said survey be made and he gave his approval of the making thereof, and that thereafter said defendant Board entered into a contract with the said Chenoweth & Rettinghouse, surveyors, pursuant to said order and resolution of the Board, passed and filed as aforesaid on the 4th day, of August 1920,
and not otherwise.
68

XII.

That by reason of each and all of the foregoing facts, acts and resolutions and orders done, passed and performed as hereinbefore set forth, the said plaintiff and all others like situated are now estopped and forever barred from in any manner claiming or asserting any right or relief herein, or at all.

XIII.

That in pursuance of said resolutions and orders hereinbefore referred to and set forth, and for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum of about Two Hundred and Fifty-five Thousand Dollars ($255,000.00), in payment of the labor, material, etc, used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commissioners, did, on the 10th day of June, 1921 by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said
Board, taking into consideration the direct and in-
69 direct benefits that accrue by the construction of said
drainage, taking a particular tract as a unit for comparison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in

said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law.

XIV.

The above named defendants, A. G. Risty, et al, further answering plaintiff's bill of complaint allege that heretofore and on and prior to October 3, 1916, due and legal notice was given to the plaintiff herein of the time and place appointed by the Board of County Commissioners of Minnehaha County, South Dakota, for claiming any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2 and that the plaintiff herein wholly failed and neglected to present to said Board of County Commissioners at said time and place, to-wit: October 3, 1916, any claim for damages therein, and that by reason thereof this plaintiff is now estopped and debarred from claiming or asserting herein any right, or claim to any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2.

XV.

The above named defendants, A. G. Risty, et al, for further answer to plaintiff's bill of complaint, allege that the plaintiff is not entitled to the aid of a court of equity herein, for
70 the reason that said plaintiff has failed, neglected and refused to tender or offer to tender herein the amount of the actual benefits received by it by reason of the establishment, construction and reconstruction of Drainage Ditch No. 1 and 2.

Wherefore, the defendants, above named, pray that the plaintiff's bill of complaint in said action be dismissed, with costs.

E. O. JONES,
L. E. WAGNER,
Solicitors for Defendants.

B. C. Matthews,
Of Counsel.

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71 Exhibit "A"

Petition.

To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefitted Thereby.

To The Honorable Board of County Commissioners of Minnehaha County, South Dakota:

1. The undersigned petitioners respectively represent and show that they are all residents of Minnehaha County, South Dakota, and that each of them is the owner of certain lands and real property situate and lying in said county in the valley of the Big Sioux River and within the territory to be drained, protected and benefitted by the reconstruction and improvement of drainage ditches One and Two in said Minnehaha County, South Dakota, and by the construction of a new spillway or outlet to said drainage ditches numbers One and Two.

2. Your petitioners further represent and show that said drainage ditches Numbers One and Two were established for the purpose of draining agricultural lands in 1907 and 1910 respectively as appears from records of said proceedings in the office of the County Auditor of Minnehaha County, South Dakota, which are hereby referred to and made a part hereof.

3. Your petitioners further represent and show that the said Drainage Ditches Numbers One and Two and the outlet thereto as constructed were and are insufficient to accomplish the purpose for which they were constructed and were
72 and are insufficient to properly drain the agricultural lands within the districts or territory supposed to be drained thereby and insufficient for the drainage of other agricultural lands lying within the valley of the Big Sioux River above the mouth of the outlet to said Drainage Ditches Numbers One and Two and between the mouth of said outlet and the lands heretofore included within the assessment districts upon which the cost of the construction of said drainage ditches One and Two was imposed and insufficient as constructed to improve, promote and conserve the public health and welfare within said territory hereinbefore described above the mouth of the outlet to said ditches Numbers One and Two lying partly within the City of Sioux Falls, South Dakota, all of which said lands and property would be benefitted, drained

and protected by a proper reconstruction and improvement of said Ditches One and Two and by the construction of a new and proper spillway or outlet to the same by means whereof the public health and welfare within the area hereinbefore described and referred to above the mouth of the outlet to said ditches would be conserved and improved.

4. Your petitioners further represent that it is necessary for the drainage of agricultural lands within said drainage districts Numbers One and Two and also agricultural lands lying above the mouth of the spillway or outlet to said ditches and between the mouth thereof and the present boundaries of said drainage Ditches Numbers One and Two to reconstruct, deepen, widen and improve said drainage ditches One and Two and to construct a new outlet or spillway thereto and that the construction of such new outlet or spillway and the reconstruction and improvement of said Ditches One and Two would also be conducive to the public health, convenience and welfare of the
73 City of Sioux Falls, South Dakota, and also of the County of Minnehaha, South Dakota and people resident within the said area hereinbefore described lying between the present boundaries of said drainage districts One and Two and the mouth of the outlet to said ditches and within the valley of the Big Sioux River, partly within the corporate limits of the City of Sioux Falls, and that in the reconstruction of the said ditches One and Two, it will be necessary that the same be cleaned, deepened, widened and that certain levees, dikes, flood gates and barriers thereto be constructed to such extent as may be necessary to carry out the surplus or flood waters and to properly drain and protect the lands within said drainage districts and within the area hereinbefore described and within the city of Sioux Falls and to properly conserve and promote the public health and welfare within the said area as aforesaid.

5. Your petitioners further represent that there should be constructed and installed in the said Drainage Ditches Numbers One and Two and at the head of the said Spillway or outlet of said Drainage Ditches, controlling gates for the purpose of regulating and controlling the amount of water flowing through the said ditches and over the said Spillway, the number and location of said gates and the manner in which they should be installed should be determined by the County Commissioners upon the advice of their engineers.

6. Your petitioners further represent that the present spillway or outlet to said Drainage Ditches Numbers One and Two where the same empties into the Big Sioux River in Sec-

tion Nine (9) Township One Hundred and one (101) of Range forty-nine (49) is wholly insufficient and has been prac-
74 tically destroyed by the action of the water therein, so that the same has become inefficient as a means of disposing of the waters flowing in said drainage Ditches Numbers One and Two and to such an extent that it has become dangerous to abutting property and to persons living within the vicinity thereof and that it is necessary to entirely abandon said present spillway or outlet and to construct an entirely new outlet or spillway in place thereof in accordance with a new and different plan therefor, the new spillway to be located at or near the present location of the present spillway.

7. Your petitioners further represent that the said drainage ditch or drainage system should consist of the following ditches: First a ditch having its initial point at the beginning of Section Two (2) of Drainage Ditch Number Two (2) of Minnehaha County as now established at the creek near the Northeast corner of Section thirty-one (31) Township One hundred four (104) of Range Forty-nine (49) and should then run Southwesterly to near the center of said Section thirty-one (31) and then south near the center line through said Section Thirty-one (31) and through Sections Six (6) and Seven (7) of Township one hundred three (103) of Range forty-nine (49) into Section eighteen (18) and then in a Southeasterly direction having its terminal point upon the Big Sioux River Sixteen hundred forty feet (1640) east of the said center of Section Eighteen (18), Township One hundred three (103) of Range forty-nine (49) following the present location of the said Section Two (2) of Drainage Ditch Number Two of Minnehaha County as now located.

Also a ditch having its initial point at the present beginning of Section One of Drainage Ditch Number Two of Minnehaha County, at the high water channel of the Big Sioux
75 River in the Southeast quarter of Section Twenty (20) Township One hundred three (103) of Range forty-nine (49) thence running in a general southerly direction through the Southeast quarter of Section Twenty (20) Township one hundred three (103) of Range forty-nine (49) and the Northeast quarter of Section twenty-nine (29), The Southwest quarter of Section twenty-eight (28), the west half of Section thirty-three (33) all in Township one hundred three (103) of Range forty-nine (49) and the west half of Section four (4) the northwest quarter of section nine (9) the Southeast quarter of Section eight (8) the east half of Section seventeen (17), the east half of section twenty (20) and the east half of Section

twenty-nine (29) all in Township one hundred and two (102) of Range Forty-nine (49) with its terminal point at the southern end of said Section One of Drainage Ditch Number Two in the Southeast quarter of Section twenty-nine (29), Township One hundred two (102) of Range forty-nine (49) following the line of the said Section One of Drainage Ditch Number Two as now established in Minnehaha County.

Also a ditch having its initial point at the present beginning of Drainage Ditch Number One of Minnehaha County at or near the Northeast quarter of the Southeast quarter of the Southeast quarter of Section twenty-nine (29) Township one hundred and two (102) of Range forty-nine (49) thence running south across the East half of the East half of Section Thirty-two (32) in Township one hundred two (102) of range forty-nine (49) and the East half of the Northeast quarter of Section Five (5) Township one hundred one (101) of Range forty-nine (49) and the Northeast quarter of the Southeast quarter of Section five (5) Township one hundred one (101) of Range forty-nine (49) thence across the West half of the Southwest quarter of Section four (4) in Township one hundred one (101) Range forty-nine (49), thence across
76 the northwest quarter of Section Nine (9) Township One hundred one (101) of Range forty-nine (49) and the Southwest quarter of the Northeast quarter of Section nine (9) township one hundred one (101) of Range forty-nine (49) where it empties into the Big Sioux River having its initial point and terminal point the same as and following the line of Drainage Ditch Number One as now established in Minnehaha County. With also, a branch drain or second part beginning at the point near the center of the Northeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49) running thence in a southeasterly direction across the Southeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49) to where it connects with the main ditch of Drainage Ditch Number One as now established in Minnehaha County.

8. Your petitioners further represent that in order to make the foregoing drainage system complete and adequate for the purposes for which it is designed, that it will be necessary to straighten, clear out and deepen the channel of the Big Sioux River at a number of places within the said Drainage District and especially to straighten the channel, of the said River upon Section thirty-two (32) Township one hundred three

(103) of Range forty-nine (49) by a ditch cutting off the bend in said river on said Section. Also to straighten the said River upon section Eight (8) Seventeen (17), Twenty (20) and Twenty-nine (29) in Township one hundred two (102) of Range forty-nine (49) by cutting off bends of the said Sioux River situated upon those Sections, the exact location of the said ditches for straightening, clearing out and deepening the channel of the said Sioux River to be determined by the County Commissioners upon advice of their engineers.

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9. Your petitioners further represent and show that the lands and territory likely to be affected by the construction of such new spillway or outlet and by the reconstruction and improvement of said drainage ditches One and Two and which will be drained, benefitted and protected thereby and within which territory the public health and welfare will be promoted includes all of the lands lying in the valley of the Big Sioux River and included within the present boundaries of said Drainage Districts Numbers One and Two as well as all of the lands in said valley of the Big Sioux River between the mouth of said spillway or outlet to said ditches and the City of Dell Rapids, South Dakota, that are subject to overflow by the waters of the Big Sioux River and that will be subject to overflow and damage by the waters of said River if the said outlet to said Drainage Ditches Numbers One and Two be abandoned and said outlet thereto closed and that the said District should be so extended and enlarged as to include all lands and property benefitted thereby as far down the valley of the Big Sioux River as the mouth of said outlet or spillway and including therein the corporation of the City of Sioux Falls as well as the corporation of the County of Minnehaha, South Dakota, which said corporations your petitioners further represent are and will be largely benefitted by the reconstruction and improvement of said ditches and construction of said new outlet or spillway thereto to their highways, bridges and other corporate properties owned by them respectively.

Dated this 15th day of July, A. D. 1916.

Attest: WALTER G. LEYSE,
City Auditor

CITY OF SIOUX FALLS

(Seal of the City of Sioux Falls)

By Geo. W. Burnside,
Mayor.

F. L. BLACKMAN,

W. BRALEY,

DEN DONAHOE

DAN A. DONAHOE,

W. M. DONAHOE

CATHERINE PECK

PORTER P. PECK

MARY C. BRACE

JOHN P. BLEEG

FRANCES G. CARPENTER

M. RUSSELL, By Louis Caille, Agt.

McKINNEY & ALLEN

E. D. CLARK

78 C. C. BRATRUD

L. P. CALDWELL

Filed in the office of the Auditor of Minnehaha County, S. D. this 3 day of Aug. 1916.

HARRY H. HOWE,
County Auditor.

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79 Order for Filing Petition for Drainage.

State of South Dakota,
County of Minnehaha—ss.

In re Drainage Ditch Numbers 1 and 2 Minnehaha County, South Dakota.

Whereas F. L. Blackman and others of the County of Minnehaha, State of South Dakota, have this day presented to this Board a petition for the construction of a drainage ditch conducive to public health, convenience and welfare and for the purpose of draining agricultural lands in the Big Sioux River Valley which lands have heretofore been drained and protected from overflow by ditches Number 1 and 2 of Minnehaha County as heretofore established and constructed, in which petition it is represented that it is necessary to re-construct, improve and extend said drainage ditches Number 1 and 2 and to construct a new spillway or outlet where said drainage ditch number one empties into the Big Sioux River in

Section Nine (9), Township One Hundred and One (101), Range Forty-nine (49) by reason of the fact that the spillway or outlet of said drainage ditch number 1 is inadequate for its purpose and has been destroyed by action of the water; also that the drainage ditches number 1 and 2 are not adequate for the purpose of which they are constructed and that they should be cleaned, deepened and widened and levees, dikes, and barriers remodeled, re-constructed and improved in such places and to such extent as may be necessary to carry off the surplus or flood water and properly drain the land to be drained thereby and protect other land subject to overflow; also that there should be constructed and installed in said drainage ditches 1 and 2 necessary flood gates for the purpose of regulating the amount of water flowing
80 through; also that it is necessary in order to make such drainage system complete and adequate for the purpose for which it is designated to straighten, clear out and deepen the channel of the Big Sioux River at different places within the drainage district of said drainage ditches number 1 and 2, and said petition having been by this board examined and found sufficient in form and being accompanied by bond with sureties approved by the County Auditor.

Now Therefore it is hereby ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that the said petition be forthwith filed with the County Auditor of this County and that a copy thereof be transmitted by the said County Auditor to the State Engineer.

A. G. RISTY,
Chairman of County Board.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of Aug. 1916.

HARRY H. HOWE
County Auditor.

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81 Resolution for Survey.

Whereas on the 3rd day of August, A. D. 1916, the City of Sioux Falls, F. L. Blackman and others of Sioux Falls, Minnehaha County, South Dakota, presented to this board a petition for the drainage of lands in the Big Sioux River Valley for the establishment of a drain chiefly to carry off the overflow of water of the Big Sioux River, such drain to begin at the beginning of Section two (2) of drainage ditch number

2 of Minnehaha County, as now established at the creek near the northeast corner of Section 31, Township 104, Range 49, and should end at a point on the said river near the center of Section 9, in Township 101, Range 49, where drainage ditch number 1 as now established in Minnehaha County, empties into the Big Sioux River, which petition was accompanied by a proper bond with sureties approved by the County Auditor of said County; and

Whereas said petition was by this board examined and found sufficient in form and was ordered filed with the County Auditor of said County, and was so filed on the 3rd day of August A. D. 1916; and

Whereas this board together with the State Engineer did on the 14th day of August, A. D. 1916, inspect the proposed route of said drainage; and

Whereas this board deems it necessary that a survey of the proposed drainage be made by a competent surveyor.

Now Therefore it is Ordered that a survey be made of the lands in the Big Sioux River Valley between the City of Dell Rapids and the terminus of said proposed drainage for the purpose of determining the exact line of said drainage and the most practicable method of draining the entire sec-
82 tion of the country of which the lands proposed to be drained are a part. Such surveyor shall include in his report to this board a description of the exact line of said drainage ditch or ditches as suggested in said petition, the size and width thereof, such survey to be made under the supervision of the State Engineer and report filed with the County Auditor with all convenient speed.

And the chairman of this board is hereby authorized to employ such surveyors and his assistants and purchase such material as may be necessary for such survey.

Approved this 14th day of Aug. 1916.

A. G. RISTY.

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83 Resolution Fixing the Exact Line and Width of Ditch and Fixing the Time and Place for Hearing Petition.

(Commissioners Proceedings, September 13, 1916)

Whereas, on September 13, 1916, Mr. L. E. Stevens, Civil Engineer employed by this Board for the making of a survey

for a proposed drainage ditch, in the valley of the Big Sioux River, in Minnehaha County, South Dakota, in the territory previously partially drained by Drainage Ditches Numbered One and Two, as heretofore established, pursuant to the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, did file his report of such survey, together with maps and profiles; and

Whereas, this Board has personally inspected the route of said proposed drainage, as described in said petition and as described in the engineer's said report;

Therefore, be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of said proposed drainage, be and the same is hereby fixed as described in said Engineer's report, and that the requisite right of way for said drainage ditch and dump space be as described in said engineer's report; and

Be it further resolved that Monday, the 2 day of October, 1916, at 2 o'clock, P. M. at the Office of the County Auditor of said County be and it is hereby fixed as the time and place for hearing of said petition and that notice thereof be given in accordance with the provisions of Section Four (4) of Chapter 134, of Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication once in each week
84 for two consecutive weeks in the Sioux Falls Daily Press, and by posting copies of said notice in at least three of the most public places near the route of said proposed drainage ditch, such posting to be made at least ten days prior to the time of said hearing.

Approved:

A. G. RISTY,
Chm. Co. Bd.

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85 Resolution Establishing Drainage Ditch No. 1 and 2.

The matter of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on August, 3, 1916, coming on to be heard by the Board of County Commissioners of said county at a regularly adjourned meeting, on Monday, the 2 day of October, A. D. 1916, pursuant to notice heretofore given, the said Board having heard and considered said pe-

tition and all matters in support of the same, and in opposition thereto, and being fully advised by the state engineer with reference thereto, now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said principal drainage ditch as hereinafter described and set forth, is conducive to the public health, convenience and welfare and it is necessary and practicable for the drainage of agricultural land and it is so found;

Be It Further Resolved that the said drainage ditch as hereinafter described be, and it is hereby named and designated as "Drainage Ditch No. 1 and 2";

Be It Further Resolved that the said Drainage Ditch No. 1 and 2 be and the same is hereby established in accordance with the resolution adopted by this Board on September 13, 1916, in so far as the same is set out and described in Sections One, Two, and Three of the engineer's report of preliminary survey, filed herein on September 13, 1916, and particularly described as follows:

86 Section One.

Commencing at a point Fifty-eight (58) feet west and Ten Hundred and Thirty-five (1035) feet north of the Southeast corner of Section Twenty-nine (29), Township One Hundred and Two (102), Range Forty-nine (49) west of the 5 P. M. running thence South parallel to the adjacent highway Two Thousand and Eighty-five (2085) feet to Station One Hundred and Fourteen (114); also commencing at a point Six Hundred and Seventy-four (674) feet north and about Thirty-five (35) degrees west of said Station number One Hundred and Fourteen (114) thence southeasterly Six Hundred and Seventy-four (674) feet to said Station number One Hundred and Fourteen (114), thence south and parallel to said highway Seventy-seven Hundred (7700) feet to station number Thirty-seven (37) thence south forty-five (45) degrees east Three Thousand Seven Hundred (3700) feet to station number zero (0) the same being on high water line, thence South Fifty-nine (59) degrees and Thirty-six (36) minutes east, Four Hundred and Fifty (450) feet, thence south Thirty-one (31) degrees east to the Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point Ten Hundred and Thirty-five (1035) feet north and Fifty-eight (58) feet west of the Southeast corner of Section Twenty-nine (29) in Township One Hundred and Two (102) of Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north Five Hundred and Forty-seven (547) feet; thence north Twenty-three (23) degrees west Thirty-three Hundred and Eighteen (3318) feet to a point Fifty-eight (58) feet west of the quarter quarter line in
87 the northeast quarter of Section Twenty-nine (29) in said Township; thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17) and a part of Section Eight (8), Twelve Thousand Nine Hundred and Thirty-five (12,935) feet; thence north Fifty (50) degrees east Twenty-seven Hundred and Thirty-two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way of the Chicago, Milwaukee & St. Paul Railway Company, in the Northwest quarter of Section Nine (9) in said Township; thence Northerly parallel with and Thirty-three (33) feet west, of said right of way line Nineteen Thousand Three Hundred and Sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the Southeast Quarter of Section Twenty (20) in Township One Hundred and Three (103) North of Range Forty-nine (49).

Section Three.

Commencing at a point Sixteen Hundred and Forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103), Range Forty-nine (49); running thence north Thirty-three (33) degrees west Thirty-one Hundred and Fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line in Sections Seven (7) and Six (6) in said Township and in Section Thirty-one (31) in Township One Hundred and Four (104) North of Range Forty-nine (49) to the center line running east and west through said Section Thirty-one (31); thence north-
88 easterly to the creek near the Northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River is to be straightened in Sections Seventeen (17), Eighteen (18) and

Twenty (20) in Township One Hundred and Three (103), North of Range Forty-nine (49) in order to afford better means of communication between the lower end of Section Three (3) of said ditch and the upper end of Section Two (2) thereof; the same being intended to cover the exact location of drainage ditch Number Two (2) as now established and constructed.

Be It Further Resolved that the consideration and determination of the question of the straightening of the Big Sioux River at the several points recommended in said engineer's report, be deferred, without passing upon the merits thereof, to some later date, when said straightening of the Big Sioux River may be given more complete consideration, covering the points recommended and other points requested and suggested at the hearing.

Be It Further Resolved that in the construction of the said Drainage Ditch, the rights of flowage of the owner of the mill at or near Baltic, South Dakota, will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch where the same joins with the creek near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, that it will not diminish or interfere with said rights of flowage and that the headgate or other protection now established, be maintained to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

89 Be It Further Resolved that headgates or controlling gates be established in said drainage ditch, on Section Twenty (20) of Sverdrup Township and on Section Twenty-nine (29) or Thirty-two (32) in Mapleton Township at such place and of such size and material as the state engineer may direct;

Be It Further Resolved that a good substantial adequate spillway be constructed, under the supervision of the state engineer, in said ditch on Section Nine (9) of Sioux Falls Township and that an efficient, substantial controlling gate be constructed at the upper end of said spillway in such manner that the same can be closed and all water be prevented from entering said spillway;

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compen-

sation for the land taken for the route of such drainage and that the same may be made a special order for Friday, October 6, A. D. 1916, at ten o'clock A. M.

A. G. RISTY,
Chairman of Board of County Commissioners of Minnehaha County, South Dakota.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of October 1916.

HARRY H. HOWE
County Auditor.

Endorsed: Filed in the District Court on Sept. 1, 1921, at 9:30 A. M.

And afterwards, to-wit, on the 25th day of January, A. D., 1923, nunc pro tunc as of the 15th day of December, A. D., 1921, there was filed in the office of the clerk of said court, stipulation as to certain Drainage Ditch Notice and that same be considered as a part of the answers and returns of the defendants and intervening defendants; that attached to said Stipulation is a "Drainage Ditch Notice"; which said Drainage Ditch Notice is in words and figures the following, to-wit:

90 Drainage Ditch Notice.

Notice is hereby given that Monday, October 2, 1916, at 2 o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others filed August 3rd, 1916, for the establishment and construction of a drainage ditch, pursuant to the provisions of chapter 134 of the laws of 1907 of the State of South Dakota, as amended by chapter 102 of the laws of 1909, the exact line and width of said drainage ditch was determined by action of said board on September 13, 1916, to be as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of section twenty-nine (29) township one hundred and two (102) range forty-nine (49) west of the 5th P. M. runnnig

thence south parallel to the adjacent highway two thousand eighty-five (2085) feet to station one hundred fourteen (114); also commencing at a point six hundred and seventy-four (674) feet north and about thirty-five (35) degrees west of said station number one hundred fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south 45 degrees east thirty-seven hundred feet (3700) to station number zero (0), the same being on high water line, thence south fifty-nine (59) degrees thirty-six (36) minutes east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to the Big Sioux River, the said line being the
91 center line of said drainage ditch and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five feet (1035) north and fifty-eight (58) feet west of the southeast corner of section twenty-nine (29), in township one hundred and two (102) of range forty-nine (49), the same being the commencement point of section one (1), hereinbefore described running thence north five hundred and forty-seven (547) feet; thence north twenty-three (23) degrees west three thousand three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the northeast quarter of section twenty-nine (29) in said township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through sections twenty-nine (29), twenty (20), seventeen (17) and a part of section eight (8), twelve thousand nine hundred and thirty-five (12,935) feet; thence north fifty (50) degrees east twenty-seven hundred and thirty two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way of the Chicago, Milwaukee & St. Paul Railway Company in the northwest quarter of section (9), in said township; thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the southeast quarter of section twenty (20) in township one hundred and three (103) north of range forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of section eighteen (18) in town-
92 ship one hundred and three (103), range forty-nine (49) running thence north thirty-three (33) degrees west thirty-one hundred and fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between sections seven (7) and eight (8) in said township; thence north parallel with and sixty (60) feet west of the quarter line in sections seven (7) and six (6) in said township and in section thirty-one (31) in township one hundred and four (104) north of range forty-nine (49) to the center line running east and west through said section thirty-one (31); thence northeasterly to the creek near the northeast corner of said section thirty-one (31). The said line being the center line of said proposed drainage ditch.

That in addition thereto the Big Sioux river is to be straightened in sections seventeen (17), eighteen (18) and twenty (20) in township one hundred and three (103) north of range forty-nine (49) in order to afford better means of communication between the lower end of section three (3) of said ditch and the upper end of section two (2) thereof; the same being intended to cover the exact location of drainage ditch number 2 as now established and constructed.

I further recommend that the Big Sioux river be straightened on section thirty-two (32), township one hundred and three (103) north of range forty-nine (49) west by the construction of a cut off beginning at the intersection of the center line of the highway bridge across the Big Sioux river, on the town line between sections thirty-two (32), township one hundred and three (103), range forty-nine (49) and section five (5), township one hundred and two (102), range forty-nine (49) and the center line of said river; thence northerly at right angles to said bridge two hundred (200) feet; thence
93 nortwesterly at an angle of twenty (20) degrees to the west, nine hundred and fifty (950) feet; thence northerly at an angle of nineteen (19) degrees to the east twenty-eight hundred and fifty (2850) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8), township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at a point in the center line of the Big Sioux river, twenty-one hundred and seventy (2170) feet easterly and seven hundred and eighty-five (785) feet southerly from the north-

west corner of section eight (8) township one hundred and two (102), range forty-nine (49); thence easterly parallel with the north line of said section eight (8) three hundred (300) feet; thence northeasterly at an angle of twenty degrees (20) to the north, four hundred (400) feet, to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8) township one hundred and two (102) range forty-nine by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the east and west quarter line of section eight (8), township one hundred and two (102), range forty-nine (49); thence northerly at an angle of forty-one (41) degrees and thirty (30) minutes to the north eight hundred (800) feet; thence northwesterly at an angle of seventy-five (75) degrees to the west five hundred and fifty (550) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section seventeen (17), township one hundred and two (102), range forty-nine (49) by the construction of a cut off beginning at a point in the center of the Big Sioux river seven hundred and twenty (720) feet southerly and six hundred and twenty (620) [—] easterly from the west quar-
94 ter post of section seventeen (17) township one hundred and two (102), range forty-nine (49); thence northerly parallel with the westerly line of said section seventeen (17) six hundred (600) feet; thence northwesterly at an angle of twenty-nine (29) degrees to the west fourteen hundred and ten (1410) feet; thence northerly at an angle of twenty-nine (29) degrees to the east fifteen hundred and sixty (1560) feet; thence northeasterly at an angle of fifty-five degrees (55) to the east eight hundred and seventy (870) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section twenty (20), township one hundred and two (102), range forty-nine (49), by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty (20), township one hundred and two (102), range forty-nine (49), thence southeasterly at an angle of one hundred and thirteen (113) degrees to the east six hundred and ten (610) feet; thence southwesterly at an angle of thirty-one (31) degrees to the west ten hundred and eighty (1080) feet; thence southwester-

ly at an angle of twenty-one (21) degrees to the west thirteen hundred and eighty (1380) feet to the center of said river.

Also in said section twenty (20) beginning at the intersection of the center line of Big Sioux river and the south line of section twenty (20), township one hundred and two (102) range forty-nine (49); thence northwesterly at an angle of sixty-two and one-half (62½) degrees to the north twenty-one hundred and ten (2110) feet; thence northerly at an angle of twenty-eight (28) degrees to the east five hundred (500)
95 feet to the center of said river.

I further recommend that the Big Sioux River be straightened on section twenty-nine (29) township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty-nine (29) township one hundred and two (102), range forty-nine (49); thence southerly at an angle of 81 degrees to the south twenty-nine hundred and ninety (2990) feet; thence southeasterly at an angle of thirty-five (35) degrees to the east ten hundred and ninety (1090) feet; thence southerly at an angle of thirty-seven and one-half (37½) degrees to the west eleven hundred (1100) feet, to the center of said river.

All of the above cut-offs to have a bottom width of sixty (60) feet and side slopes of one and one-half (1½) to one (1). A right of way one hundred (100) feet in width, one-half each side of the above described center lines will be required.

The tract of country likely to be affected by the establishment and construction of the said proposed drainage is in general terms described as follows: Sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty-two (22), twenty-seven (27), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), in township one hundred and one (101) of range forty-nine (49); sections thirteen (13), twenty-four (24) and twenty-five (25) in township one hundred and one (101), range fifty (50); sections three (3), four (4), five (5), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-eight (28), twenty-nine (29), thirty-one (31), thirty-two (32) and thirty-three (33) in township one hundred
96 and two (102), range forty-nine (49); section five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), twenty (20), twenty-one (21),

twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty-two (32), thirty-three (33) and thirty-four (34) in township one hundred and three (103), range forty-nine (49); sections twenty-nine (29), thirty-one (31) and thirty-two (32) in township one hundred and four (104), range forty-nine (49), including also the mill property at or near the town of Baltic and the tracts of country covered by the right of flowage belonging to said mill property. Also the following additions to the City of Sioux Falls, Minnehaha County, South Dakota; North Boulevard addition, Carpentar's addition, Central Park addition, Meredith's First Addition, Meredith's Second addition, Harrison's addition, Lincoln Park addition, Englewood addition, West Lawn addition, Sioux Falls Improvements Company's addition, North Park Addition, North Park Second addition, Brooks' addition, Bunker's addition, Lake View addition, Brookings addition, Berwick addition, Summit addition, McClellan's Second addition, West Park addition, Pettigrew & Tate's Eighth addition, Glendale addition, Scott's Second addition, Morningside addition, Van Eps' addition, Millspaugh's addition, Daniels' addition, Morse's addition, Gale's addition, Gale's Sioux Falls, Phillips' addition, Syndicate addition, Central addition and W. R. Green addition.

The separate tracts of land through which said proposed ditch will pass and parts of which will be required therefore and for dump space, and the names of the owners of said tracts as appears from the records in the office of the
97 register of deeds of said county on August 3rd, 1916, that being the date of filing said petition, are as follows:

Owner	Description		Township	Range
Lars Simonson	NW¼ of NW¼	Sec. 32	104	49
Lars Simonson	NE¼ of NE¼	" 31	104	49
Lars Simonson	SE¼ NE¼	" 31	104	49
Gustava Nelson	SW¼ of NE¼	" 31	104	49
P. G. Thompson	E½ of SW¼	" 31	104	49
Julia L. Moe	NW¼ of SE¼	" 31	104	49
Even O. Fossum	NE¼ of NW¼	" 6	103	49
Gunerius Thompson	All that part of SE¼ of NW¼ Sec. 6 lying south of a certain slough running West of Northwest to end of drain ditch		103	49
F. P. Sorkilmo	All that Part of SE¼ of NW¼ Sec. 6 located & lying on the north side of a certain intermittent water-course or slough running through the center of said section in a northwesterly course to ditch on the west line of said "40" except the N½ of N½ of said SE¼.		103	49

Lina Hanson,	N½ N½ SE¼ NW¼ Sec. 6,	103	49
Gunerius Thompson	E½ of SW¼ Sec. 6	103	49
Ole J. Ustrud	E½ of NW¼ Sec. 7	103	49
Magnhild Floren, Olaf Berthum Floren, Mabel Floren & Ovidia Mathilda Floren	E½ of SW¼ Sec. 7	103	49
Andrew Swenson Aas	E½ of NW¼ Sec. 18	103	49
John O. Aasen	S½ of NE¼ Section 18	103	49
B. G. Flamoe	NE¼ of NW¼ Sec. 20	103	49
Bertn G. Flamoe	SE¼ of NW¼ Sec. 20	103	49
Peter Paulson,	E½ of SE¼ Sec. 20	103	49
Olymphious S. Thompson	Tract 3 of County Auditor's Subdivision of the NE¼ of Sec. 29	103	49
Olymphious S. Thompson	SE¼ of NE¼ and W½ of SW¼ of Sec. 28	103	49

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Owner	Description		Township	Range
Bertha Peterson, Alice, Christina Thompson, John Oscar Thompson, William Henry Thompson, Fred Raymond Thompson, Reuben Victor Thompson, Mabel Josephine Thompson, Carl Melvin Thompson	SW¼ of NW¼	Sec. 33	103	49
Andrew J. Aason	NW¼ of NW¼	" 33	'03	49
Joseph C. Thompson	NW¼ of SW¼	" 33	103	49
Thomas Hendrickson	SW¼ of SW¼	" 33	103	49
Ole Thompson Aspass	W½ of NW¼	" 4	102	49
Martin H. Oyen and Cleopatra H. Oyen	W½ of SW¼	" 4	102	49
Martin Oien	W½ of NW¼	" 9	102	49
Martin H. Oien	SE¼ of NE¼	" 8	102	49
Ole Gunderson	W½ of SE¼	" 8	102	49
Leonard Renner Ingeberg Peterson Peter R. Peterson Iver R. Peterson	E½ of SE¼	" 8	102	49
Gertie R. Peterson,	W½ of NE¼	" 17	102	49
Christian J. Orstad	W½ of SE¼	" 17	102	49
Albert N. Allis	W½ of NE¼	" 20	102	49
Robert J. Huston	W½ of SE¼	" 20	102	49
Charles E. Kaufmann,	NE¼ & NE¼ of SE¼ of Section 29		102	49
State of South Dakota	SE¼ of SE¼	Sec. 29	102	49
State of South Dakota	E½ of NE¼ & NE¼ of SE¼	" 32	102	49
Hans Ruvald	SE¼ of SE¼	" 32	102	49
Hans Ruvald	E½ of NE¼ & NE¼ of SE¼	" 5	101	49
City of Sioux Falls	Starting at Southwest corner of Section 4, running thence east along Sec. line to the center line of County Ditch #1			

	as shown on Map #3 of the recorded plat of said ditch, thence in a northwesterly direction along the center line of said ditch to the west line of Sec. 4 thence south along said section line to the place of beginning	101	49
State of South Dakota	SW¼ of Sec. 4, except above described tract	101	49

99

Name	Description	Township	Range
Southern Minnesota Railway Extension Company (Now Chicago Milwaukee & St. Paul Railway Company.	Right of way across the SW¼ of SW¼ Sec. 4	101	49
Watertown & Sioux Falls Railway Company	Right of Way across the SW¼ of SW¼ Sec. 4	101	49
Watertown & Sioux Falls Railway Company	Right of Way across the East ½ of SE¼ Sec. 5,	101	49
Chicago, Milwaukee & St. Paul Railway Company	Right of Way of Madison Branch, on Sections 8 and 9,	102	49
Mapleton Township	Interest in Highway adjacent to the line of the proposed ditch in Sections 4, 8, 9, 17, 20 and 29	102	49
Sverdrup Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 6, 7, 18, 20, 28, 29 and 33.	103	49
Dell Rapids Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 29, 30, 31 and 32,	104	49
Sioux Falls Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 4 and 5 and 9	101	49

100 Berwick Addition to Sioux Falls.

	Lot No.	Block No.
Elwin L. Potter	1, 2 and 3	5
Arthur D. Horton	5, 6, 7, 8, 9, 10 and 11	4
State of South Dakota	1, 2 and 3	13
Grant Lines	5, 6, 10 and 11 lying east of Drainage Ditch	14
State of South Dakota	7, 8, and 9	14
State of South Dakota	1, 2 and 3	19

Sophia Krull,	4	18
Sophia Krull, Emma Buchholz, Mary Toepfer, Charles Krull, William F. Krull and Otto R. Krull	5 and 6	18
Sophia Krull	7, 8, 10, 11	18
George W. Hanson (Fee) Security Savings Bank (Tax title)	9	18
Moses M. Robinson	1	31
Security Savings Bank	2 & 8	31
James Kennedy	3	31
Security Savings Bank	All of Block	32

* * * * * * * * *

The Kittery Realty Company—Tract 2 of NE¼ Section 9, Twp. 101, Rge. 49.

The Kittery Realty Company—Tract 3 of NE¼ Sec. 9 Twp. 101 Rge. 49.

State of South Dakota. Tract 3 of NW¼ Sec. 9, Twp. 101 Rge. 49.

101 The separate tracts of land wherein the Big Sioux River is proposed to be constructed and which will likely be affected thereby and the names of the owners of said tracts as appear from the records of the office of the Register of deeds of said County on August 3rd, 1916, that being the date of the filing of said petition, are as follows:

Name of Owner.	Description	Township	Range
Andrew J. Aasen,	W½ NE¼ Section 32	103	49
Andrew J. Aasen	NE¼ of NE¼ Sec. 32	103	49
Joseph O. Thompson,	S½ of SE¼ of NE¼ Section 32,	103	49
Gus S. Thompson,	N½ of SE¼ of NE¼ Section 32.	103	49
Jonas L. Finnegan,	N½ of SE¼ of Sec. 32,	103	49
Margaret Finnegan,	SE¼ of SE¼ Sec. 32,	103	49
John Finnegan,	SW¼ of SE¼ Sec. 32	103	49
Ole Gunderson,	NW¼ Sec. 8	102	49
Iver Nelson,	NW¼ of SW¼ Sec. 8,	102	49
Jonas Olson,	SW¼ of SW¼ Sec. 8,	102	49
Ole Gunderson,	E½ of SW¼ Sec. 8,	102	49

Iver R. and Palma Peterson,	NW¼ of NW¼ of Sec. 17	102	49
Bernt Mekvold,	SW¼ of NW¼ Sec. 17	102	49
C. C. Fleischer,	NW¼ of SW¼ Sec. 17,	102	49
Iver R. and Palma Peterson,	East 26 acres of NE¼ of NE¼ Sec. 18	102	49
Bernt Mekvold,	SE¼ of NE¼ Sec. 18	102	49
W. O. Quincy,	W½ of NW¼ Sec. 20	102	49
Albert N. Allis,	E½ of NW¼ Sec. 20,	102	49
Robert J. Huston	N½ of SW¼ Sec. 20,	102	49
Charles Kaufmann,	S½ SW¼ Sec. 20,	102	49
Charles Kaufmann,	W½ of NE¼ Sec. 29	102	49
Charles Kaufmann,	NE¼ of NW¼ Sec. 29	102	49
Ole P. and Maria Schjodt	W½ of SE¼ Sec. 29	102	49
Berit Johnson,	NE¼ of SW¼ Sec. 29	102	49

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In addition to the above, notice is also given to Minnehaha County, Townships of Sioux Falls, Mapleton, Sverdrup, and Dell Rapids in said County and the City of Sioux Falls in said County on account of benefits to highways, bridges, parks and city waterworks plant in the said drainage area and notice is also given to the Chicago, Milwaukee & St. Paul Railway Company, also to the Watertown & Sioux Falls Railway Company on account of the benefits to their rights of way within said drainage area;

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have why the said drainage should not be established and constructed;

And all persons deeming themselves damaged by said proposed drainage or claiming compensation for the lands proposed to be taken for said drainage are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 15th day of September A. D. 1916.

THE BOARD OF COUNTY COMMISSIONERS,
By: A. G. Risty, Chairman.

Attest:

(Seal) Harry H. Howe, County Auditor
By E. H. Shenkle Deputy.

Filed in the office of the Auditor of Minnehaha County, S. D., this 15 day of Sept., 1916.

HARRY H. HOWE, County Auditor,
By E. H. Shenkle, Deputy.

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104 (Order permitting amendment to bill of complaint.)

February 10, 1922.

The above entitled suit coming on for hearing upon the 31st day of January, 1922, upon the application of the plaintiff for leave to amend its bill herein to conform to the proof by adding an additional paragraph to the original bill to be known as Paragraph "Eighteenth (and One-half)", and plaintiff appearing by Messrs. Bailey & Voorhees, its solicitors, and the defendants appearing by Mr. E. O. Jones, their solicitor and the intervening defendants appearing by Messrs. Porter & Bartlett, their solicitors, and the Court being fully advised in the premises, and it appearing to the Court that upon the trial of said suit evidence was offered and received and from
105 all parties to the said suit relevant to the issue proposed to be raised by said amendment and that in the furtherance of justice the said amendment should be permitted. It is hereby ordered that the application of the plaintiff to amend its original bill of complaint herein be and the same is hereby allowed, and that such amendment be made and filed nunc pro tunc as of the date of the trial of the said suit on the 15th day of December 1921.

It is further ordered that the amendment be made by attaching to the original bill of complaint herein a copy of said amendment and making it a part of the original bill, and that the bill as amended need not be rewritten in full.

It is further ordered that the amendment hereby allowed is in words and terms as follows:

"Eighteenth (And One-half)

That the equalization of benefits of 1681 units out of a total number of units of 32,559.62 units estimated in dollars and cents at approximately $15,000 fixed by the Board of County Commissioners of Minnehaha County, South Dakota on the 10th day of June, 1921, against the property of the plaintiff, the Chicago, Milwaukee & St. Paul Railway Company, as above set forth is wholly speculative, arbitrary, unjust, illegal and discriminatory and was made by the Board of County Commissioners of said Minnehaha County without any rea-

sonable or rational basis therefor, and is not in proportion to any benefit which the property of the plaintiff has received or ever can receive by rebuilding of the spillway and the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and No. 2, as hereinbefore set forth; that the property of
106 the plaintiff has not and never can be benefited by the work performed by the said Board of County Commissioners as herein set forth to the extent of $15,000, or to any extent whatever, and that the assessment sought to be collected from the plaintiff as above set forth is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the city of Sioux Falls and within the drainage area of said Drainage Ditch No. 1 and No. 2. That the said equalization of benefits is so arbitrary and discriminatory against the property of the plaintiff as to deprive the plaintiff of its property without due process of law and to deprive the plaintiff of the equal protection of the laws."

And the defendants and intervening defendants having asked permission to submit further evidence upon the issues set out in said amendment, it is further ordered that they may do so at any time within ten days from the date hereof upon two days notice to the solicitors for the plaintiff.

Done at Sioux Falls, South Dakota, this 31st day of January, 1922.

By the Court:

JAS. D. ELLIOTT,
Judge.

(Seal of Court)

Attest:
Jerry Carleton,
Clerk.

Endorsed: Filed in the District Court on Feb. 10, 1922, at 11:30 A. M.

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108 (Exception of defendants to order allowing amendment to bill of complaint.)

Come now the defendants, by their attorney, E. O. Jones, Esq., and the Intervening Defendants, by their attorney, N. B. Bartlett, Esq., and except to the Order permitting the amendment to the Bill to conform to the proof, which exception is allowed by the Court.

(Amendment to Bill of Complaint.)

109 Eighteenth (and One-Half)

That the equalization of benefits of 1681 units out of a total number of units of 32,559.62 units estimate in dollars and cents at approximately $15,000 fixed by the Board of County commissioners of Minnehaha County, South Dakota, on the 10th day of June, 1921, against the property of the plaintiff, the Chicago, Milwaukee & St. Paul Railway Company, as above set forth is wholly speculative, arbitrary, unjust, illegal and discriminatory and was made by the Board of County Commissioners of said Minnehaha County, without any reasonable or rational basis therefor, and is not in proportion to any benefit which the property of the plaintiff has received or ever can receive by rebuilding of the spillway and the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and No. 2, as hereinbefore set forth; that the property of the plaintiff has not and never can be benefited by the work performed by the said Board of County Commissioners, as herein set forth to the extent of $15,000, or to any extent whatever, and that the assessment sought to be collected from the plaintiff as above set forth is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the city of Sioux Falls and within the drainage area of said Drainage [—] No. 1 and No 2. That the said equalization of benefits is so arbitrary and discriminatory against the property of the plaintiff as to deprive the plaintiff of its property without due process of law and to deprive the plaintiff of the equal protection of the laws.

(Endorsed): Filed Feby. 10, 1922, nunc pro tunc as of December 15, 1921, Jerry Carleton, Clerk.

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111 (Opinion of the District Court.)

James D. Elliott, District Judge.

United States District Court, District of South Dakota.
Sioux Falls, S. Dak., Feb. 17th, 1922.

Chicago, Rock Island & Pacific Railway Company, a corporation, Plaintiff,
No. 98 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, Milwaukee & St. Paul Railway Company, a corporation, Plaintiff,
No. 99 S. D. vs. In Equity
A. G. Risty, Et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation, Plaintiff,
No. 100 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Northern States Power Company, a Corporation, Plaintiff.
No. 101 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

City of Sioux Falls, a Municipal Corporation, Plaintiff,
112 No. 102 S. D. vs. In Equity.
A. G. Risty, et al., Defendants

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Great Northern Railway Company, a Corporation, Plaintiff,
No. 103 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

C. O. Bailey, Esq., Sioux Falls, S. D. and others, Counsel for Plaintiffs.

Messrs. Porter & Bartlett, and C. O. Jones, Esq., Sioux Falls, S. D., Counsel for Defendants.

Gentlemen:—

I have finally disposed of the questions presented in the various drainage ditch cases, consolidated for the purpose of trial, and which were tried and submitted upon single record.

The question of the constitutionality of the South Dakota drainage statute is pleaded by each plaintiff, and upon this issue, the interests of the plaintiffs in all these suits are identical. It is urged by the plaintiffs in the various suits that the entire South Dakota drainage statute is unconstitutional for the reason that it is in conflict with the Fourteenth Amendment of the Constitution of the United States.
113 Plaintiffs call the Court's attention to the provision of the Fourteenth Amendment that prevents the taking of property "Without due process of law."

If the South Dakota statute does not give the person whose land is to be assessed for the drainage of agricultural lands his "day in court", then there is no "Due process of law." I find upon investigation of the various drainage ditch statutes that almost universally the provision is made for the organization at the inception of the proceeding of a drainage district, with boundaries defined, organized after notice to all property owners within the district, and endowed by statute with certain powers consistent with the purpose for which the district is organized. I also note that ordinarily, where no provision is made for the formation of a drainage district, as is the case in this state, provisions are usually made for the notification of the property owners whose interests are supposed to be included in the drainage district, and for the giving to them of an opportunity to be heard in respect to the question of the practicability or feasibility of the drainage proposition, and whether or not the benefits will exceed the cost, and whether or not the particular lands of the owner, shall be included within the drainage district and assessed its pro-rata share of the benefits.

It is urged by the plaintiffs, and must be conceded, that in this regard the South Dakota statute differs from the drainage statutes of most other states. Section 8459, Revised Statutes of South Dakota, provides that a petition for proposed drainage may be filed with the Board of County Commissioners. This is the first step in the proceeding.
114 This petition is only required to set forth the necessity for the drainage, a description of the route, its in-

itial and terminal points, and its general course, or of its exact course in whole or in part, and a general statement of the territory likely to be affected thereby.

Under this statute petitioners are not required to describe the specific tracts of land to be included within the drainage area, or which will be affected thereby or assessed therefor. Neither is it necessary to give the names of the owners of the property. The statute requires only a "general statement" as to the extent of the territory affected.

Section 8461 of said Revised Statutes, provides that the Board shall fix a time and place for the hearing of the petition and shall give notice by publication at least once each week for two consecutive weeks in a newspaper in the county, and by posting notices near the route of the proposed drainage. It also provides that such notice shall describe the route of the proposed drainage, and the tract of country likely to be affected thereby, in general terms, the separate tracts of land through which the proposed drainage will pass, and give the names of the owners thereof as appears from the records in the office of the Register of Deeds on the date of the filing of the petition. It is further provided that such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed.

Plaintiffs note that this statute, except as to property
115 owners through whose property the proposed drainage will pass, provides only this general notice, and especially complain that it gives no property owner any notice that his particular tract of land is included among the lands affected by the proposed drainage, and insist that the notice is broad enough to take in each and every tract of land included within the boundaries of the county in which the drainage project is situated.

It is true that, other than this general notice, there is no notice whatever given to the property owner that his particular land is affected by the drainage proposition, or that he has any interest in it, or will be mulcted in assessment for benefits by reason thereof. He receives no summons or other notice, either by personal service or by mail. He has, however, the general notice given in the published summons by the Commissioners to "All persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed."

By Section 8461 of the said Revised Statutes, the County Commissioners pass upon the petition a' the time named in the summons and notice, and if they find it feasible to establish the drainage, no provision is made for any other notice to any property owner, unless it should be found necessary to change the initial or terminal points so that the drainage will pass through other lands than those described in the original notice, or to increase the width of the lands to be taken for the proposed drainage, in which case the Board must give the owners of such lands notice. There is
116 no provision, however, for any notice to any property owner after the drainage ditch is established.

The Board may then proceed without further notice, to its construction. It may incur construction expense before taking any proceedings towards making an assessment for the payment of the costs, or it may before doing the work, estimate the costs and make an apportionment of benefits upon which the assessment may subsequently be spread by the County Auditor.

Section 8463 of said Revised Statutes authorizes the said County Commissioners, after establishing the drainage, to fix the proportion of benefits of the proposed drainage among the lands affected, and also appoint a time and place for equalizing the same. It is then provided that notice of such equalization of proportion of benefits shall be given by publication for two weeks. It is provided that this notice must give a description of each tract of land affected by the proposed drainage, and the names of the owners as appears from the records of the office of the Register of Deeds. It is further provided that the lands to be charged with benefits include all pieces of property that, in the judgment of the Board of County Commissioners are benefitted by the drainage proposition. At this hearing the Board fixes the proportion of benefits for each tract of land, taking any particular tract as a unit, and also fixes the benefit which any railroad company may obtain for its property by such construction and equalizes it together with the proportion of the bene-
117 fits to tracts of land. This statute seems to provide for this hearing for fixing the proportion of the benefits before the ditch is constructed and before it is known what will be the actual amount of money expended. This hearing may be delaved until after the ditch has been built. It also provides that in event there is further expense incurred, or if for any reason, parties assessed do not pay the tax, a new proportion of benefits shall be fixed and new assessments made.

At this hearing the owners of the lands alleged to be benefitted have notice, have the right to appear and contest the amount of the benefits upon their lands, and may even urge that no benefits are derived. From this assessment there is a provision granting an appeal to the Circuit Court of the County in which the lands are situated, in which the proportional benefit may be an issue, and the owner of the land, upon such appeal, may contest the fact that there are any benefits to the land in question. The law further provides for an appeal from the determination of such issue in the Circuit Court to the Supreme Court of the State.

After such proportional benefits are determined the County Auditor spreads the tax and it then becomes a lien upon the property benefitted.

This brief statement of the provisions of the statute, not at all complete, but in a general way outlines the general powers of the Board and the method of the establishment of the ditch, and the various steps up to the spreading of the tax against the lands benefitted.

These proceedings are peculiarly limited to the drainage of agricultural lands, because the Constitution of the State of South Dakota provides that:

"The drainage of agricultural lands is especially declared to be a public purpose and the Legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest corporate authorities thereof and the corporate authorities of counties, townships and municipalities, with powers to constitute levees, drains and ditches * * * * * by special assessments upon the property benefitted thereby according to the benefits received."

Pursuant to this provision of the Constitution, the Legislature of the State has provided for the drainage of agricultural lands, but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands "for any public use". Without repetition, and calling attention now to the reasons urged by the plaintiffs sustaining the unconstitutionality of this statute enacted for the purpose of draining agricultural lands, and considering the objections urged in various forms by the different plaintiffs, we find that all of the objections center about the criticism that no notice is provided the owners of lands affected by the drainage ditch, except the general notice, and in fact, no personal notice until the date fixed by the Board for the equalization of pro-

portional assessments for the various tracts of land
118 benefitted by the drainage. It will be noted that the Legislature has provided that no tax can become effective, no assessment can be made, until the benefits have been ascertained and proportioned, and before this can be done a definite day must be named by the Board and the various land owners are given notice.

The question resolves itself into one of whether or not this hearing after notice, with the right of appeal, constitutes "a day in Court" to the various land owners. I have reviewed the authorities submitted by plaintiffs and I am frank to confess that the statutes of this state do not provide for the description of the lands alleged to be benefitted by the ditch, or the owners of the lands, or that notice shall be given to such owners, or that the owners shall appear and show cause, if any they have, why the ditch is not practicable or should not be established, or have the opportunity to show that the cost would be greater than the benefits, or would be confiscatory, and yet, I am satisfied that the courts of the various states and the Supreme Court of the United States have recognized the power of the Legislature to provide the method of the levying of this tax against the lands benefitted by a drainage ditch, and have held that a law that provides for notice and an appearance and the right to contest the amount of the tax, and to contest the right to tax at all, with the right of appeal therefrom, if given to the land owner prior to
119 the time that a tax is levied and becomes effective, is "due process of law."

I was impressed upon the oral argument with counsel's reference to the decision in the North Dakota case, Soliah vs. Heskin, etc., 222 U. S. 522. Counsel urged that the law of North Dakota, very similar to ours, was sustained because it provided for a notice at the time of the establishment of the ditch. Reference to this opinion demonstrates that the Court held as follows:

"Neither does that Amendment invalidate an act authorizing an appointed Board to determine whether a proposed drain will be a public benefit and create a drainage district consisting of land which it decides will be benefitted by such

drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property.

(Underscoring is mine.)

Under the South Dakota statute, applying this rule as announced in the North Dakota case, clearly, the notice is provided and an opportunity to be heard is afforded the land owner before the assessment becomes a lien upon his property, in the drainage of agricultural lands.

Louisiana has held that:

"Whenever by the rules of the state or by state authority, a tax assessment, servitude or other burden is imposed upon property for the public use, * * * * * * * * and those
120 laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person of such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without 'due process of law.' " Davidson vs. New Orleans, 96 U. S. 97.

Massachusetts has held that:

"If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." Spencer vs. Merchant, 125 U. S. 578.

Construing the statutes of the State of Missouri, it was held that:

"It is granted that the land owners were not afforded an opportunity to be heard in respect to the value of their land. While no hearing is given when the lands are appraised a hearing is given when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice when owners aggrieved by the valuation may have a full hearing upon that question. This is due process of law." Embree vs. K. C. & L. Road Dist. 240 U. S. 242.

The drainage statute of Michigan was considered in re Roberts vs. Smith, 72 N. W. ....., and also in Gillette vs.

McLaughlin, 37 N. W. 551, and in Smith vs. Carlo, 72 N. W. 22. In these cases the same objections were made to
121 the constitutionality of the law that are argued by the plaintiffs here, and especially that the persons who did not own lands traversed by the drain, but who are within the assessment district, have no opportunity to be heard upon the necessity for laying the drain. And, further, that persons within the assessment district are entitled, under the constitution, to a hearing upon the question of the public necessity for the drain. These contentions were denied in these cases, the law held constitutional, and a full discussion of the questions is to be found in these cases and the cases therein cited.

The Michigan statute is construed again in re Voight vs. Detroit, 82 N. W. 253, and on appeal, 184 U. S. 115, in which it was urged that no provision is made for a notice to property owners of the time and place of hearing upon either the question of fixing the taxing district or the amount of the award to be spread thereon. This, it is claimed, leads to taking property without due process of law, and therefore the law is unconstitutional. It was claimed in this case, by counsel, that the complainant was entitled to notice of the hearing relating to the establishment of the assessment district, and of the amount of the total assessment, and because the statute did not provide for these notices it was unconstitutional. It was held in this case that this position could not be maintained.

"The provision of law by which, when the proceeding has reached the stage where it is proposed to levy the tax, a notice must be served on the property owner, was held sufficient to avoid the constitutional objection, notwithstanding no
122 notice is required in respect to the creation of the district or the determination of the aggregate amount of the tax to be collected.

In re Paulson vs. Portland, 149 U. S. 30 it is held:

"It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question, What proportion of tax shall be assessed upon his land, there is no taking of his property without due process of law."

I repeat that under the South Dakota statute there is ample provision for notice to every land owner, and an opportunity given to be present at the hearing, at which time and place he may assert all objections against the validity and justice of the proposed charge upon his property before the tax is lev-

ied, and carried by the County Auditor as such on the books of his office and made a lien upon the property. It follows that, in my judgment, the South Dakota statutes, enacted in the light of that provision of the Constitution of the State providing for the drainage of agricultural lands, is constitutional.

The case made by the bills filed by the plaintiffs in these various actions involve a real and substantial question under the Constitution of the United States. The amount involved in each case is greatly in excess of Three Thousand Dollars, exclusive of interest and costs. On the question of the jurisdiction of this Court, I am of the opinion that each
123 plaintiff states a case in his bill plainly cognizable in this court. All of the plaintiffs except the City of Sioux Falls allege diversity of citizenship, in addition to the Constitutional question, and the proper amount involved. I repeat that there can be no question as to the bills involving a real and substantial question under the Constitution of the United States, and in such a case the jurisdiction of this Court extends to every question involved, whether of Federal or State law, and enables the Court to rest its judgment or decree on the decision of such of the questions as in its opinion effectually dispose of the cases. Davis et al. vs. Wallace et al. (Opinion Jan. 9, 1922,.... U. S. .... with cases there cited).

It conclusively appears on the face of these pleadings that there is no speedy or adequate remedy at law. The remedy at law must be a remedy on the law side of the Federal Court, not a remedy in the State Courts of South Dakota. In each of the cases where there is a diversity of citizenship, this Court of Equity will not deny the plaintiff relief because there may be a remedy in the courts of the state, for the reason that the non-resident is not required to subject himself to jurisdiction of the Courts of the State in order to obtain relief. U. S. Life Ins. Co. vs. Cable, 95 Fed. 761.

In neither of the cases at bar is there a remedy at law on the law side of the Federal Court. If plaintiffs, or either of them are compelled to pay this tax, no action would lie on the law side of the Court that would give them relief. No action on the law side of the Court would protect them, or either of them, from future assessments and future responsibilities.

There is the further issue presented on the face of the bills, that for the reasons therein stated, no Drainage Ditch No. 1 and 2, under which it is pretended this assessment is made,

was ever established. That this is simply a pretense for the maintenance and repair of the ditches that had been theretofore established, and that the steps that have been taken by the County Commissioners are without authority of law. In substance, that the Board of County Commissioners are trespassers, acting with no right or color of right. That insofar as there is an attempt to assess benefits to the property of the plaintiffs, or other property in the City of Sioux Falls, the proceedings are entirely void. That as to each of the plaintiffs the assessment of benefits made is arbitrary, unjust, illegal and void. This is the basis of the claim that the assessment is such as to result in the property of the plaintiffs bearing more than its share of the burden of improvements while such property is in no wise benefitted thereby. That the alleged benefits from this improvement have not been estimated upon these properties with the farm lands according to any standard which will produce approximately correct general results. That the taxes upon the plaintiff's property are upon some fanciful view of future benefits, while the farm
124 property is assessed wholly according to its area and position. That the property of the respective plaintiffs is sought to be burdened for this improvement upon a basis so wholly different from that used for ascertaining the contribution demanded from individual owners of agricultural lands adjacent to the drain, as necessarily to produce manifest inequality. That the plaintiffs are therefore deprived of the protection of the law which must be extended to all.

The determination of these various issues necessarily requires a consideration of the facts as they appear in the record. Fortunately there is practically no dispute as to the facts. The only dispute is as to the legal effect of the acts of the Board of County Commissioners.

What, then, was the situation at and prior to the time that the said Board assumed authority to require the plaintiffs and others in the City of Sioux Falls, to pay for the building of this new spillway, and the repair of the ditches hereinafter referred to? The Sioux River flows from the north, in a southerly direction, west of the City of Sioux Falls, then flows in an easterly direction, south of the main portion of the city, then flows north through the city of Sioux Falls, flowing a distance of some ten miles from a point north of the city where the drainage ditch hereinafter referred to leaves the river, to a point where the drainage ditch empties its waters into the river. The river thus describes a large

horse-shoe, the drainage ditch cutting across the open end, practically from the river on one side to the river on the
125 other. Dell Rapids is situated in the Sioux Valley more than twenty miles north of Sioux Falls.

At first there was established Drainage Ditch No. 1, and then Drainage Ditch No. 2. These two ditches extended from a point north of the City of Sioux Falls some distance to a point some fifteen miles north of Sioux Falls, at which point Drainage Ditch No. 2 was intended to take the flood water from the Sioux River and conduct it down its length into and through Drainage Ditch No. 1, to the river north of Sioux Falls, cutting through the hills adjacent to the river, and necessitating the conduct of the water down a fall of more than one hundred feet into the river. Drainage Ditch No. 1 and Drainage Ditch No. 2 were duly constructed under the provisions of the Constitution and laws of the state for the drainage of agricultural lands and were operated for the purpose for which they were constructed. The first petition for said Drainage Ditch No. 1 was filed in 1907, and the petition for Drainage Ditch No. 2 was filed in 1910. Such proceedings were had that these two ditches were constructed down the valley in a southerly direction, near the Sioux River until a point was reached north of the City of Sioux Falls, when the ditch was turned in an easterly direction across to the Sioux River at a point north and east of the City of Sioux Falls. Benefits were assessed and paid by the owners of adjacent lands under the provisions of the statutes of the State of South Dakota to which I have referred. In
126 1915 the force of the waters conducted by these two drainage ditches was so great as to wash out what is called the spillway, through the bluff adjacent to the point where the waters from the ditches entered the river. The ditches in the meantime also became out of repair, and at one point several miles above the City where the ditch approached the river, the water was cutting from the river into the ditch, threatening to turn the entire course of the Sioux River at this point into the ditch, and through the ditch back into the river, leaving the Sioux River from that point and for about twelve miles around to where the ditch flowed into the river, without water. The spillway from the ditch through the bluff down into the river was so unskilfully, inefficiently and unscientifically constructed that it would not stand the force of the water with a fall of one hundred feet into the river. It was washed out, and the bluff being of soil and sand, washed out of the entire depth of the river and began washing back

through the bluffs, threatening to cut clear back to a point where the water cut through from the river to the ditch, thus taking away from the City of Sioux Falls the benefits of the river, its sewer system and the advantages of the stream, and take the water from the plaintiff, The Northern States Power Company, that naturally flowed down the river except for the interference by this drainage ditch. And in the cutting into this bluff also threatened to cut into the gravel bed in which the water supply of the City is located, a few miles west of it, and thus drain and destroy and take away from the City of Sioux Falls, its water supply. This was the situation in 1916.

This situation presented no question of the
127 drainage of agricultural lands. The people who had been responsible for the establishment of these two drainage ditches and the conduct of the water down through the hill to the river below, because of the inefficient manner in which the spillway had been constructed, had caused all of the trouble. The thing that confronted the Board of County Commissioners at that time, having charge of these two drainage districts, was the maintenance of the ditches and of the spillway which was a part of the ditch that had already been constructed. In the construction of these ditches no suggestion had ever been made that the City of Sioux Falls, all lying entirely south of the districts drained, was in any manner interested in the drainage, or that there could be any benefits assessed to such city or any property owner thereof. The situation that confronted them was not drainage of agricultural lands, it was the maintenance of the ditches that had been established by them, and the prevention of the dangers threatened by the water that they were conducting down through these ditches, through this hill, into the river. They might have taken their chances upon the damages that their acts were responsible for, and let the river cut down through the ditch that they had constructed and turned the course of the river there and taken the water away from the City of Sioux Falls entirely, and exhausted and destroyed the City's water supply, and destroyed the power of the plaintiff, the Northern States Power Company, by taking the water from the stream at the point where the power plant is located, without in any way endangering the agricultural lands along this ditch, except so much of it as would be
128 washed away in forming this new bed of the river. I apprehend that we may reasonably find from the evidence here that such a cut-off in the river would be to the advantage of the land owners and prevent floods, so that it was

not the drainage of the lands that was bothering the Commissioners, it was not the purpose to drain agricultural lands that impelled the Commissioners to act; the thing that impelled them to give this situation any consideration was the dangers that were threatened by reason of their having constructed these two ditches, and an effort to stop the ravages of the water they were conducting down there, by the construction of a substantial, adequate spillway. It was also necessary for them, in order to stop this threatened danger, to stop the ravages of the water at the point where it was cutting into their ditch. Certainly, this condition never could have existed if they had never built the ditch. They were responsible for it and it was their duty to maintain the ditch and to stop the ravages of the water cutting into it and through it.

This was one of the questions that they had before them, one of the problems that they had to solve, and they did proceed to construct this spillway in a substantial way and to dike, and with cement to hold the water in the stream at the place where it was cutting into the ditch. The statutes of the State of South Dakota specifically provide the duty and the method for the maintenance of these ditches. Section 8470 of the said Revised Statutes, provides as follows:

"Assessments for maintenance. For the cleaning and
129 maintenance of any drainage ditch established under the provisions of this article, assessments may be made upon the land owners affected, in the proportion determined for such drainage, at any time, upon the petition of any person setting forth the necessity therefor, and after due inspection by the Board of County Commissioners."

When this river cut through into the ditch, when the ditch became clogged in places and was not wide enough in others, when the spillway washed out by the force of the water they were conducting down the ditch, and the cutting of the bluff began and large areas of land were being washed away, and the other dangers were threatened, there was only one proposition presented to the Commissioners, and that was one of maintenance; was one of taking care of the water that they were conducting down these two ditches, No. 1 and No. 2.

Instead of proceeding frankly to maintain the ditches they had established in the manner provided by statute; instead of carrying out the obligations they had assumed when they brought the water down through these ditches, and attempted to deliver it through this bluff into the river; instead of pro-

ceeding regularly under this statute to do that which it was their duty to do; instead of performing the obligation that they had assumed when they established the ditches, that of maintaining them, they proceeded to act upon the assumption that because they had conducted the water down into these ditches, and because of the inefficient manner in which
130 they had constructed the ditches and built the spillway, and all of these dangers were threatened, therefore, the plaintiffs, and others in Sioux Falls, were necessarily to be damaged. And, although a proper maintenance of these two ditches, No. 1 and No. 2, would stop the damage, would prevent any danger, the Commissioners evidently reasoned that because the plaintiffs and others in Sioux Falls were in danger, they must pay for the repair of these ditches. That could not be done by simply saying the ditches shall be repaired and the City of Sioux Falls, the plaintiffs, and others, shall pay for it, or pay a part of it, and therefore, they proceeded to do indirectly what it was conceded they could not do directly. In other words, they then began to look around and see what they would do in the way of taking care of the water and stopping these dangers.

At first it was proposed to change the spillway and conduct the water down in a southerly direction, through a slough or lake, into the river west of the City, and save the great fall that is involved at the point where the water enters the river from the spillway northeast of the city.

This was abandoned and they finally then pretended to act under a statute authorizing the abandonment of ditches. As a matter of fact there was no abandonment in good faith. No attempt to abandon the ditches. In fact, the reading of the resolution shows it was simply that they abandoned the spillway. That they filed a petition which was headed, "To reconstruct and improve Drainage Ditches No. 1 and No. 2, Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by assessment upon the property, persons and corporations benefitted thereby."

This petition was filed in July, 1916, with the Board of County Commissioners. There had never been an abandonment of Ditch No. 1 and Ditch No. 2. There had been a pretended abandonment of the spillway. But the Commissioners proceeded then to construct a proper spillway on the identical location of the old one. In other words, no change whatever was made in the two ditches, No. 1 and No.

2, except to properly construct an efficient, adequate, substantial spillway, and prevent the river cutting from its bed into the ditch, cleaning out the ditch and repairing it, changing the gates at the head of the ditch where the flood waters were taken from the river.

Upon this petition, for this purpose, the Board of Commissioners assumed authority and power to re-christen this Ditch No. 1 and Ditch No. 2, and call it Ditch No. 1 and 2, and for the purpose of making these repairs and maintaining the old ditches under the new name, proceeded as if no ditch had been established, and as if the Ditches No. 1 and No. 2 were not in existence, and as if no obligation had been assumed by the drainage districts when they diverted the water down through the bluffs to the river, and proceeded to make the repairs and to reach out and say that the various plaintiffs were benefitted. Instead of charging the repairs and [maintainence] of the ditches to those who were responsible for their construction under the provisions of the statutes above referred to, the Commissioners proceeded to assume
131 the right and authority to constitute a new drainage ditch without any abandonment of the old ditches, with no thought of using new or different drainage in any way, except to maintain them and to perfect that which had been inefficiently constructed, with no thought or purpose except to repair the damage that had already been done, and prevent future damage.

Under these circumstances, I am of the opinion that the Commissioners were acting entirely without authority of law. There is no provision in the statutes of the State of South Dakota for the taking in of any other lands and assessing them, for the maintaining of a ditch after it has been constructed, and the benefits of its building have been assessed.

I am of the opinion that the forming of this new ditch was simply a pretense, and that the plaintiffs' pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed.

I am of the opinion that Section 8489 of said Revised Statutes, in regard to invalid and abandoned proceedings is not applicable to any situation such as existed here. That section has reference to the abandonment of a ditch that has been enjoined, vacated, set aside or declared void, and specifically provides for the re-establishment of a ditch over the same

territory, and that the new ditch shall assume the expenses paid on the old ditch, and give credit for any payment
132 made upon the old ditch by people benefitted. No such proceeding was attempted to be followed in this case. The proceedings establishing old ditches No. 1 and No. 2 have never been held void, never been set aside, never been abandoned. They are in force today and are responsible for the manner in which the ditches were constructed and for any damages that result from their negligence.

Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and [maintainence] of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage Ditch No. 1 and 2 was ever established and has no existence.

I am of opinion that the proceedings of the Board of Commissioners in the repair and [maintainence] of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the City of Sioux Falls, are void. Entertaining this view it follows that plaintiffs' prayer for an injunction should be granted.

I may suggest in conclusion, however, that even if the Court had found that Drainage District No. 1 and 2, was legally constituted, and that the Board of County Commissioners had the right to extend the benefits to property within the City of Sioux Falls, the proofs overwhelmingly bring the plaintiffs within the rule recently expressed in re Thomas et al. v. Kansas City Southern Railway Co., et al. (De-
133 cember term A. D. 1921,....Fed....) in that the taxation that is imposed upon each of the plaintiffs is a much higher rate, and upon a different basis, than the tax upon land lying within the district. As a matter of fact no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiffs' property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. Taking, for instance, the tax upon one of the plaintiffs, the City of Sioux Falls, for its miles of streets in the City of Sioux Falls, with no pretense that there is any method of taxation or measuring a benefit or a gain, that would produce

even approximately correct general results, when considered with benefits to the lands in the district. Simply a vague, indefinite generality, indulged in by the engineer and adopted by the Board. Benefits purely fanciful, with no substantial basis. Take the railroads, different plaintiffs, there is no pretense that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all.

Referring to the testimony showing the manner of making assessments and the amount, in a general way: I think it fairly appears from the record in the case that the contention of the plaintiffs that the attempt to assess the property of these plaintiffs was an afterthought. It, in my judgment, is established that they could not be benefitted, even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the Board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands. The plaintiff, Chicago, Rock Island & Pacific Railway Company, is simply arbitrarily assessed Eight Thousand Dollars, in raising a total of Three Hundred Thousand Dollars. The Northern States Power Company was assessed Fifty Thousand Dollars, one fifth of the entire expense although there is included in the pretended district agricultural lands something like twenty miles in length and several miles in width. The injustice of this is apparent when it is noted that the record disclosed that it was located upon the rapids of the Sioux River, in the City of Sioux Falls, had been located there for many years. It was, therefore, entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business.

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The injury that was to be remedied by this improvement was one that had been caused by Drainage Ditch No. 1 and

Drainage Ditch No. 2, one that could not have existed
135 but for the establishment of those ditches. The duty to maintain these ditches involved the duty to repair the break from the banks of the river, and the duty to prevent the taking of the water from the river, that would, or should, naturally flow therein to plaintiff's benefit.

Even if there had been a valid establishment of a drainage ditch at the time and place in controversy, and even if the Board of County Commissioners had jurisdiction, there was an entire failure to present any evidence upon which any benefit could possibly be predicated against this plaintiff. The engineer who pretended to work out the hypothetical benefit admitted that he was not a hydro-electric engineer, and therefore, not able to analyze and state the result of the different conditions of the water in the river. The suggestion applies with special force to the status of this plaintiff that the amount of benefits were fanciful, exorbitant and arbitrary, with no possible appreciation in the value of its property as a result of this improvement, and it is self-evident that upon no basis that can be used and applied to all of the property tributary to this ditch, could Thirty Thousand Dollars be ascertained as the reasonable contribution to be demanded of this particular plaintiff.

These suggestions are applicable in a general way to the attempted assessment of the property of all of the plaintiffs, and I am of the opinion that the plaintiffs have all properly invoked the aid of this Court from an arbitrary, unwarranted exercise of power by the Board of County Commissioners of Minnehaha County, who, without due process of law or compensation, threatened to deprive them, and each of them, of their property. What I have said, I think, should apply with equal force to all property in the City of Sioux Falls, attempted to be assessed by the Board of Commissioners for the maintenance of this ditch under the name of a new ditch. The responsibility for the maintenance of this ditch, for the repair of the break from the river into the ditch, and the change of the head gates, and the cleaning out of the ditch, and the repair and reconstruction of the spillway, was, and is, upon the two drainage districts responsible for their construction and maintenance, and the amount expended, some $250,000.00, which, with interest, now amounts to $300,000.00 or more, is a charge upon those districts to be assessed and made a lien upon the property within the districts, assessed in the proportion and collected in the manner, provided by the statutes of the State of South Dakota for the maintenance of drainage ditches.

There is another and further suggestion. I am of the opinion that this reconstruction of the old spillway without change of location, the repair of the break from the river into the ditch, the cleaning of the ditch, the change of the head gates where the flood waters are taken from the river, everything that was done under this pretended establishment of a new ditch, could not be viewed in the same light or as serving the same purpose as the construction of the original
136 ditches, because the thing that caused the Board of Commissioners to take any action with reference to the condition that then existed was the danger that existed because of the conduct of the water down through these two drainage ditches to and through this spillway. The danger that was threatened was not that the agricultural lands would not be drained, but that immense damage was threatened, that the course of the river was to be diverted to this cut-off, that great areas of land were threatened to be cut away by this river one hundred feet deep, that the water supply of the City was threatened to be taken away because of this drainage ditch and this imperfect spillway. Because the water was to be taken from the river and all of the benefits of the river for several miles, through and around the City of Sioux Falls would be destroyed. The power of the Northern States Power Company would be destroyed by taking the water from the river. If it had not been for those conditions, for these threatened dangers, no action would have been taken, the ditches would have continued to function as they had functioned before. If the spillway had been properly constructed originally, and if it had not proven inadequate, there would have been no cause for any action by the Board in the year 1916. Every consideration that impelled action by the Board was some phase of the threatened danger by reason of the inadequate and imperfect construction and [maintainence] of these two ditches. Neither of these considera-
137 tions that influenced the action of the Board had anything to do with draining agricultural lands.

It may be said that to remedy these wrongs constituted a public use, as referred to in the Constitution of the State of South Dakota. Admitting that that is true, we are confronted with the proposition that there has been no legislation conforming with the provisions of the Constitution, authorizing the Legislature to provide for the establishment of drainage ditch districts, and the naming of officers with the powers therein referred to. If, therefore, any claim were made that the Commissioners were acting under this authority, independent of the provision of law with reference to the drainage of

agricultural lands, the answer is that the provision of the Constitution is not self-executing, and that no legislation has been provided carrying this provision of the Constitution into effect.

You may prepare proper orders in each case granting plaintiff an injunction as to all property located in the city of Sioux Falls and all Property not within the old Drainage District No. 1 and Drainage District No. 2. [Provided] an exception in behalf of the plaintiffs to the order of the Court denying the plea of the unconstitutionality of the drainage statute as applied to agricultural lands and the defendants a general exception to each order.

Yours truly,

138 JAS. D. ELLIOTT
U. S. District Judge.

Endorsed: Filed in the District Court on Feb. 23, 1922, at 4:15 P. M.

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139 (Decree, March 2, 1922.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, Milwaukee & St. Paul Railway Company, Plaintiff, No. 99 vs. In Equity.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

and

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and

Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, and W. G. Porter, Intervening Defendants.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was Ordered, Adjudged and Decreed as follows, viz: that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, as County Commissioners of the County of Minnehaha, and State of South Dakota, their agents, servants, employes, attorneys, and suc-
140 cessors in office, and each and every of them, be and they are hereby forever restrained and enjoined from making any apportionment of benefits upon the plaintiff herein, the Chicago, Milwaukee & St. Paul Railway Company, or upon any property belonging to the plaintiff (other than such property of the plaintiff as may have heretofore been assessed for the original construction of Drainage Ditch No. 1 or of Drainage Ditch No 2, of Minnehaha County, South Dakota) for the construtcion of a spillway, dams, retaining gates, ditches, and for all other work done or that may hereafter be done by or under the supervision of the Board of County Commissioners of the County of Minnehaha South Dakota in the matter of the construction, or re-construction, repair, or maintenance of Drainage Ditch No. 1, and Drainage Ditch No. 2, or of said ditches under the designation of "Drainage Ditch No. 1 and No. 2" or as "Drainage Ditch No. 1 and 2", of Minnehaha County, South Dakota and that they and each of them are hereby perpetually restrained and enjoined from making any assessments on said property, or upon any parcel or portion thereof for the cost of the construction, reconstruction, repair or maintenance of the said spillway, dams, retaining gates, ditches and other work heretofore done, or which may be hereafter done upon the said drainage ditches above referred to, or any of them, and from in any manner including any of the property of the plaintiff, the Chicago, Milwaukee & St. Paul Railway Company (other than the property originally assessed for the construction of Drainage Ditch No. 1 or of Drainage Ditch No. 2) within the territory benefited by said drainage ditches, or either of them.

It is further ordered, adjudged and decreed that the defendant, Fred E. Ward as Auditor of the said County of Minnehaha, South Dakota, his agents, servants, employees, attorneys and successors in office, and each and every of them, be and are hereby forever restrained and enjoined from making

any such apportionment of benefits, or from making, or levying any such assessment upon the plaintiff, the
141 Chicago, Milwaukee and St. Paul Railway Company, or upon any of its property (other than that originally assessed for the construction of said Drainage Ditch No. 1 and said Drainage Ditch No. 2) and from certifying any such assessment to the County Treasurer of the said County of Minnehaha, South Dakota,

It is further ordered, adjudged and decreed that the defendant J. O. Anderson, as Treasurer of the County of Minnehaha, South Dakota, his agents, servants, employees, attorneys, and successors in office, and each and every of them, are hereby forever restrained and enjoined from filing any such assessment and from collecting any such assessment against the property of the plaintiff, the Chicago, Milwaukee & St. Paul Railway Company, (other than the property heretofore assessed for the original construction of the said Drainage Ditch No. 1 or of said Drainage Ditch No. 2)

It is further ordered, adjudged and decreed that this decree be and is hereby declared to be without prejudice to any of the rights of the plaintiff, the Chicago, Milwaukee & St. Paul Railway Company, to object to any apportionment of benefits for the construction of said spillway, dams, retaining gates, ditches and other work heretofore done, or that may hereafter be done by the Board of County Commissioners of Minnehaha County, South Dakota, in the matter of the construction or re-construction, repair, or maintenance of Drainage, Ditch No. 1 or of Drainage Ditch No. 2, or of the Drainage, Ditches No. 1 and No. 2, or of Drainage Ditch No. 1 and 2, of Minnehaha County, South Dakota, upon any of the property of the plaintiff which may heretofore have been assessed for the original construction of said Drainage Ditch No. 1 or of said Drainage Ditch No. 2, and without prejudice to any and all rights of the plaintiff to contest any such apportionment of benefits, or any assessment which may be made
142 under any such apportionment of benefits, or any act of the Board of County Commissioners of said County of Minnehaha in the construction of said spillway, dams, retaining gates, ditches and other work heretofore done, or which may be hereafter done by or under the supervision of the Board of County Commissioners of said Minnehaha County, South Dakota, in the matter of the construction or re-construction, repair, or maintenance of said Drainage, Ditch No. 1, or of said Drainage Ditch No. 2, or of said Drainage Ditches No. 1 and No. 2 or of said drainage Ditch No. 1 and 2, and, that so far as this decree is concerned, the rights of the plaintiff,

the Chicago, Milwaukee & St. Paul Railway Company with respect, to the making of any apportionment of benefits, or the levying of any assessment against any of its property heretofore assessed for the original construction of said Drainage Ditch No. 1, or of said Drainage Ditch No. 2, are expressly saved and reserved and shall remain the same as if this suit had not been instituted or this decree entered herein.

It is further ordered, adjudged and decreed that the plaintiff herein, the Chicago, Milwaukee & St. Paul Railway Company, have and recover against the defendants herein, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota and against the intervening defendants herein, Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt,
143 South Dakota, Dakota Trust and Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter, its costs and disbursements herein taxed and allowed in the sum of .... Dollars (the amount thereof to be inserted herein by the Clerk of the Court after the costs shall have been taxed by him)

Done in open Court, at Sioux Falls, in said Southern Division of the District of South Dakota, on the 2nd day of March 1922.

By the Court:

JAS. D. ELLIOTT,
Judge.

(Seal of Court)

Attest:
Jerry Carleton,
Clerk.

7—6313

To the entry of the foregoing decree the plaintiffs, the defendants and the intervening defendants duly and severally excepted, which exceptions are allowed by the court.

Dated March 2nd, 1922.

JAS. D. ELLIOTT, Judge.

Endorsed: Filed in the District Court on Mar. 2, 1922, at 4:15 P. M.

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145 (Assignment of Errors.)

And now, on this 25" day of August, A. D. 1922, come the defendants, by their Solicitors, Elbert O. Jones and L. E. Waggoner, and the intervening defendants, by their Solicitor, Norman B. Bartlett, and say that the decree entered in the above entitled cause on the 2nd day of March, A. D. 1922, is erroneous and unjust to the defendants.

First:

Because plaintiff's bill of complaint herein does not set forth any matter of equity entitling the plaintiff to the relief prayed for and it affirmatively appears from said
146 bill of complaint that the plaintiff has a plain, adequate and complete remedy at law.

Second:

Because the bill of complaint does not set forth any matters of equity in addition to the pretended constitutional question, or any special circumstances to bring the case under some recognized head of equity jurisdiction, and it is necessary to allege and prove some special circumstances in addition to the constitutional question, and thereby bring the case under some recognized head of equity jurisdiction, in order that this Court shall have jurisdiction of said matters.

Third:

Because the bill of complaint fails to set forth facts sufficient from which this Court can infer or presume that there will result a multiplicity of suits, irreparable injury, or a cloud cast upon the title of its property, and it is necessary to specifically allege facts from which this Court can infer that either a multiplicity of suits, irreparable injury or a cloud will be cast upon the title of its property as a direct result of the action that plaintiff is attempting to enjoin, and such allegations must be specific allegations of fact, and not conclusions.

Fourth:

Because it affirmatively appears from the face of plaintiff's bill of complaint, and the record herein, that there is no jurisdictional amount in controversy in this case at this time, and can be none, and that, therefore, this action is prematurely brought, for the reason that no assessment, levy or tax has been, in fact, made, assessed, equalized, fixed or levied against the property of the plaintiff, or at all.

Fifth:

147 Because it affirmatively appears from plaintiff's bill of complaint, and the record herein, that the State Tribunal having jurisdiction of said drainage ditch proceedings, was enjoined by this proceeding before such State Tribunal had had an opportunity to perform its statutory duty to determine, equalize, assess, fix or levy the amount of benefit, assessment or tax, if any, chargeable against the property of the plaintiff, and for this Court to maintain jurisdiction before such State Tribunal had performed its full statutory duty, determined, equalized, assessed and fixed the amount of benefit, assessment or tax, was a usurpation of the authority invested in the State Tribunal, and an attempt to substitute this Court for such State Tribunal; and for the further reason that there is no provision of law giving this Court original jurisdiction over said matters.

Sixth:

Because the allegations of plaintiff's bill of complaint herein involve and present for litigation the determination of facts and matters controlled and governed by the drainage statutes of South Dakota, which, by their terms, create and provide a special tribunal with exclusive original jurisdiction to try and determine the questions presented in said bill of complaint, which determinations of said State Tribunal are final and conclusive upon this Court in this action, for the reason that this Court has no original jurisdiction by a bill in equity, to direct, reject, or control the proceedings and determinations of that tribunal, and thereby take away from that tribunal the power of discretion, and the exercise of its judgment in arriving at a proper determination of the matters before it.

Seventh:

Because until the tribunal created by the drainage statutes of South Dakota has exercised its judgment and discretion in the determination of questions of fact properly before
148 it, and the necessary steps of procedure have been taken, and it has finally determined, equalized and fix-

ed the proposed tax or assessment, if any, against the plaintiff's property, this Court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, for the reason that until such proposed assessment, tax or servitude has been equalized and fixed and assessed, this action is premature.

Eighth:

Because the undisputed evidence shows that on or about December 4, 1920, an equity suit was instituted in the State Circuit Court, within and for Minnehaha County, South Dakota, the same being a court of general jurisdiction and having jurisdiction over the subject matter therein presented, by one Oluf O. Gilseth, being a person belonging to the same class of persons as the plaintiff herein, whose lands were affected by the construction of Drainage Ditch No. 1 and 2, and against whose lands the proportion of benefits for the construction of said ditch had been proportioned at the same time, upon the same basis, and in like manner and under the same law as the proportion of benefits to the land of this plaintiff, which said action was brought by said Oluf O. Gilseth for himself, and as a representative of the class to which he and this plaintiff belong, and which action was brought against the defendants herein, and was instituted, tried and determined with notice to and knowledge by, approval, acquiescence and consent of this plaintiff, its officers, agents and attorneys, and in which said case the same facts were alleged and relied upon in the bill of complaint of the said Oluf O. Gilseth as are alleged and relied upon by the plaintiff herein in its bill of complaint, and which bill of complaint prayed for the same relief, and which said action came on for trial, in which trial this plaintiff was entitled to be
149 heard, on the 31st day of January, 1921, and thereafter said State Court entered its judgment and decree dismissing said action upon its merits, and denying the plaintiff the right to an injunction against these defendants, which said judgment and decree is now in full force and effect, and which determination is binding upon this plaintiff, and is, therefore, a bar to this action, for the reason that all matters presented by plaintiff's bill of complaint herein are res adjudicata.

Ninth:

Because the uncontradicted evidence in this case shows that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, and upon which the drainage ditch designated as Drainage Ditch No. 1 and 2, was ordered established and constructed, and the notice of hearing

said petition given pursuant to law, and the resolution of the Board upon the hearing of said petition establishing said ditch, all contained a description of plaintiff's property, and alleged that the same was affected thereby, and said resolution determined that plaintiff's property so described was affected by said Drainage Ditch No. 1 and 2, which determination, unappealed from, is now final and conclusive upon this plaintiff, and this Court, and, therefore, this Court was unwarranted in determining and decreeing that plaintiff's property is not affected by Drainage Ditch No. 1 and 2, no extrinsic fraud being alleged in plaintiff's bill of complaint.

Tenth:

Because the undisputed evidence in this case shows that the plaintiff's property is receiving some benefit, and that it has not exhausted its statutory remedy for an equalization of such benefits, and its only complaint is that too many units of benefit have been apportioned against its property; and, therefore, this Court has no jurisdiction under its gen-
150 eral equity powers to correct an unequal or unjust assessment, since the statute prescribes a method for reviewing or correcting unequal or unjust assessments.

Eleventh:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was a new project, with plaintiff's property included therein, which finding and judgment of said Tribunal are binding upon this plaintiff and upon this Court, and can not be attacked in this collateral action, for the reason that said Tribunal is, by the drainage law of the State of South Dakota, given jurisdiction to determine the nature, kind and character of the proposed drainage, and the description of and the amount of property affected by said drainage project, and having made said findings and judgment, and this plaintiff not having appealed therefrom, said plaintiff is now bound thereby.

Twelfth:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and

determined therein and thereby that said ditch was conducive to the public health, convenience and welfare of the territory described in the petition of the City of Sioux Falls, F. L. Blackman and others, and was necessary and practicable for draining agricultural lands, which findings and judgment of said Tribunal are now binding upon this plaintiff and
151 upon this Court, and cannot be attacked in this collateral action, for the reason that, by the drainage law of the State of South Dakota, the Board of County Commissioners are given authority to determine whether or not a proposed drainage ditch will or will not be conducive to the public health, convenience and welfare of the territory described in the petition therefor, or necessary and practicable for draining agricultural lands; and having found in the affirmative in both instances, and the plaintiff herein not having appealed from such determination, the same is now binding upon this plaintiff and upon this Court.

Thirteenth:

Because no facts have been alleged in plaintiff's bill of complaint constituting extrinsic fraud on the part of the Board of County Commissioners of Minnehaha County, South Dakota, or any one else, in filing the petition of the City of Sioux Falls, F. L. Blackman and others, or in the allegations contained therein, or the resolution or other proceedings on, and prior to, or in the establishment of said drainage ditch designated as "Drainage Ditch No. 1 and 2", on October 3, 1916; and there is no evidence in the record of any extrinsic fraud on behalf of the Board of County Commissioners, or anyone else, in any of said proceedings, and, therefore, the determination of the facts found by said Board in said resolution of October 3, 1916, are now binding and conclusive upon this plaintiff and upon this Court, and this Court has no right, authority, or jurisdiction to enter upon, attempt to decide, to decide or re-litigate such questions of fact as were previously determined by such special Tribunal.

Fourteenth:

Because the undisputed evidence in this case shows that more than five years have elapsed after this plaintiff
152 had actual knowledge and legal notice of the establishment and construction of Drainage Ditch No. 1 and 2, and during all of said time this plaintiff took no steps to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars ($250,000.00) thereon and plaintiff's bill of complaint wholly fails to make any distinct averments, and none of the evidence tends to ex-

cuse this unwarranted delay, and for these reasons this Court should not come to its relief.

Fifteenth:

Because the drainage statutes of South Dakota provide a fixed and determinable basis, method and rule of apportionment of benefits, and, pursuant thereto, the Board of County Commissioners of Minnehaha County, South Dakota, applied such fixed and determinable basis, method and rule of apportionment of benefits, which will probably produce approximately correct general results as to the benefits to plaintiff's property, as well as all other property in the drainage district, and, therefore, such apportionment is not arbitrary, and this Court cannot usurp the power of the Board to equalize the proportion of benefits as provided by
153 said statutes.

Sixteenth:

Because the evidence wholly failed to show that there would result a multiplicity of suits, or irreparable injury, or a cloud cast upon the plaintiff's property, and also failed to show any circumstances to bring the case under some recognized head of equity jurisdiction, and the evidence does show that the plaintiff had a plain, adequate and complete remedy at law.

Seventeenth:

Because all the evidence now shows that there is no jurisdictional amount in controversy in this action, and that, therefore, this action was prematurely brought, in that the apportionment had not been equalized, and no tax had ever been assessed or levied against the plaintiff's property, or any other property, and that the amount of such tax, if any, and, therefore, the amount in controversy herein, has not been, and cannot be, determined until after such equalization and final assessment has been made, as provided by the law of South Dakota, and the uncontradicted evidence shows that said equalization of the apportionment of benefits was prevented by the temporary restraining order and the final decree in this case.

Eighteenth:

The Court erred in not adjudging and decreeing that on October 3, 1916, Drainage Ditch No. 1 and 2 was duly and legally established by the Board of County Commissioners of Minnehaha County, South Dakota, for a public purpose, including but not limited to the drainage of agricultural lands,

for the reason, that the Constitution of the State of South Dakota and Section 8458 of the Revised Code of South Dakota, 1919, provide therefor.

Nineteenth:

The Court erred in not adjudging and decreeing that the proceedings taken by the Board of County Commissioners of Minnehaha County, South Dakota, upon the petition of the City of Sioux Falls, F. L. Blackman and others, filed with the County Auditor on August 3, 1916, and upon which Drainage Ditch No. 1 and 2 was established on October 3, 1916, constituted the establishment of an entirely new drainage proceeding, and gave the Board of County Commissioners jurisdiction to construct such drainage as a new project, for the reason that such petition prayed for the construction of a drainage ditch over the exact line of drainage ditches
154 previously abandened, and contemplated a more comprehensive and perfect drainage system for the purpose of draining and benefitting additional property, in compliance with and as authorized by Sections 8458, 8476 and 8489 of the Revised Code of South Dakota, 1919, and the undisputed evidence shows the work done consisted of about eight miles of canalizing the river, doubling the capacity of the ditch and outlet, building dikes, dams and controlling works, and an adequate spillway or outlet to said ditch, at a total cost of over Two Hundred Fifty-five Thousand Dollars ($255,000.00), which was more than double the amount of the total assessments for old Drainage Ditch No. 1 and Drainage Ditch No. 2, which was the sum of One Hundred Twenty-seven Thousand, Seven Hundred Six and 10/100 Dollars ($127,706.10).

Twentieth:

The Court erred in not adjudging and decreeing that plaintiff's land was subject to assessment for benefits which it received, if any, under the establishment and construction of Drainage Ditch No. 1 and 2, without regard to whether its lands had been assessed and included within the assessment district of Drainage Ditch No. 1 and Drainage Ditch No. 2, or not, for the reason that Drainage Ditch No. 1 and 2, as established on October 3, 1916, was established as a new project upon due and legal notice to the plaintiff, and in the manner provided by the drainage statutes of South Dakota.

Twenty-First:

The Court erred in entering its decree herein in favor of the plaintiff and against the defendants, upon this plaintiff's

bill of complaint and the amendment allowed thereto, for the reason that said plaintiff's offer to amend said bill of complaint came too late, and long after plaintiff's attention was called to the fact that its bill contained no allegation
155 of arbitrary acts by objection to the introduction of testimony during the trial, and after the entire case had been tried, argued and submitted, and briefs had been filed twenty days, which amendment injected an entirely new cause of action into the bill of complaint, and to overcome which, the Court refused to receive evidence showing or tending to show that plaintiff's property was receiving a substantial benefit, and that the apportionment was not arbitrary and which amendment, when offered, did not conform to the facts established upon said trial, in that said proposed amendment assumed that the Board of County Commissioners were acting under jurisdiction obtained in the establishment of old Drainage Ditch No. 1 and Drainage Ditch No. 2, and not under the new drainage proceedings designated as "Drainage Ditch No. 1 and 2", as shown by the undisputed evidence; assumed that the equalization of the proportion of benefits had been had and assessment duly made thereon, whereas, all the evidence shows that merely a tentative fixing of the proportion of benefits had been made; assumed that the property of plaintiff had not been, and never could be, benefited by old Drainage Ditch No. 1 and Drainage Ditch No. 2 while the uncontradicted evidence shows a substantial benefit from the construction of Drainage Ditch No. 1 and 2, and that its property had been assessed and the assessment paid for benefits received by the construction of Drainage Ditch No. 1 and Drainage Ditch No. 2; assumed that the assessment for benefits had been made, while the uncontradicted evidence shows that no equalization or assessment of benefits had ever been made, and cannot be made until after the proportion of benefits has been equalized and finally fixed; assumed that the acts of the Board in making the so-called assessment were arbitrary, while the evidence shows that no assessment or equalization of benefit has ever been made; and further, said amendment does not attack the drainage law as arbitrary, or the unit provided by law as arbitrary but al-
leges that the acts of the Board in fixing the amount
156 of the benefits to plaintiffs' property were arbitrary, speculative and unjust, whereas, all the evidence shows that the Board, with its Engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received by plaintiff's property, using the fixed and determinable basis, method and rule of apportionment provided by the drainage law of South Dakota, and the undis-

puted evidence further shows on behalf of both parties that some benefit was received by the plaintiff; assumed the amount of the assessment and made an issue as to the amount of benefit, if any, plaintiff received, which matter this Court has no jurisdiction to determine; assumed and made an issue of the inequality of the so-called assessment upon plaintiff's property, and other agricultural land, which issue is within the exclusive jurisdiction of the State Tribunal, and this Court in this action has no jurisdiction to try or determine the same.

Twenty-second:

The Court erred in not adjudging and decreeing that the plaintiff herein is not in a position to question the regularity of the proceedings in the establishment and construction of Drainage Ditch No. 1 and 2, as an independent drain-
157 age proceeding, as it, by its officers and agents, had actual knowledge and legal notice of the proceedings taken to establish said drainage; as it, through its officers and agents, saw the work in the course of construction, assisted in the work of construction thereof, by furnishing services and materials used therein, with knowledge that such services and materials were furnished therefor, and were being used in the construction of said drainage, and received compensation for said services and materials so furnished and used; as it, through its officers and agents, urged and encouraged the Board of County Commissioners to take the action and do the work which was done under such drainage proceedings for its benefit, and as it is now, and has been for more than three years last past, receiving protection and substantial benefits from said drainage construction, with the full knowledge that there was no manner of paying for such construction except by assessment upon the property benefited, included in which was plaintiff's property, all without protest against the doing of any such work, or the extent or manner thereof, until such work and drainage project had been substantially completed, and until this action was brought to restrain the making of an assessment to pay for the cost of said construction, and, therefore, the plaintiff is now estopped from questioning said proceedings and maintaining this action.

Twenty-third:

The judgment and decree herein is not supported by the evidence, and is contrary to law, in that it appears from the undisputed evidence that the outlet to old Drainage Ditch No. 1 was destroyed and abandoned and thereby said ditch

abandoned and that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, fully complied with the requirements of the drainage statutes of South Dakota for the establishment of a new drainage, and that thereafter all the statutory requirements were duly and fully followed and pursued, and such proceedings were had that, pursuant to statute, on October 3, 1916, the Board of County Commissioners of Minnehaha County, upon due notice and hearing of said petition, ordered and adjudged the establishment of said drainage as a new project and drainage ditch, and designated it as "Drainage Ditch No. 1 and 2", and further adjudged and decreed that the construction thereof was for a public purpose, and was necessary and practicable for draining agricultural lands, and that the property of this plaintiff was included within the drainage area, and affected
158 thereby, which property was described in the petition, notice, and said resolution and judgment, which resolution and judgment was never appealed from by this plaintiff, or anyone, and is now in full force and effect, and has been for more than six years last past; that there is no evidence at all in the record that the plaintiff has been in any manner prevented from fully presenting its defense, if any, to the allegations and prayer contained in said petition of the City of Sioux Falls, F. L. Blackman, et al, or from fully trying all the issues therein presented, or that the jurisdiction of the Board of County Commissioners was imposed upon.

And it further appears from the undisputed evidence that an apportionment of benefits has been made for the payment of the costs of construction of said Drainage Ditch No. 1 and 2, and that the law provides, and the County Commissioners applied, after personal inspection, and exercising their best judgment, a fixed and determinable basis, method, and rule of apportionment of benefits, which will probably produce approximately correct general results as to the plaintiff's property, as well as all other property in the drainage district; and that no equalization of benefits or assessment has been had thereon, and that no legal charge or servitude has yet been placed upon the property of plaintiff, or anyone else, and that this action is premature.

Twenty-fourth:

The said decree is not sustained by the evidence, but is contrary thereto, in that it appears from the undisputed evidence that Drainage Ditch No. 1 and 2 was established as a new ditch by the Board of County Commissioners of Minnehaha County, South Dakota, on October 3, 1916, included in

which drainage district was plaintiff's property, and of which proceedings this plaintiff had knowledge and legal notice for more than six years last past, and has never taken any
159 steps prior to the institution of this action, to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars ($250,000.00) thereon, and has wholly failed to establish any lawful excuse for said unwarranted delay; and that all steps taken by the Board of County Commissioners leading up to and the establishment of said Drainage Ditch No. 1 and 2, were warranted in law, and said Board was lawfully acting under and in conformity with the Constitution and drainage statutes of the State of South Dakota; and that said drainage ditch was petitioned for, and lawfully established for a public use and purpose, and for the purpose of draining agricultural lands; that the apportionment of benefits, as made by the Board of County Commissioners, was made pursuant to and in conformity with the method and rule laid down by the drainage statutes of South Dakota, and after a personal inspection and deliberation by said Board, applied in conformity therewith in such a manner as will probably produce approximately correct general results as to the benefits enjoyed by plaintiff's property, as well as all other property in the drainage district and that plaintiff's property is enjoying substantially the amount of benefit apportioned to it.

160 Twenty-fifth:

For all the reasons and errors aforesaid, the Court erred in not entering and rendering a decree in favor of the defendants, and against the plaintiff, dismissing its bill of complaint, and denying the injunction herein, and in not entering its judgment and decree in accordance with the prayer of defendants' answer.

Wherefore, defendants pray that the judgment and decree of said Court be reversed, with directions to enter a decree in favor of the defendants and against the plaintiff, dismissing plaintiff's bill, as prayed for in defendants' answers.

ELBERT O. JONES and
L. E. WAGGONER
Solicitors for Defendants.

NORMAN B. BARTLETT
Solicitor for Intervening Defendants.

Endorsed: Filed in the District Court on Aug. 25, 1922, at 5 P. M.

161 (Petition for appeal and allowance thereof.)

To The Honorable James D. Elliott, Judge of the United States District Court Within and for the Southern Division of the District of South Dakota:

The above named defendants and intervening defendants feeling themselves aggrieved by the decree made and entered in this case on the 2nd day of March, A. D. 1922, do hereby appeal from said decree to the Circuit Court of Appeals, for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that their appeal be allowed, and that citation issue, as
162 provided by law, and that a transcript of the record, proceedings and papers, upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Paul, Minnesota, and your petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

ELBERT O. JONES and
L. E. WAGGONER
NORMAN B. BARTLETT
Solicitors for Defendants and Intervening Defendants.

The foregoing petition granted, and the appeal allowed upon giving bond, conditioned as required by law, in the sum of One Thousand and No/100 Dollars ($1,000.00).

JAS. D. ELLIOTT
Judge of the United States District Court within and for the Southern Division of the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25,1922, at 5 P. M.

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163 Bond On Appeal.

Know All Men By These Presents : That we, A. G. Risty, et al, defendants, Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, as Principals, and the Southern Surety Company of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted

to the Chicago, Milwaukee & St. Paul Railway Company, appellee in the above cause, in the sum of One Thousand Dollars ($1,000.00), conditioned that, whereas on the 2nd day of March, A. D. 1922, in the District Court of the United States, for the Southern Division of the District of South Dakota, in a suit pending in that court wherein the Chicago, Milwaukee & St. Paul Railway Company, was plaintiff, and A. G.
164 Risty, et al, were defendants, and the Minnehaha National Bank of Sioux Falls, South Dakota, et al, were intervening defendants, numbered on the Equity Docket as 99, a decree was rendered against the said A. G. Risty, et al, defendants, and the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, and the said A. G. Risty et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, having obtained an appeal to the Circuit Court of Appeals for the Eighth Circuit, and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree, and a citation directed to the said Chicago, Milwaukee & St. Paul Railway Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals, for the Eighth Circuit, to be held in the City of St. Paul, in the State of Minnesota, on the 2" day of May, A. D. 1923, next.

Now, if the said A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

A. G. RISTY
Signing for all Defendants.

THE MINNEHAHA NATIONAL BANK OF SIOUX FALLS,
H. V. Harlan, V. P.
Signing for all Intervening Defendants.

SOUTHERN SURETY COMPANY OF DES MOINES, IA.
By C. T. Charnock,
Attorney-in-Fact, Surety.

(Southern Surety Company Corporate Seal)

165 State of South Dakota,
County of Minnehaha—ss.

On this 15th day of August, 1922, before me H. B. Charnock, a notary public in and for said County, and State, per-

sonally appeared C. T. Charnock, well known to me to be the Attorney-in-fact of the Southern Surety Company, a corporation that is described in and that executed the above and foregoing instrument and duly acknowledged to me that said corporation executed the same.

And I further certify that at the same time the said C. T. Charnock exhibited to me the original certificate of authority issued to said Company by the Commissioner of the State of South Dakota, and that the following is a true, perfect and complete copy thereof:

STATE OF SOUTH DAKOTA
DEPARTMENT OF INSURANCE.

Renewable Annually.

Office of the Commissioner
Company's Certificate of Authority.
No. 11050

Whereas, The Southern Surety Company, a corporation organized under the Laws of Iowa, has filed in this Office a sworn statement exhibiting its condition of business for the year ending December 31st, 1921, conformable to the requirements of the Laws of this State regulating the business of Insurance, and

Whereas, The said Company has filed in this office a duly certified copy of its charter, with certificate of organization, and has complied with all the requirements of the Insurance Laws aforesaid;

Now Therefore, I, W. N. Van Camp, Commissioner of Insurance of the State of South Dakota, pursuant to the provisions of said laws do hereby certify that the above
166 named Company is fully empowered through its authorized agents to transact its appropriate business of Accident and Health, Liability, Workmen's Compensation, Fidelity, Surety, Burglary, Theft, Plate Glass and Automobile Insurance in this State according to the Laws thereof, until the last day of February, 1923.

In Testimony Whereof, I have hereunto set my hand and official seal at Pierre, this First Day of March, A. D. 1922.

(Notarial Seal)

W. N. VAN CAMP,
Commissioner of Insurance.
By W. J. Madden,
Deputy Commissioner.

H. B. CHARNOCK,
Notary Public, South Dakota.

The foregoing bond is hereby approved.

JAS. D. ELLIOTT,
Judge of the United States District Court
Within and for the Southern Division of
the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25, 1922, at 5 P. M.

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168 (Praecipe for Transcript.)

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the Circuit Court of Appeals of the United States, for the Eighth Circuit, by including therein the following:

1. The Bill of Complaint, except the title and verification, and except the Exhibits thereto attached.

2. Order Allowing Intervention.

3. The following portions of Defendants' Answer, viz:

(a) Paragraphs "A", "B", "C", "D", and "F" of Defendants' Special Answer.

(b) Introduction and Paragraphs "First" to "Twenty-second" inclusive, of Defendants' General Answer; and

(c) Paragraphs "VIII", "IX", "XII", "XIV" and "XV" of Defendants' Affirmative Defense, together with the prayer.

4. The Statement of the Evidence Submitted, and Approved by the Court.

5. Order Permitting Amendment of Bill, and Exception taken to said Order.

6. Amendment to Bill.

169 7. The Opinion and decree of the District Court.

8. Assignments of Error.

9. Petition for Appeal.

10. Order Allowing Appeal.

11. Bond upon Appeal, and Approval of same.

12. Notice of Deposit of Statement of Evidence with Clerk and Proof of Service thereof.

13. Approval of Court of the Statement of the Evidence.

14. Citation in Appeal, and Service thereof.

15. Praecipe and Clerk's Certificate.

Dated at Sioux Falls, South Dakota, this 23 day of September, A. D., 1922.

E. O. JONES
N. B. BARTLETT,
Solicitors for Appellants.

Endorsed: Filed in the District Court on Sept. 25, 1922.

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170 (Notice to plaintiff of lodgment of statement of evidence in District Clerk's office.)

To C. O. Bailey, Solicitor for Chicago, Milwaukee & St. Paul Railway Company, Plaintiff:

Please take notice that the Appellants have prepared a Statement of the evidence to be included in the record upon the appeal of the above entitled matter to the Circuit Court of Appeals, for the Eighth Circuit, and has lodged the same in the office of the Clerk of this Court for your examination, (a copy of which Statement is herewith served upon you).

You will further take notice that the Appellants will ask the Court, at the Government Building, in the City of Sioux Falls, in said District of South Dakota, at ten o'clock in the forenoon of the 5th day of October, A. D. 1922, or as soon thereafter as counsel can be heard, to approve said Statement.

Dated this 25 day of September, A. D. 1922.

E. O. JONES
N. B. BARTLETT
Solicitors for Appellants.

Service of the foregoing Notice this .. day of September, A. D. 1922 is hereby acknowledged also service of the Statement therein referred to.

. . . . . .

171 Solicitor for Chicago, Milwaukee & St. Paul Railway Company, Plaintiff.

Endorsed: Filed in the District Court on Sept. 25, 1922.

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172 (Affidavit of service of notice to plaintiff of lodgment of statement of evidence.)

State of South Dakota,
County of Minnehaha—ss.

T. G. Owen, being first duly sworn, on oath deposes and says: That he is a citizen and elector of the County of Minnehaha and State of South Dakota; that upon this 25th day of September, A. D. 1922, he served the hereunto attached Notice of Filing the Praecipe in the above entitled matter, also Notice of lodgment of Statement with the Clerk, and Notice of time when the Court will be asked to approve said Statement, also a copy of the proposed Statement, upon C. O. Bailey, Solicitor for the plaintiff therein, at Sioux Falls, South Dakota, by delivering to and leaving with him true and correct copies of such Notice and said Statement.

T. G. OWEN.

Subscribed and sworn to before me this 25 day of September, A. D. 1922.

(Notarial Seal) J. H. BARTLETT,
Notary Public, South Dakota.

Endorsed: Filed in the District Court on Sept. 25, 1922.

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174 (Additional praecipe for transcript.)

The Clerk of this Court is hereby directed to incorporate into the transcript upon the appeal in the above entitled suit for the use of the Circuit Court of Appeals of the United States for the Eighth Circuit, the following portions of the record in addition to those indicated in the praecipe filed by the defendants, and the intervening defendants, to-wit:

1. The title of the bill of complaint.

2. Exhibit "B" to the bill of complaint.

175 3. Exhibit "C" to the bill of Complaint.

4. The following portions of the answer of the defendants, to-wit:

(a) The title.

(b) Paragraphs I, II, III, IV, V, VI, VII, X, XI, XIII, XIV, and XV, of Defendant's Affirmative Defence.

(c) The following Exhibits to the answer of the defendants, to-wit: The petition of F. L. Blackman and others

upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had the order for filing said petition, the resolution for survey under said petition, the resolution fixing line and width of the Ditch and time and place for hearing the petition of F. L. Blackman and others, the published notice of hearing said petition (said notice not being attached to the original answer but having been filed after the filing of the answer together with a stipulation that it might be considered as a part of the answer), and the resolution establishing Drainage Ditch No. 1 and 2, all of the said exhibits to be inserted as a part of said answer.

5. Plaintiff's Praecipe for additional portions of the record.

BAILEY & VOORHEES,
Solicitors for Plaintiff.

Endorsed: Filed in the District Court on Oct. 27, 1922, at 3 P. M.

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177 (Statement of Evidence.)

(Filed in U. S. District Court on January 25, 1923.)

The above entitled suit came on for hearing before the Court on December 15th, 1921, before the Honorable J. D. Elliott, Presiding Judge, plaintiff appearing by Mr. Ed. L. Grantham and Mr. C. O. Bailey, its solicitors, defendants appearing by Mr. E. O. Jones, their solicitor, and the intervening defendants appearing by Messrs. Porter & Bartlett, their Solicitors, the following proceedings were had:

178 Evidence of Plaintiff.

F. E. WARD, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Stipulation.

"It is stipulated and agreed between all parties that the testimony received in these consolidated cases shall be considered as received in each case, so far as such testimony is pertinent to such case, and that such testimony apply only to that case."

Q. You may state your name?

The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set

aside, for the reasons that the said bills of complaint fail to state any matter of equity entitling the plaintiffs to the relief prayed for, nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this court has no jurisdiction over these matters, because plaintiff's bills of complaint herein do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this court can infer or presume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property, or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that the plaintiffs have a plain, adequate and complete remedy at law.

179 For the further reason that it affirmatively appears from the fact of the bills of complaint and record, that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits, assessment or tax chargeable against the property of the plaintiffs, if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multiplicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determinations of the state tribunal upon questions of fact before them, are conclusive upon this court in this action, this court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings. Motion denied, defendants and intervening defendants excepting.

180 The defendants and intervening defendants then objected to the introduction of any testimony for the reason and on the ground urged in the motions to dismiss. Objection overruled. The Defendants and intervening defendants excepting.

(Testimony of Witness F. E. Ward)

I am the auditor of Minnehaha County, South Dakota; drainage ditch records A and B and Commissioners records 5 and 6 are part of the records of Minnehaha County.

Plaintiff offered in evidence the following portions of Drainage Ditch Record A.

July 1, 1907.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioner respectfully represents: That he is a resident of the City of Sioux Falls in said County; that he is the owner of certain lands in the valley of the Big Sioux River north and west of the City of Sioux Falls in said County, viz: Blocks Three (3) and Thirty-one (31) of Meredith's First Addition to Sioux Falls, according to the recorded plat thereof; the Northwest Quarter of the South West Quarter of Section Eighteen (18), and the South West Quarter of the North West Quarter of said Section Eighteen (18), except the railroad right of way, all in Township One Hundred and One (101) North, of Range Forty Nine (49); also a certain
181 tract or parcel of land bounded and described as follows, to-wit:—Commencing at a point twenty-four (24) rods north of the southeast corner of the North-West quarter of Section Thirty Two (32), in Township One Hundred and Two (102) North, of Range Forty-Nine (49); running thence north ten (10) rods; thence west eighty (80) rods; thence south ten (10) rods; thence east eighty (80) rods to the place of beginning all of which lands will be affected by the drainage herein proposed;

Your petitioner further represents that it is necessary for the drainage of agricultural lands in said Big Sioux Valley between the dam of the Cascade Milling Company in the City of Sioux Falls and the City of Dell Rapids that the proposed drainage be established.

Your petitioner further represents that the establishment of such drainage will be conducive to the public health, convenience and welfare of the inhabitants of the City of Sioux Falls and of the inhabitants of the Big Sioux Valley between Sioux Falls and Dell Rapids that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in said valley and will prevent great damage to the buildings and their contents; and will pre-

vent great damage to the highways in said County, and also to the railroad tracks and rights of way of the Chicago, Milwaukee & St. Paul Railway Company and of the South Dakota Central Railway Company in said valley; and will prevent damage and destruction of many bridges and their approaches in said valley;

Your petitioner further represents that the general purpose of said proposed drainage is, among other things, to
182 prevent the annual or occasional flooding of lands in said valley caused by high water in said river, by providing a drain to carry off all the water of said river above its normal stage or above the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the center line of Section Five (5) in Township One Hundred and One (101) North of Range Forty Nine (49), and running thence southeasterly across said Section Five (5), Section Four (4) and the North Half of Section Nine (9), all in Township One Hundred and One (101) North of Range Forty Nine (49) and east of the buildings of the State Penitentiary to a terminal point on said river in the City of Sioux Falls near the center of Section Nine (9) in said Township, the length of which will be approximately one and three-fourths miles.

Your petitioner further represents that the territory likely to be affected thereby is that portion of the Townships of Dell Rapids, Sverdrup, Mapleton, Wayne and Sioux Falls and of the City of Sioux Falls in the immediate valley of the Big Sioux River subject to overflow from said river.

Dated July 1, 1907.

WILLIAM H. LYON
Petitioner.

State of South Dakota,
County of Minnehaha—ss.

Personally appeared William H. Lyon, who being first duly sworn, deposes and says; that he is the petitioner in the above entitled matter; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

WILLIAM H. LYON

Subscribed and sworn to before me, this 1st., day of July, 1907.

M. E. McDOUGAL,
(Notarial Seal) Notary Public.

Petition for Drainage, Filed this 1st day of July, 1907.

C. E. HILL, County Auditor.
By H. W. Ward, Deputy.

Plaintiff offered and there was received in evidence pages 562 and 563 and the first two lines of 564 of Commissioners' Record 5, it being a resolution of the Board of County Commissioners fixing the route and width of the proposed ditch and the time and place of hearing the petition of W. H. Lyon for the proposed drainage ditch thereafter established as Drainage Ditch No. 1.

This resolution is not printed at length herein because it contains matter not deemed of importance. It established the line of Drainage Ditch No. 1 as follows: Commencing 58 feet west and 135 feet north of the southeast corner of Section 29, Township 102, Range 49, thence south parallel to the adjacent highway 2085 feet to station No. 114; also commencing 674 feet north and about 35 degrees west of Station No. 114; thence southeasterly 674 feet to said Station 114, thence south and parallel to said highway 7700 feet to Station No. 37, thence south 45 degrees, east 3700 feet to Station Zero (0), thence south 59 degrees, 36', east to the Big Sioux River.

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It also contains the following provisions: "Be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the width of said drainage ditch be and it is hereby fixed at 40 feet at the bottom thereof, with a side slope of one foot to one."

Plaintiff offered in evidence the following part of Commissioner's Record 5:

Sioux Falls, S. D., Dec. 31, 1907.

Pursuant to adjournment, at 10 o'clock A. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the County Court House.

Present:

Dist. No. 5: Thomas McKinnon, Chairman.

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson.

Dist. No. 3: Alfred Acheson.

184 Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. J. H. Gates, attorney for the Board in the matter of Drainage Ditch No. 1, filed and read a written opinion in regard to the legal propositions presented.

Further remarks were made by Messrs. Porter, Keith and Bates and by Mr. Blackman.

On motion, the Board adjourned at 2 o'clock P. M. Tuesday, December, 31, 1907.

185 Sioux Falls, S. D., Dec. 31, 1907.

Pursuant to adjournment, at 2 o'clock P. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the county court house.

Present:

Dist. No. 5: Thomas McKinnon, Chairman.

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson,

Dist. No. 3: Alfred Acheson.

Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. Howard offered the following resolution:

Resolution Establishing Drainage Ditch No. 1:

The matter of the petition of William H. Lyon for the establishment of a drainage ditch filed in the County Auditor's office of Minnehaha County, South Dakota, on July 1, 1907, the said drainage ditch having been heretofore described and named "Drainage Ditch No. 1", coming on to be heard by the Board of County Commissioners at a regularly adjourned meeting, on Monday, December 30, 1907, pursuant to notice heretofore given, and written objections thereto having been filed by Martin Oien, et al, and by Joseph C. Carpenter, and

by the Chicago, Milwaukee and St. Paul Railway Co. and the claims of said parties having been presented orally by their counsel, and William H. Lyon, F. S. Blackman, O. Benson and others having appeared in behalf of said petition, and said hearing having been adjourned to this 31st day of December, 1907, and this Board having fully heard and considered said petition and all matters in opposition to and in support of the same; Now Therefore

Be it Resolved by the Board of County Commissioners
186 of Minnehaha County, South Dakota, that said Drainage Ditch No. 1, is conducive to the public health, convenience and welfare, and is necessary and practicable for draining agricultural lands, and it is so found:

Be it further Resolved that said Drainage Ditch No. 1, be and is hereby established:

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land, or other property through which the same shall pass, and damages as compensation for the land taken for the route of such drainage.

Mr. Howard moved the adoption of said resolution, and that the vote be taken by districts. Mr. Harvey seconded the motion. Upon roll call,

Charles Harvey, Dist. No. 1 voted, Yes;

J. E. Johnson, Dist. No. 2 voted, No;

Alfred Acheson, Dist. No. 3 voted, No;

J. D. Howard, Dist. No. 4. voted, Yes;

Thomas McKinnon, Dist. 5 voted, Yes;

The Chairman declared the resolution adopted.

Plaintiff offered in evidence the following portions of Ditch Record A;

April 11, 1908.

Resolution Assessing Benefits.

Whereas, The Board of County Commissioners of Minnehaha County, South Dakota, has established Drainage Ditch No. 1, and has fixed the damages arising therefrom, and has been investigating and considering the proportion of bene-
187 fits that will accrue to the lands, tracts and lots within the drainage area of said Drainage Ditch; and

Whereas, in arriving at this determination of the proportion of benefits it has considered, not only the benefits which will accrue directly by virtue of the construction of said Drainage Ditch, but also the indirect benefits by virtue of said drainage being an outlet for connecting drains that may hereafter be constructed, and particularly is this so in reference to the lands within the drainage area lying north of a line running east and west through the center of Section Twenty Nine (29) Mapleton Township; and

Whereas, the number of acres set opposite each tract hereinafter described represents the actual number of acres of land within said tract that are benefitted, and excluding therefrom lands taken by said Drainage Ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said Drainage Ditch, the land taken by the drainage is excluded; and

Whereas, in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat of the County Auditor's Subdivision of the particular quarter section in which the land is located on file in the Register of Deeds office; and

Whereas, in the consideration of benefits said Board has assumed that the North-East Quarter of the North-East Quarter of the South-West Quarter of Section Thirty-Three (33) in Township One Hundred and Two (102) of Range Forty-Nine (49) West of the Fifth P. M., owned by the state of South Dakota, and containing ten acres is benefitted "one", and taking the same as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sverdrup, Mapleton, Sioux Falls and Wayne; the benefits to the County of Minnehaha; and the benefits to the several Railroad Companies hereinafter described, arising and accruing by the construction of Drainage Ditch No. 1, be, and they are hereby fixed and determined in the following proportions, viz:—

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Esten E. Eggen	E½ of NE¼	31	102	49	5	.45

Thomas Paulson	E½ of SE¼	31	102	49	43	3.87
State of South Dakota	E½ of NE¼	32	102	49	72.9	9.11
Ellen Berg and Mary Schjodt	(Except right of way of South Dakota Central Ry. Co.) NW¼ of NE¼	32	102	49	35.88	4.48
J. E. Colton	(Except right of way of South Dakota Central Ry. Co.) SW¼ of NE¼	32	102	49	37.78	4.72
Esten E. Eggen	(Except right of way of South Dakota Central Ry. Co.) N½ of NW¼	32	102	49	66.25	8.28
Esten E. Eggen	SW¼ of NW¼	32	102	49	40.	5.
Esten E. Eggen	That part west of river of N½ of SE¼ of NW¼	32	102	49	6.	.63
Emmet D Putman	That part east of river of N½ of SE¼ of NW¼	32	102	49	13.	1.63
Ezra M. Shotwell	North 3 acres of S½ of SE¼ of NW¼	32	102	49	3.	.37
W. H. Lyon	South 5 acres of north 8 acres of S½ of SE¼ of NW¼	32	102	49	5.	.53
Thomas Paulson	S 2 acres of N½ of S½ of SE¼ of NW¼	32	102	49	2.	.25
Lars N. Brakke	S½ of S½ of SE¼ of NW¼	32	102	49	10.	1.25
Thomas Paulson	SW¼	32	102	49	152.	19.
State of South Dakota	NE¼ of SE¼	32	102	49	37.5	4.69
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J. E. Colton	(Except right of way of South Dakota Central Ry. Co.) NW¼ of SE¼	32	102	49	37.98	4.75
Thomas S. Nolan	(Except right of way of South Dakota Central Ry. Co.) SW¼ of SE¼	32	102	49	38.01	4.75
Hans Ruvald	(Except right of way of South Dakota Central Ry. Co.) SE¼ of SE¼	32	102	49	36.89	4.62
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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Francis A. Miller	(Except right of way of C. N. & St. P. Ry. Co.) N½	33	102	49	110.8	11.87
State of South Dakota	(Except right of way of C. M. & St. P. Ry. Co.) N½ of SW¼	33	102	49	76.	8.5

O. Benson	(Except right of way of C. M. & St. P. Ry. Co.) S½ of SW¼	33	102	49	72.	8.38
O. Benson	W½ of SE¼	33	102	49	60.	6.
Esdert Arends	NE¼	29	102	49	154.5	12.35
Sioux Falls Brewing & Malting Co.	NE¼ of NW¼	29	102	49	39.	3.12
Carrie Erickson and John A. Erickson	W½ of NW¼	29	102	49	57.	4.56
M. P. Brende and S. P. Brende	(Except tract 1) SE¼ of NW¼	29	102	49	2.5	.2
M. P. Brende, and S. P. Brende	Tract 1 of NW¼	29	102	49	36.	2.88
Erick O. Eggen	(Except tracts 1 and 2) NE¼ of SW¼	29	102	49	10.2	1.28
M. P. Brende and S. P. Brende	Tract 1 of SW¼	29	102	49	7.8	.98
Ole O. Eggen	Tract 2 of SW¼	29	102	49	21.5	2.69
Carrie Erickson, and John A. Erickson,	(Except right of way of South Dakota Central Ry. Co.) W½ of SW¼	29	102	49	38.62	4.83
Ellen Berg and Mary Schjodt	(Except right of way of South Dakota Central Ry. Co.) SE¼ of SW¼	29	102	49	36.49	4.56
Esdert Arends,	NE¼ of SE¼	29	102	49	39.	4.88
Ellen Berg and Mary Schjodt	Except ½ acre next below described) NW¼ of SE¼	29	102	49	36.5	4.56
School District No. 17	A tract in the south east corner (8 rods north and south by 10 rods east and west) of NW¼ of SE¼	29	102	49	.38	.047

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Ellen Berg and Mary Schjodt,	SW¼ of SE¼	29	102	49	35.25	4.41
State of South Dakota	SE¼ of SE¼	29	102	49	35.5	4.44
Esdert Arends,	(Except right of way of C. N. & St. P. Ry. Co.) NW¼	28	102	49	142.25	11.38
Esdert Arends	(Except right of way of C. M. & St. P. Ry. Co) SW¼	28	102	49	118.2	13.66
Ole C. Volden, and Thomine O. Volden E. Larson	NW¼ of NE¼	21	102	49	12.	.72
	(Except right of way of C. M. & St. P. Ry. Co.) NW¼	21	102	49	151.85	9.11

Michael J. Brende	E½ of SW¼	21	102	49	39.5	2.77
Paul H. Brende, and Martha O. Brende	(Except right of way of C. M. & St. P. Ry. Co.) NW¼ of SW¼	21	102	49	36.95	2.59
O. S. Pendar,	(Except right of way of C. M. & St. P. Ry. Co.) SW¼ of SW¼	21	102	49	35.95	2.52
Henry J. Schimmel	NE¼ of NE¼	20	102	49	39.	2.34
Albert N. Allis	W½ of NE¼	20	102	49	78.	4.68
James A. Leavitt,	SE¼ of NE¼	20	102	49	39.	2.34
Albert N. Allis	E½ of NW¼	20	102	49	76.	4.56
Ernie Lyon and Anson Tennis	W½ of NW¼	20	102	49	74.	4.44
John O'Grady	N½ of SW¼	20	102	49	73.	5.11
Sioux Falls Brewing & Malting Co.	S½ of SW¼	20	102	49	70.	4.9
O. S. Pendar	E½ of SE¼	20	102	49	78.	5.46
O. S. Pendar	SW¼ of SE¼	20	102	49	39.	2.73
John O'Grady	NW¼ of SE¼	20	102	49	39.	2.73

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Ernie Lyon and Anson Tennis,	E½ of NE¼	19	102	49	3.	.18
Leonard Renner	E½ of NE¼	17	102	49	77.	3.08
Gertie R. Peterson	NW¼ of NE¼	17	102	49	38.	1.52
Gertie R. Peterson	N½ of SW¼ of NE¼	17	102	49	19.5	.78
Iver R. Peterson	S½ of SW¼ of of NE¼	17	102	49	19.5	.78
Gertie R. Peterson	NE¼ of NW¼	17	102	49	39.	1.56
Ingeborg Peterson	NW¼ of NW¼	17	102	49	18.	.72
Bernt Mekvold	SW¼ of NW¼	17	102	49	33.	1.32
Bernt Mekvold	W 26 2-3 acres of SE¼ of NW¼	17	102	49	26.67	1.07
Gertie R. Peterson	N½ of E 13 acres of SE¼ of NW¼	17	102	49	6.5	.26
Iver R. Peterson	S½ of E 13 acres of SE¼ of NW¼	17	102	49	6.5	.26
Iver R. Nelson	E½ of SW¼	17	102	49	80.	4.
Iver R. Nelson	NW¼ of SW¼	17	102	49	37.	1.85

T. O. Horten	E½ of SW¼ of SW¼	17	102	49	18.	.9
Nels I. Nelson	W½ of SW¼ of SW¼	17	102	49	20.	1.
Jonas Olson	E½ of SE¼	17	102	49	78.	3.90
C. J. Orstad	W½ of SE¼	17	102	49	78.	3.90
Jonas Olson	NW¼ of NE¼	16	102	49	2.	.08
Barney Finnegan	SW¼ of NE¼	16	102	49	23.	.92
John Bliss	E½ of NE¼	16	102	49	75.	3.
Leonard Renner	(Except right of way of C. M. & St. P. Ry. Co.) W½ of NW¼	16	102	49	73.	2.92
S. P. Brende	NE¼ of SW¼	16	102	49	40.	2.
Mary P. Brende	(Except right of way of C. M. & St. P. Ry. Co.) NW¼ of SW¼	16	102	49	36.9	1.85

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Ole O. Volden	(Except right of way of C. M. & St. P. Ry. Co.) SW¼ of SW¼	16	102	49	36.95	1.85
Ole O. Volden and Thomine O. Volden	SW¼ of SW¼	16	102	49	33.	1.65
Mary P. Brende	NW¼ of SE¼	16	102	49	19.	.95
S. P. Brende	SW¼ of SE¼	16	102	49	25.	1.25
Andrew P. Brende	N½ of NE¼	9	102	49	50.	2.00
Christian Christiansen	S½ of NE¼	9	102	49	38.	1.52
Ole T. Nessan	NE¼ of NE¼	9	102	49	32.	1.28
Martin H. Oien	That part west of the Southern Minn. R. R. Right of way of W½ of NW¼	9	102	49		
	Except right of way of Madison line of C. M. & St. P. Ry. Co.				41.4	1.66
Alfred Christensen	That part east of the Southern Minn. R. R. right of way of W½ of NW¼	9	102	49	31.	1.24
Andrew P. Brende	SE¼ of NW¼	9	102	49	40.	1.6
Jonas Olson,	(Except the plat of Olsons Add. to to Renner E½ of SW¼	9	102	49	71.85	2.87
Leonard Renner,	(Except rights of way of C. M. & St. P. Ry. Co. and except the town plat of Renner W½ of SW¼	9	102	49	69.7	2.79

Christian Christensen	N½ of SE¼	9	102	49	20.	.8
Jonas Olson	S½ of SE¼	9	102	49	18.	.72
Martin H. Oien	(Except right of way of C. M. & St. P. Ry. Co.) E½ of NE¼	8	102	49	72.3	2.89
Martin H. Oien	That part north and east of right of way of C. M. & St. P. Ry. Co. of W½ of NE¼	8	102	49	2.	.08

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Ole Gunderson	That part south and west of right of way of C. M. & St. P. Ry. Co. of W½ of NE¼	8	102	49		
	Except the north 50 rods of that part west of the river.				65.4	2.62
J. L. Ingalls	The north 50 rods of that part west of the river of W½ of NE¼	8	102	49	3.	.32
J. L. Ingalls	(Except the south 30 rods) NE¼ of NW¼	8	102	49	22.	.88
Ole Gunderson	The south 30 rods of NE¼ of NW¼	8	102	49	40.	.4
Ole Gunderson	S½ of NW¼	8	102	49	38.	1.52
Ole Gunderson	NE¼ of SW¼	8	102	49	40.	1.6
Iver Nelson	(except 2½ acres in square form in SE corner) NW¼ of SW¼	8	102	49	17.5	.7
Louis Olson	2½ acres in square form in SE corner of NW¼ of SW¼	8	102	49	2.5	.1
Jonas Olson	SW¼ of SW¼	8	102	49	30.	1.2
Ole Gunderson	SE¼ of SW¼	8	102	49	39.	1.56
Leonard Renner	(Except 1 acre in square form in NW corner) NE¼ of SE¼	8	102	49	38.16	1.53
School District No. 2	1 acre in square form in NW corner of NE¼ of SE¼	8	102	49	.84	.034
Ole Gunderson	W½ of SE¼	8	102	49	76.	3.04
Leonard Renner	SE¼ of SE¼	8	102	49	38.	1.52
Ole Thompson Aspass	E½ of NE¼	5	102	49	72.37	2.17
O. O. Gilseth	NW¼ of NE¼	5	102	49	37.4	1.12

O. O. Gilseth	W¾ of SW¼ of NE¼	5	102	49	29.	.87
O. O. Gilseth	NE¼ of NE¼ of SW¼ of NE¼	5	102	49	1.5	.045

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
John Brekke	E½ of SE¼ of SW¼ of NE¼	5	102	49	5.	.15
John Brekke	SE¼ of NE¼ of SW¼ of NE¼	5	102	49	1.5	.05
O. O. Gilseth	(Except right of way of C. M. & St. P. Ry. Co.) NW¼	5	102	49	40.	1.2
P. J. Merakergaard	(Except right of way of C. M. & St. P. Ry. Co.) SW¼	5	102	49	73.4	2.24
Martin H. Oyen and Cleopatra H. Oyen	(Except right of way of C. M. & St. P. Ry. Co. and except tract 1) SE¼	5	102	49	140.48	5.62
Erick O. Evebak	Tract 1 of SE¼	5	102	49	9.32	.37
Nels B. Peterson	E½ of NE¼	4	102	49	77.14	2.31
Ole O. Eggen	W½ of NE¼	4	102	49	78.49	2.35
Nels B. Peterson	E½ of NW¼	4	102	49	78.04	2.34
Ole T. Aspass	(Except right of way of C. M. & St. P. Ry. Co.) W½ of NW¼	4	102	49	69.66	2.09
Ole T. Nessan	NE¼ of SW¼	4	102	49	40.	1.6
Andrew P. Brende	SE¼ of SW¼	4	102	49	40.	1.6
Martin H. Oyen and Cleopatra H. Oyen	(Except right of way of C. M. & St. P. Ry. Co.) W½ of SW¼	4	102	49	72.	2.88
Tosten Olsen	SE¼	4	102	49	118.	4.72
Nels B. Peterson	W½ of NW¼	3	102	49	20.7	.41
Martha R. Roberts, John H. Roberts, and Thomas S. Roberts,	NW¼ of NW½	34	103	49	20.75	.42
Nels B. Peterson	SW¼ of NW¼	34	103	49	21.	.42
Jorgen Peterson Evjen and Nels Peterson	W½ of SW¼	34	103	49	35.5	1.07
Martha R. Roberts, John H. Roberts, and Thomas S. Roberts	NE¼ of NE¼	33	103	49	39.	.78
Thomas S. Roberts	NW¼ of NE¼	33	103	49	39.	.78

Nels B. Peterson	S½ of NE¼	33	102	49	80.	1.6
Thomas S. Roberts	NE¼ of NW¼	33	103	49	39.	.78

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Andrew J. Aasen	(Except right of way of C. M. & St. P. Ry. Co.) NW¼ of NW¼	33	103	49	35.	.7
O. S. Thompson	(Except right of way of C. M. & St. P. Ry. Co.) SW¼ of NW¼	33	103	49	36.	.72
Nels B. Peterson	SE¼ of NW¼	33	103	49	40.	.8
Anne O. Haugan, Amanda B. Haugan and Jennie A. Haugan	E½ of SW¼	33	103	49	79.	2.37
Joseph C. Thompson	(Except right of way of C. M. & St. P. Ry. Co.) NW¼ of SW¼	33	103	49	36.	1.08
Thomas Hendrickson, and B. B. Hendrickson	(Except right of way of C. M. & St. P. Ry. Co.) SW¼ of SW¼	33	103	49	35.	1.05
Nels B. Peterson	N½ of SE¼	33	103	49	80.	2.4
Nels B. Peterson	SW¼ of SE¼	33	103	49	39.	1.17
Jorgen Peterson Evjen and Nels B. Peterson	SE¼ of SE¼	33	103	49	39.	1.17
Andrew J. Aasen	N½ of NE¼	32	103	49	67.2	1.35
Andrew J. Aasen	SW¼ of NE¼	32	103	49	37.	.74
G. S. Thompson	N½ of SE¼ of NE¼	32	103	49	19.5	.39
Joseph O. Thompson	S½ of SE¼ of NE¼	32	103	49	19.5	.89
Andrew J. Aasen	E½ of NW¼	32	103	49	11.	.22
Thomas Hendrickson	E½ of SW¼	32	103	49	20.	.6
James L. Finnegan	N½ of SE¼	32	103	49	76.	2.28
John Finnegan	SW¼ of SE¼	32	103	49	36.	1.08
Margaret L. Finnegan	SE¼ of SE¼	32	103	49	37.25	1.12
G. S. Thompson	Tract 1 of NE¼	29	103	49	17.	.34
Joseph C. Thompson	Tract 2 of NE¼	29	103	49	12.	.24
O. S. Thompson	(Except right of way of C. M. & St. P. Ry. Co.) tract 3 of NE¼	29	103	49	73.1	1.46
O. S. Thompson	N½ of SE¼	29	103	49	56.7	1.13
O. S. Thompson	SW¼ of SE¼	29	103	49	17.	.34

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Ole Peterson	SE¼ of SE¼	29	103	49	29.	.5
C. T. Nyhus	(Except the N 5 acres) NE¼ of NE¼	28	103	49	29.75	.6
Erick C. Brende	N 5 acres of NE¼ of NE¼	28	103	49	3.	.06
G. T. Nyhus	NW¼ of NE¼	28	103	49	40.	.8
G. T. Nyhus	S½ of NE¼	28	103	49	78.	1.56
O. Thompson	(Except the E 19 acres) E½ of NW¼	28	103	49	60.24	1.2
G. T. Nyhus	E 19 acres of E½ of NW¼	28	103	49	18.76	.38
O. Thompson	(Except right of way of C. M. & St. P. Ry. Co.) W½ of NW¼	28	103	49	74.15	1.48
O. Thompson	(Except right of way of C. M. & St. P. Ry. Co.) N½ of SW¼	28	103	49	73.9	1.48
O. Thompson	E 18¾ acres of E½ of SW¼ of SW¼	28	103	49	17.8	.36
Ole Peterson	W 1¾ acres of E½ of SW¼ of SW¼	28	103	49	1.7	.034
Ole Peterson	(Except right of way of C. M. & St. P. Ry. Co.) W½ of SW¼ of SW ¼	28	103	49	15.45	.31
Thomas S. Roberts	SE¼ of SW¼	28	103	49	39.	.78
G. T. Nyhus	N 3½ acres of N½ of SE¼	28	103	49	1.5	.03
Erick O. Eggen	(Except the N 3½ acres) N½ of SE¼	28	103	49	76.5	1.53
Thomas S. Roberts	SW¼ of SE¼	28	103	49	39.	.78
Erick O. Eggen	SE¼ of SE¼	28	103	49	39.	.78
C. T. Nyhus	SW¼ of NW¼	27	103	49	7.1	.14
Erick O. Eggen	NW¼ of SW¼	27	103	49	15.75	.32

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Martha R. Roberts, John H. Roberts, and Thomas S. Roberts,	E½ of SW¼ of SW¼	27	103	49	2.	.04

Erick O. Eggen and D. D. Russell	W½ of SW¼ of SW¼	27	103	49	17.75	.36
E. S. Carter, and S. C. Carter	W½ of NE¼	4	101	49	57.	5.7
David Frank	E½ of NE¼ of NW¼	4	101	49	19.5	2.44
M. H. Hylatt	W½ of NE¼ of NW¼	4	101	49	19.5	2.44
David Frank	(Except rights of way of C. M. & St. P. Ry. Co.) W½ of NW¼	4	101	49	70.6	8.83
David Frank	SE¼ of NW¼	4	101	49	40.	5.
David Frank	(Except rights of way of C. M. & St. P. Ry. Co. and S. D. Central Ry. Co.) SW¼	4	101	49	143.86	17.98
Mary C. Brace	NW¼ of SE¼	4	101	49	30.	3.75
Margaret Wuest	Tract 1 of SE¼	4	101	49	3.5	.44
Mary C. Brace	(Excepts tracts 1 and 2) SW¼ of SE¼	4	101	49	8.	1.
Hans Ruvald	(Except right of way of South Dakota Central Ry. Co.) NE¼ of NE¼	5	101	49	35.04	4.38
Thomas S. Nolan	NW¼ of NE¼	5	101	49	39.66	4.96
Arthur Tobin	SW¼ of NE¼	5	101	49	40.	5.
Hans Ruvald	(Except right of way of South Dakota Central Ry. Co.) SE¼ of NE¼	5	101	49	34.45	4.31
A. C. Jensen	NE¼ of NW¼	5	101	49	36.22	4.53
D. A. Scott	NW¼ of NW¼	5	101	49	38.	4.75
South Dakota Water Co.	S½ of NW¼	5	101	49	76.	9.5

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Hans C. Ruvald	NE¼ of SW¼	5	101	49	39.5	4.94
Catherine W. Peck	NW¼ of SW¼	5	101	49	38.5	4.71
Mary C. Brace	(Except blocks 34, 35, 49, 50 and 61, of North Boulevard Add. to Sioux Falls) S½ of SW¼	5	101	49	66.5	8.31
Hans Ruvald	(Except right of way of S. D. Central Ry. Co.) NE¼ of SE¼	5	101	49	34.45	4.31

Western Surety Co.	NW¼ of SE¼	5	101	49	40.	5.
Mary C. Brace	(Except blocks 4, 6, 9, 13, and 29 of North Boulevard add to Sioux Falls and except right of way of S. D. Central Ry. Co.) S½ of SE¼	5	101	49	62.66	7.83
D. A. Scott	N½ of NE¼	6	101	49	40.	4.
Catherine W. Peck	S½ of NE¼	6	101	49	42.	4.2
Catherine W. Peck	N½ of SW¼	6	101	49	14.	1.4
H. C. Everson and A. H. Everson	S½ of SW¼	6	101	49	40.	4.
Catherine W. Peck	N½ of SE¼	6	101	49	73.	7.3
H. C. Everson and A. H. Everson	SW¼ of SE¼	6	101	49	38.5	3.85
H. C. Everson	Tract I of SE¼	6	101	49	23.	2.3
Frances G. Carpenter	Tract 2 of SE¼	6	101	49	15.	1.5
Frances G. Carpenter	NE¼ of NE¼	7	101	49	40.	4.
H. O. Gates and E. J. Sharon	W½ of NE¼	7	101	49	79.5	7.95
Frances G. Carpenter	SE¼ of NE¼	7	101	49	40.	4.
H. O. Gates and E. J. Sharon	E½ of NW¼	7	101	49	50.	5.
J. L. Riedesel	SW¼ of NW¼	7	101	49	5.	.5
E. J. Sharon and F. L. Blackman	The unplatted part of W½ of SE¼ and of E½ of SW¼ of (Except that tract lying N. of block 37, Meredith's 2d add. to Sioux Falls and S of center line of Mulberry street extended W. and E. of center line of Harvard street extended and W. of center line of Hooker Street extended) (also except that portion of tract 1 lying between Monroe street extended W. and the center line of Manchester street extended W.)	7	101	49	37.	3.7

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Amenda A. Burtch Horatio A. Burch and B. A. Burtch	That part of tract 1 of SW¼ Lying N. of block 37, Meredith's 2d add. to	7	101	49		

	Sioux Falls and S. of center line of Mulberry street extended W. and the E. of center line of Harvard street, extended and W. of center line of Hooker Street extended				1.5	.15
Eliza K. Leyse	That part of tract 1 of SW¼ Lying between Monroe street extended W. and the center line of Manchester street extended W.	7	101	49	1.5	.15
D. R. Howie	NW¼ of SW¼ of	7	101	49	18.	1.8
Frank Richardson	N½ of SW¼ of SW¼	7	101	49	15.	1.5
Otto R. Bornemann	SE¼ of SW¼ of SW¼	7	101	49	7.5	.75
Frances G. Carpenter	N½ of NE¼	8	101	49	80.	8.
Frances G. Carpenter	N½ of NW¼	8	101	49	80.	8.
C. E. McKinney	N½ of SW¼	8	101	49	80.	6.
E. B. Northup	SW¼ of SW¼	8	101	49	40.	2.
C. E. McKinney	SE¼ of SW¼	8	101	49	37.	3.7
Elmer S. Gilbert	SE¼ of NE¼ of SE¼	8	101	49	5.	.5
Frances G. Carpenter	(Except block 40 of Central Park add. to Sioux Falls) SW¼ of NW¼	8	101	49	37.5	3.75

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Frances G. Carpenter	(Except blocks 33, 48 and 49 of Central Park add. to Sioux Falls) SE¼ of NW¼	8	101	49	32.5	3.25
Frances G. Carpenter	(Except blocks 5, 8, 12 and 21 of Central Park add. to Sioux Falls) SW¼ of NE¼	8	101	49	30.	3.
Frances G. Carpenter	NW¼ of NW¼ of SE¼ of NE¼	8	101	49	2.5	.25
State of South Dakota	(Except right of way of C. M. & St. P. Ry. Co.) S½ of NW¼	9	101	49	37.5	3.75
Abbie P. Sherman, Annie C. Phillips and Flora C. Phillips	Tract 3 of NW¼	17	101	49	3.	.3
Catherine W. Peck, and Porter P. Peck	(Except block 1 and lots 10, 11 and 12 of block 34 of Millard Park add. to Sioux Falls) Tract 1 of NW¼	17	101	49	83.92	8.39

Catherine W. Peck and Porter P. Peck	Tract 2 of NW¼	17	101	49	12.6	1.26
Catherine W. Peck, and Porter P. Peck	Tract 4 of NW¼	17	101	49	.3	.03
Henry M. Whitehead	Tract 1 of SW¼	17	101	49	12.	1.2
Francis D. Hoskins	Tract 2 of SW¼	17	101	49	1.65	.17
Artenas Gale	Tract 3 of SW¼	17	101	49	1.1	.11
Porter P. Peck	(Except lots 1, 2, 3, 4, 5 and 6 of block 3, Lincoln Park add. to Sioux Falls) NE¼ of NE¼	18	101	49	37.25	3.73
Porter P. Peck	SE¼ of NE¼	18	101	49	35.	3.5
Marcus Russell	SW¼ of NE¼	18	101	49	40.	4.
Marcus Russell	SE¼ of NW¼	18	101	49	40.	4.
W. H. Lyon	SW¼ of NW¼	18	101	49	37.	3.7
German State Bank	(Except right of way of C. St. P. & M. O. Ry. Co.) NE¼ of SW¼	18	101	49	38.48	3.85

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
W. H. Lyon	(Except right of way of C. St. P. M. & O. Ry. Co. NW¼ of SW¼	18	101	49	33.96	3.4
Marcus Russell	W½ of NW¼ of SE¼	18	101	49	20.	2.
Marcus Russell	SW¼ of NE¼ of NW¼ of SE¼	18	101	49	2.5	.25
Marcus Russell	N½ of NE¼ of NW¼ of SE¼	18	101	49	5.	.5
G. H. Flemmer	That part of NW¼ of NW¼ Lying east of Big Sioux River (except block 89 of Sioux Falls Imp. Co. add. to Sioux Falls	18	101	49	5.	.5
S. Wildmark	Tract 1 of NW¼	18	101	49	2.	.2
Porter P. Peck	That part of NW¼ of NW¼ Lying West of Big Sioux River (except tract 1 and except lots 1, 2, 3, 4, 12, 13, 14, 15, 16, 17 and 18 of block 91 of Sioux Falls Imp. Co. add. to Sioux Falls)	18	101	49	11.	1.4
George J. Morris	(Except right of way of C. St. P. M. & Co. Ry. Co.) E. 10 acres of S½ of SW¼	18	101	49	9.37	.94

German State Bank	(Except right of way of C. St. P. M. & O. Ry. Co.) W 70 acres of S½ of SW¼	18	101	49	64.35	6.44
Jesse W. Boyce	(Except right of way of C. St. P. M. & O. Ry. Co.).. S½ of SE¼	18	101	49	40.	4.
C. C. Bratrud	N½ of NE¼	19	101	49	9.5	.95
Laura A. Darling	S½ of NE¼	19	101	49	2.	.2
Dan A. Donahoe	(Except blocks 5, 7, and 13 of West Lawn add. to Sioux Falls) E½ of NW¼	19	101	49	66.5	6.65
E. V. Rowley	W½ of NE¼ of NW¼ of NW¼	19	101	49	5.	.5
Ludwig Seubert	SE¼ of NE¼ of NW¼ of NW¼	19	101	49	2.5	.25
Jean Obert 203	NE¼ of NE¼ of NW¼ of NW¼	19	101	49	2.5	.25

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Dan A. Donahoe	NW¼ of NW¼ of NW¼	19	101	49	9.	.9
Dan A. Donahoe	S½ of NW¼ of NW¼	19	101	49	19.	1.9
Daniel A. Donahoe	SW¼ of NW¼	19	101	49	38.	3.8
Southwestern Investment Co.	N 50 rods of Tract 1 of NW¼	19	101	49	24.5	2.45
Amelia Bauch	(Except the N 50 rods Tract 1 of SW¼	19	101	49	14.5	1.45
W. H. Fullerton, Thomas Fullerton and George J. Fullerton	Tracts 2 and 3 of SW¼	19	101	49	7.45	.75
Thomas F. Loughran and John M. Doyle	Tract 4 of SW¼	19	101	49	8.	.8
Mary R. Guertin	Tract 5 of SW¼	19	101	49	8.	.8
Daniel A. Donahoe	Tract 9 of SW¼	19	101	49	.75	.08
Southside Trust Co. et. al.	Tract 10 of SW¼	19	101	49	8.	.8
F. C. Whitehouse, Receiver	N½ of NW¼	30	101	49	18.	1.8
F. C. Whitehouse, Receiver	SW¼ of NW¼	30	101	49	32.	3.2
F. L. Baton	NW¼ of SW¼	30	101	49	20.	2.
R. F. Pettigrew	SW¼ of SW¼	30	101	49	33.	3.3
John F. Tate	NW¼ of NW¼	31	101	49	20.	2.

John J. Smith	(Except right of way of C. St. P. M. & O. Ry. Co. and except the west 13 rods and 4 feet) E½ of NE¼	13	101	50	42.	4.2
Andrew C. Wheelock	W½ of NE¼	13	101	50	30.	3.
Andrew C. Wheelock	W 13 rods and 4 feet of E½ of NE¼	13	101	50	7.5	.75
Dainel Hayward	(Except right of way of C. St. P. M. & O. Ry. Co.) E½ of SW¼	13	101	50	30.9	3.09

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
W. H. Lyon	(Except right of way of C. St. P. M. & O. Ry. Co.) NE¼ of SE¼	13	101	50	32.53	3.25
Andrew C. Wheelock	(Except right of way St. P. M. & O. Ry. Co.) NW¼		101	50	36.97	3.7
Pine Tree Syndicate	S½ of SE¼	13	101	50	73.	7.3
Margaret Filber	A tract beginning at the NE corner of Running thence W 320 feet, thence S 120 feet, thence S 70 degrees, E 320 feet, thence N 20 degrees E 52 feet thence N 180 feet to beginning	24	101	50	1.18	.18
Adelbert Caldwell and Louis P. Caldwell	(Except the tract last above described) NE¼ of NE¼	24	101	50	33.7	3.37
William Shay	NW¼ of NE¼	24	101	50	18.	1.8
Adelbert Caldwell and Louis P. Caldwell	S½ of NE¼	24	101	50	32.	3.2
Edwin D. Clark	E½ of SE¼	24	101	50	20.	2.
Charles T. Crocker	NE¼ of NE¼	25	101	50	10.	1.
F. L. Eaton	SE¼ of NE¼	25	101	50	8.	.8
F. L. Eaton	NE¼ of SE¼	25	101	50	8.	.8
Charles T. Crocker	SE¼ of SE¼	25	101	50	20.	2.

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Berwick Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
J. N. Weston		3	1	.007
Susan W. Noland		4	1	.01
J. N. Weston	Lots 5 and	6	1	.026
E. B. Mallet	Lots 7, 8, 9, 10, 11 and	12	1	.078

Moses M. Robinson	Lots 1, 2, 3, and	4	2	.05
Abiel Abbott	Lots 5, 6, 7, 8, 9, 10, 11 and	12	2	.1
Frank C. Frizzell	Lots 1 and	2	3	.026
E. N. Frizzell	Lots 3, 4, 5, and	6	3	.05
F. W. Williams	Lots 7 and	8	3	.026
E. N. Frizzell	Lots 9 and	10	3	.026
F. C. Frizzell	Lots 11 and	12	3	.026
John W. Horton and A. D. Horton			4	.1
Elwin H. Potter			5	.137
E. B. Mallet			6	.09
E. S. W. Packer	Lots 1 and	2	7	.026
G. W. Shattuck	Lots 3 and	4	7	.026
Martha G. Shattuck	Lots 5 and	6	7	.026
F. W. Williams	Lots 7 and	8	7	.026
Martha G. Shattuck	Lots 9 and	10	7	.026
Catherine F. Taylor	Lots 11 and	12	7	.026
F. C. Frizzell	Lots 1, 2, 3 and	4	8	.052
G. W. Shattuck	Lots 5 and	6	8	.026
John Kennedy	Lots 7 and	8	8	.026
F. C. Frizzell	Lots 9 and	10	8	.026
F. E. Payne		11	8	.013
Martha G. Shattuck		12	8	.013
Abiel Abbott	Lots 1, 2, 3, 4, 5, and	6	9	.078
Mathias Blumer		7	9	.013

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Name of Owner	Description	Lot	Block	Proportion of Benefits.
Abiel Abbott		8	9	.013
Moses M. Robinson	Lots 9, 10, 11, and	12	9	.052
P. C. Pinkham	Lots 1 and	2	10	.026
C. B. Rosengren		3	10	.013
G. W. Shattuck	Lots 4, 5, 6, 7, 8, and	9	10	.078
J. N. Weston	Lots 10, 11 and	12	10	.039
E. B. Mallett	East half of		11	.033
City of Sioux Falls	West half of		11	.05
Security Savings Bank	Lots 1, 2, 3, 4, 5, 6, 7, 8, and	9	12	.117
F. L. Blackman	Lots 10, 11 and	12	12	.039

E. B. Mallet	Lots 1, 2, 3, 4, 5, and	6	13	.058
Elwin N. Potter	Lots 7, 8, 9, 10, 11 and	12	13	.078
E. B. Mallett			14	.09
E. B. Mallett			15	.156
Fred Nelson	Lots 1 and	2	16	.026
Security Savings Bank		3	16	.013
C. F. McCormack		4	16	.02
G. W. Hanson		5	16	.013
C. L. Norton		6	16	.02
Security Savings Bank	Lots 7, 8, 9, 10 11 and	12	16	.078
Martha Hurst	Lots 1 and	2	17	.033
Susan Nowland	Lots 3 and	4	17	.026
Security Savings Bank	Lots 5 and	6	17	.013
Abiel Abbott	Lots 7, 8, 9, and	10	17	.052
Moses M. Robinson	Lots 11 and	12	17	.026
E. B. Mallett	Lots 1, 2 and	3	18	.039
Minnehaha Trust Co.		4	18	.013

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Name of Owner	Description	Lot	Block	Proportion of Benefits.
Lewis J. Krull	Lots 5 and	6	18	.016
E. B. Mallett	Lots 10, 11, and	12	18	.026
E. B. Mallett			19	.143
E. B. Mallett			20	.156
Abiel Abbott	Lots 1, 2, 3, and	4	21	.052
Moses M. Robinson	Lots 5 and	6	21	.026
H. K. Richards et al, trustees	Lots 7, 8, 9, 10, 11 and	12	21	.078
E. B. Mallett			22	.033
Security Savings Bank	Lots 1, 2, and	3	24	.039
F. W. Clarke		4	24	.013
J. C. Boynton		5	24	.013
L. J. Moddle		6	24	.02
M. W. Potter	Lots 7 and	8	24	.026
Elwin N. Potter		9	24	.013
Rufus Gunn	Lots 10, 11 and	12	24	.039
E. B. Mallet			25	.1

E. B. Mallet			27	.033
Moses M. Robinson	Lots 1, 2 and	3	28	.039
Abiel Abbott	Lots 4, 5, 6, 7 and	8	28	.065
E. B. Mallet			29	.1
E. B. Mallet			30	.1
Abiel Abbot		2	31	.006
A. L. Baker		3	31	.02
Peter Graffam		4	31	.02
Wilhelmina Hurst	Lots 5 and	6	31	.026
Abiel Abbot	Lots 7 and	8	31	.026
City of Sioux Falls		.75 Block "A"		

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Brookings' Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
Wigant Ludewig	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12 and	13	5	.17
Hans C. Ruwald	Lots 1, 2 and	3	11	.02
James Spaulding et al	Lots 1 and	2	12	.026
H. Ruwald	Lots 3, 4, and	5	12	.039
Hans C. Ruwald		6	12	.013

Brooks' Addition to Sioux Falls.

Southside Trust Co.	Lots 14, 15, 16 and	17	1	.033

Bunker's Addition to Sioux Falls.

Hans Ruwald	Lots 1, 2, 3, 4, 5, 6, and	7	1	.084
N. S. Johnson, and C. O. Waade		8	1	.012
Geo. G. Hull		9	1	.012
Hans Ruwald	Lots 10, 11, 12, 13 and	14	1	.06
W. W. Ormiston		15	1	.012
H. T. Richardson	Lots 16 and	17	1	.024
Hans Ruwald	Lots 18, 19 and	20	1	.036
R. A. Orriston		1	2	.012
Hans Ruwald	Lots 2, 3, 4, 5, 6, and	7	2	.072
Joseph Elott	Lots 8 and	9	2	.024
Minnie E. Espe, and F. L. Blackman		10	2	.012
Hans Ruwald		11	2	.012
O. C. Caldwell		11	2	.012

Hans Ruwald	Lots 13, 14, 15, 16, 17, 18, 19 and	20	2	.096

Minnehaha Trust Co. Subdivision of Block 3, of Carpenter's Addition to Sioux Falls.

Security Savings Bank		7		.01
L. B. Goodell		8		.01
L. B. Goodell and Martha A. Goodell		9		.01
L. B. Goodell	Lots 10 and	11		.02

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Name of Owner	Description	Lot	Block	Proportion of Benefits.
Security Savings Bank		12		.01

Carpenter's Addition to Sioux Falls.

Lewis Krull			6	.05

Central Park Addition to Sioux Falls.

Eliza Halpin	Lots 1 and	2	1	.025
George A. Ludlow	Lots 3 and	4	1	.02
Helen E. Phelps		5	1	.01
Frances G. Carpenter and Anne Pohle		6	1	.01
Wilhelmina Josewski	Lots 7 and	8	1	.02
Helen E. Phelps	Lots 9 and	10	1	.02
Benjamin F. Barnes	Lots 11, 12, and	13	1	.03
Helen E. Phelps	Lots 14, 15 and	16	1	.03
John F. Shoemaker			2	.16
Frances G. Carpenter			3	.16
Henry D. Norris			4	.16
Alph H. Sears			5	.16
Geo. H. Brace, Trustee, and Mary C Brace			8	.16
William E. Bell			12	.16
Mariette Blomiley			13	.16
Frances G. Carpenter			14	.16
Clara L. Hambright	Lots 1, 2, 3, and	4	15	.04
Abe Davison and Sippie Davison	Lots 5, 6, 7, and	8	15	.04
Michael Marousek	Lots 9, 10, 11 and	12	15	.04
Clara L. Hambright	Lots 13, 14, 15 and	16	15	.04

Frances C. Carpenter			16	.16
J. W. Werner			17	.16
Anna E. Ploog			18	.16
Frances G. Carpenter			19	.16
Peter Jameson	Lots 1, 2, 3, and	4	20	.04
Nora Connell	Lots 5, 6, 7, and	8	20	.04

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Name of Owner	Description	Lot	Block	Proportion of Benefits.
Peter Jameson	Lots 9, 10, 11, 12, 13, 14, 15 and	16	20	.08
W. R. Timpe and H. L. Schroeder	Lots 1, 2 and	3	21	.03
D. J. Carpenter		4	21	.01
Mattie M. Hansen	Lots 5, 6, 7, and	8	21	.04
E. G. Tibbels and James Ross	Lots 9 and	10	21	.02
H. B. Muir		11	21	.01
N. E. Strignham		12	21	.01
D. J. Carpenter		13	21	.01
W. R. Timpe, and H. L. Schroeder	Lots 14, 15 and	16	21	.03
G. H. Brace and Mary C. Brace			30	.16
Laura L. Pomeroy			31	.16
Frances G. Carpenter, Artemas Gale and C. A. Greeley	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and	14	32	.14
May Sanders and May B. Sanders	Lots 15 and	16	32	.02
Alph Sears			33	.16
George T. Greeley and Frances G. Carpenter			40	.16
Frances G. Carpenter			48	.16
Geo. H. Brace			49	.16
A. Gale, C. A. Greeley, G. C. Carpenter and G. H. Brace	Out lot "A"			.1
Geo. H. Brace, and James Jameson, trustees	Out lot "B"			.1
Geo. H. Brace and James Jameson, trustees	Out lot "C"			.1

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Englewood Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
Marcus Russell			1	.16
William Fuller			2	.16
Marcus Russell			3	.16
Annie A. W. Nock			4	.16
James B. Adams			12	.16
Marcus Russell			13	.16
Mark N. Powers			14	.16
Marcus Russell			15	.16
Marcus Russell			16	.16
Marcus Russell			17	.16
James B. Adams			18	.16
F. I. Russell, Martin Olson and S. O. Detlie		1	19	.01
Frank E. Orr and F. I. Russell		2	19	.01
M. T. Botsford	Lots 3 and	4	19	.02
Addie R. Woodworth	Lots 5, 6, 7 and	8	19	.04
Marcus Russell	Lots 9, 10 and	11	19	.03
Sarah Walker		12	19	.01
Alice M. Steinbach		13	19	.01
Lillie M. Darrow	Lots 14, 15 and	16	19	.03
Ouda Detlie and Lena Gunderson	Lots 1, 2, 3, and	4	20	.04
F. I. Russell, and M. Grigsby		5	20	.01
Marcus Russell		6	20	.01
F. I. Russell, J. A. Johnson and H. H. Gulstine	Lots 7 and	8	20	.02
Marcus Russell	Lots 9, 10, 11, 12, 13, 14, 15 &	16	20	.08
F. I. Russell, and S. D. Kennedy		1	21	.01
S. D. Kennedy	Lots 2, 3, 4, and	5	21	.04
F. I. Russell and S. D. Kennedy		6	21	.01

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Name of Owner	Description	Lot	Block	Proportion of Benefits.
M. J. Tinkham	Lots 7 and	8	21	.02
F. I. Russell and S. D. Kennedy	Lots 9, 10, 11, 12, 13, 14, 15 and	16	21	.08
F. L. Blackman			22	.16
F. L. Blackman			27	.16
F. L. Blackman			28	.16
Marcus Russell			29	.16
Edward A. Benson, and Chas. E. Anderson			30	.16
M. Russell			31	.16
Marcus Russell	Lots 1, 2, 3, and	4	32	.04
F. I. Russell and E. T. Newhall	Lots 5 and	6	32	.02
J. H. Ryan	Lots 7 and	8	32	.025
F. I. Russell and E. T. Newhall	Lots 9, 10 and	11	32	.03
F. I. Russell and Joe Kirby		12	32	.01
Marcus Russell	Lots 13, 14, 15 and	16	32	.04

Harrison Addition to Sioux Falls.

Carroll Whitney, Ellen Whitney, Alfred Perry, Herbert Perry and H. B. Burtch	Lots 5, 6, and	7	16	.026
Porter P. Peck			17	.16
Porter P. Peck			18	.16
C. A. Mitchell	Lots 1, 2, and	3	19	.039
Oscar S. Potter	Lots 4, 5, 6, 7, 8, 9, 10, 11 and	12	19	.117
Lesterk D. Sharon			20	.16

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Harrison Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
O. C. Potter			21	.16
O. C. Potter	Lots 2, 3, 4, 5, 6, 7, and	8	22	.09
G. H. Flemmer			25	.16
Fred W. McMullen			26	.16
Fred W. McMullon			27	.16

Fred W. McMullon			28	.16
Fred W. McMullon			29	.16
Oscar C. Potter			30	.16
Porter P. Peck			31	.16
Porter P. Peck			32	.16

Lakeview Addition to Sioux Falls.

Wm. Klauson	Lots 5 and	6	2	.01
Ingabret Thorson		7	2	.01
H. H. Keith and Mary S. Keith		8	2	.01
H. H. Keith and Mary S. Keith			3	.08

Lincoln Park Addition to Sioux Falls.

Soren Mason and Emma S. Miller	Lots 1 and	2	3	.026
Belle Payne	Lots 3 and	4	3	.026
Soren Mason and S. E. Young	Lots 5 and	6	3	.026

McClellan's Second Addition to Sioux Falls.

John McClellan	Lots 1, 2, 3, 4, 5, 6, 7, 8 and	9	29	.07
Wm. Van Eps and Joe Kirby	Lots 17 and	18	29	.013
John McClellan	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, &	14	30	.136
G. H. Brace and John McClellan		15	30	.006

Meredith's First Addition to Sioux Falls.

R. E. Bach			1	.08

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Name of Owner	Description	Lot	Block	Proportion of Benefits.
Herbert C. Everson and Hattie A. Everson			4	.08
Chas. A. Scott	Lots 1, 2 and	3	8	.02
R. E. Bach and Fred Diver	Lots 4, 5, and	6	8	.02
Union National Bank	Lots 7, 8 and	9	8	.02
R. E. Bach and Fred Diver	Lots 10, 11 and	12	8	.02
E. J. Sharon			9	.08
Lizzie L. Baker			16	.08

Mariette Blomiley			17	.08
Soren Monson			18	.08
Soren Monson			23	.08
Marion Chase			24	.08
William Klauson and J. C. Wasom			25	.08
William Klauson and J. C. Wasom			26	.08
W. H. Lyon			31	.08
Charles M. Thompson	Lots 1, 2, 3, 4, 5, and	6	32	.04
William Klauson and J. C. Wasom	Lots 7, 8, 9, 10, 11 and	12	32	.04

Meredith's Second Addition to Sioux Falls.

E. J. Sharon			33	.16
E. J. Sharon			34	.1
Amanda A. Burtch Horatio A. Burtch B. A. Burtch and P. G. Honneger, guardian			37	.05
Oscar C. Potter			38	.15
O. C. Potter	Lots 1, 2 and	3	39	.039
Leon A. Potter	Lots 4, 5, 6, 7, 8, and	9	39	.078
O. C. Potter	Lots 10, 11 and	12	39	.039
John E. Patheal			40	.039
O. C. Potter			43	.12

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Name of Owner	Description	Lot	Block	Proportion of Benefits.
Amanda A. Burtch, Horatio A. Burtch, B. A. Burtch, and P. G. Honnegger, guardian			44	.16
F. L. Blackman and E. J. Sharon			45	.08
F. L. Blackman and E. J. Sharon			46	.08
F. L. Blackman and E. J. Sharon			47	.16
Amanda A. Burtch Horatio A. Burtch, B. A. Burtch and P. G. Honnegger, guardian			48	.08

M. E. McDougal			56	.02
F. L. Blackman and E. J. Sharon			57	.12
F. L. Blackman and E. J. Sharon			58	.09
Eliza K. Leyse			59	.04
F. L. Blackman and Carrie Lundell			60	.08
Eliza K. Leyse			74	.12
Charles E. Baker	Lots 1 and	2	75	.013
Eliza K. Leyse	Lots 4, 5, 6, 7, 8, 9, 10, 11 and	12	75	.045

Millard Park Addition to Sioux Falls.

Porter P. Peck			1	.16
Porter P. Peck	Lots 10, 11 and	12	34	.039

North Boulevard Addition to Sioux Falls.

Arthur D. Story Lyman J. Story and Geo. H. Brace			4	.16
Mary C. Brace			6	.16
Mary C. Brace			9	.16
Mary C. Brace			13	.16
E. H. Doble, H. F. Doble and Geo. H. Brace			29	.16

Name of Owner	Description	Lot	Block	Proportion of Benefits.
S. W. McCall and Geo. H. Brace			34	.16
Charles Brigham, John G. Spofford and Geo H. Brace			35	.16
Charles Brigham, John G. Spofford and Geo H. Brace			49	.16
Obed F. Smith			50	.16
Geo. H. Brace			61	.16

North Park Addition to Sioux Falls.

Lilly E. Bradley	Lots 1 and	2	1	.02
James A. Guest	Lots 3, 4, 5, and	6	1	.04
Hans Ruwald	Lots 7 and	8	1	.02
Hans Ruwald and M. D. Skinner	Lots 9 and	10	1	.02

Hans Ruwald	Lots 1, 2, 3, 4, 5, 6, and	7	2	.07
D. S. Glidden, Trustee and Hans Ruwald		8	2	.01
John Kadinger	Lots 9, 10, 11 and	12	2	.04
Hans Ruwald and Wiley & Williams		13	2	.01
Hans Ruvald and Frank R. Richardson	Lots 14, 15 and	16	2	.03
W. G. Scripture and Hans Ruwald		1	3	.01
Hans Ruwald		2	3	.01
W. G. Scripture and Hans Ruwald		3	3	.01
W. C. Hollister and Hans Ruwald	Lots 4, 5, and	6	3	.03
N. A. Albers	Lots 7, 8 and	9	3	.03
Amelia Albers		10	3	.01
Hans Ruwald and W. C. Hollister	Lots 11, 12, 13, 14, 15, and	16	3	.06
J. W. Hutchinson			4	.16
John Farren	Lots 1 and	2	5	.02
Charles D. Nelson	Lots 3, 4, 5, 6, 7, and	8	5	.06

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Name of Owner	Description	Lot	Block	Proportion of Benefits.
John Farren	Lots 9, 10, 11, 12, 13, 14, 15 and	16	5	.08
Hans Ruwald	Lots 1, 2, 3, 4, and	5	6	.05
John Freedrickson, Peter Holland and Hans Ruwald		6	6	.01
Hans Ruwald and Leopold Guertin	Lots 7 and	8	6	.02
R. A. Morris	Lots 9 and	10	6	.02
Hans Ruwald and Wm. B. Allen	Lots 11, 12, 13, 14, 15 and	16	6	.06
Hans Ruwald	Lot 1 and north half	2	7	.015
F. W. Piper	Lot 3 and south half	2	7	.02
J. W. Ramsey	Lots 4 and	5	7	.02
P. G. Stiles		6	7	.01
T. Y. Stevenson	Lots 7 and	8	7	.02
E. C. Lord, George Dillon and Ella E. Dillon		9	7	.01

R. A. Morris	Lots 10 and	11	7	.02
Hans Ruwald	Lots 12, 13, 14, 15 and	16	7	.05
Hans Ruwald and Amy M. Skinner	Lots 1 and	2	8	.02
Hans Ruwald, Amy M. Skinner and E. W. Skinner	Lots 3, 4, and	5	8	.03
J. W. Parker	Lot 6 and north half	7	8	.01
Hans Ruwald and John W. Harding	Lot 8 and south half	7	8	.005
Lena H. Bessler		1	10	.015
Minnehaha Trust Co. and S. C. Hunter		2		.01
W. A. Shindlar	Lots 3, 4 and	5	10	.015
J. M. Warren	Lots 10, 11 and south half	12	10	.025
Lena Bessler	Lot 13 and north half	12	10	.015

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Name of Owner	Description	Lot	Block	Proportion of Benefits.
Barbara O. Listman and Hans Ruwald	Lots 1 and	2	11	.02
James A. Guest	Lots 3 and	4	11	.02
Hans Ruwald and H. T. Dolloff	Lots 5, 6 and	7	11	.03
Sarah M. Buckley		8	11	
Peter P. Simeon	Lots 1 and	2	12	.02
Hans Ruwald and W. C. Hollister		3	12	.01
Union National Bank		4	12	.01
Hans Ruwald	Lots 5, 6, and	7	12	.03
S. C. Hunter		8	12	.01

North Park Second Addition to Sioux Falls.

Julia W. Anderson	1	.16
Hans Ruwald	2	.16
Hans Ruwald	3	.24
Hans Ruwald	4	.16
Hans Ruwald	5	.16
Hans Ruwald	6	.16
Theron S. Swain and Henry E. Shaw	7	.16

Hans Ruwald			8	.16
Hans Ruwald			9	.16
Hans Ruwald			10	.16
Hans Ruwald			11	.16
Julia W. Anderson	Lots 1 to 16 inclusive		12	.16
Hans Ruwald	Lots 17 and	18	12	.02
Julia W. Anderson	Lots 19, 20, 21, 22, 23 and	24	12	.06
Hans Ruwald			13	.16
Thomas E. Powers			14	.17
Hans Ruwald			15	.24
George J. Fullerton	Lots 1 and	2	16	.02
S. Olney		3	16	.01

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Name of Owner	Description	Lot	Block	Proportion of Benefits.
S. Olney and J. Guertin		4	16	.01
S. Olney		5	16	.01
F. C. Whitehouse and H. G. Newell		6	16	.01
J. F. Hawer	Lots 7 and	8	16	.02
Edward H. Story and C. H. Wagner		9	16	.01
Hans Ruwald and Lena Hanson		10	16	.01
Hans Ruwald		11	16	.01
Hans Ruwald and Lena Hanson		12	16	.01
Hans Ruwald		13	16	.01
W. W. Ormiston		14	16	.01
Hans Ruwald and Basha L. Smith		15	16	.01
Hans Ruwald and F. C. Whitehouse		16	16	.01
Hans Ruwald and Rena Paulson	Lots 1 and	2	17	.02
Bell Pederson	Lots 3, 4, 5, 6, 7, and	8	17	.06
Hans Ruwald and Alice T. Newell	Lots 9 and	10	17	.02
Hans Ruwald	Lots 11, 12, 13, 14, 15, and	16	17	.06
W. R. Quincy	Lots 1 and	2	18	.02

Hans Ruwald		3	18	.01
Hans Ruwald and John M. Watson		4	18	.01
John F. Sherman	Lots 5 and	6	18	.02

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North Park Second Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
S. E. White		7	18	.01
Hans Ruwald	Lots 8, 9, 10, 11, 12 and	13	18	.06
Hans Ruwald, T. M. Robinson and C. H. Eastlock	Lots 14, 15 and	16	18	.03
Hans Ruwald			19	.16
Hans Ruwald			20	.16
Guy A. Newell	Lots 1, 2 and	3	21	.03
F. C. Whitehouse		4	21	.01
F. L. Blackman, Edward E. Whitney and I. P. Lounsbury		5	21	.01
F. L. Blackman and John Hilton		6	21	.01
F. L. Blackman	Lots 7 and	8	21	.02
Hans Ruwald, I. Scott and E. R. Oldfield	Lots 9, 10, 11, 12, 13, 14, 15 and	16	21	.08
Hans Ruwald	Lots 1, 2, 3, 4, 5, and	6	22	.06
F. L. Blackman		7	22	.01
Hans Ruwald and Carrie W. Newell		8	22	.01
F. L. Blackman	Lots 9 and	10	22	.02
Hans Ruwald	Lots 11, 12, 13, 14, 15 and	16	22	.06
Hans Ruwald			23	.16
Wigant Ludewig			24	.24

Sioux Falls Improvements Co. Addition to Sioux Falls.

B. H. Lien, treasurer			89	.3
S. Widmark	Lots 1, 2, 3 and	4	91	.028
Sarah F. Foster	Lots 12, 13 and	14	91	.021
J. Reichard and J. W. Reichard	Lots 15 and	16	91	.014
Moses Hawkins		17	91	.007

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Name of Owner	Description	Lot	Block	Proportion of Benefits.
James W. Bowles		18	91	.007

Summit Addition to Sioux Falls.

Esther Hitchcock and N. J. Ronlund		1	17	.01
Peter Larson		2	17	.005
Ella H. Pyle	Lots 23, 24, 25 and	26	17	.045
Frederic Gardiner, Jr.		1	18	.015
Margaret M. Matthews and Hannah L. Matthews		2	18	.015
Union National Bank		3	18	.015
Mike Henle		4	18	.015
Ellen Bennett and R. M. Bennett	Lots 5, 6, and	7	18	.035
J. D. Fearon		8	18	.007
Minnie S. Neason and Gertrude E. Neason		9	18	.007
Elen Bennett and R. M. Bennett	Lots 16, 17, 18 and	19	18	.06
R. I. Bach		20	18	.015
Ellen Bennett and R. M. Bennett	Lots 21, 22, 23, 24, 25 and	26	18	.09

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West Lawn Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
D. A. Donahoe	N½ of NE¼ of		5	.02
Katherine E. Sherman	S½ of NE¼ of		5	.02
Henry Reichelt	E½ of E½ of NW¼ of		5	.01
Wm. Quinn and	W½ of E½ of NW¼ of		5	.01
Minnehaha County and Warner & Rogers and Minnehaha County	E½ of W½ of NW¼ of		5	.01
	W½ of W½ of NW¼ of		5	.01
Katherine E. Sherman	E½ of E½ of SW¼ of		5	.01
Laura M. Mellon	W½ of E½ of SW¼ of		5	.01
Laura M. Mellon	W½ of SW¼ of		5	.02
Emma Martin	N½ of SE¼ of		5	.02
Minnie L. Murphy	S½ of SE¼ of		5	.02

C. S. Newcomer and R. W. Barnes			7	.16
Clara L. Hambright			13	.16

West Park Addition to Sioux Falls.

David R. Rector	Lots 1 and	2	1	.013
Sioux Falls Trust Co and Minnehaha National Bank	Lots 14 and	15	1	.006
Northwestern Investment Co. and Minnehaha National Bank		16	1	.006
The Williams Estate Co. and Minnehaha National Bank	Lots 17, 18, 19 and	20	1	.045
The Williams Estate Co. and Minnehaha National Bank	Lots 1, 2, 3 and	4	2	.05
Northwestern Investment Co. and Minnehaha National Bank	Lots 5, 6, and	7	2	.039
Anders C. Blomquist		8	2	.013
Northwestern Investment Co. and Minnehaha National Bank	Lots 9, 10, 11, 12 and	13	2	.065
Minnehaha National Bank		14	2	.013

Name of Owner	Description	Lot	Block	Proportion of Benefits.
O. S. Swenson and R. J. Wells	Lots 15, 16, 17 and	18	2	.05
Minnehaha National Bank	Lots 19 and	20	2	.026
Sioux Falls Trust Co. and Minnehaha National Bank	Lots 13 and	14	3	.02
Northwestern Investment Co. and Minnehaha National Bank	Lots 15 and	16	3	.026

Town of Renner

Leonard Renner	Lots 1, 2, 3, 4, 5, 6, 7, and	8		.09

Olson's Addition to Renner.

Jonas Olson		1		.004
James W. Parker	Lots 2, 3, and	4		.014
Jonas Olson	Lots 5 to 13 inclusive			.052

James W. Parker	Lots 14, 15, 16, 17, 18 and	19	.028
Jonas Olson	Lots 20, 21, 22, 23 and	24	.024

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Name of Owner.	Description	Acres.	Proportion of Benefits
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 28, 29, and 33, township 103, range 49, west 5th p. m.....	25.02	3.75
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4, 9, 16, 21, 28 and 33, township 102, range 49, west 5th p. m. Sioux Falls and Egan line....	72.50	15.41
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 5, 8, and 9, township 102, range 49 west 5th p. m. (Sioux Falls and Madison line)	17.30	2.60
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4 and 9, township 101, range 49, west 5th p. m.	17.05	5.12
South Dakota Central Railway Co.	Right of way as now laid out and located across sections 29 and 32, township 102, range 49 west 5th p. m.	11.06	3.32
South Dakota Central Railway Co.	Right of way as now laid out and located across sections 4, 5, and 9, township 101, range 49, west 5th p. m.....	17.72	5.32
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 18, Township 101, range 49, west of 5th p. m.	12.18	3.65

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Name of Owner	Description	Acres	Proportion of Benefits
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 13, Township 101, range 50, West 5th p. m.	16.88	5.06
Sverdrup Township.	Seven miles and 84 rods of laid out and established highways within the drainage area.		2.9
Mapleton Township.	Twelve miles and 52 rods of laid out and established highways within the drainage area.		7.73
Sioux Falls Township.	Two and onehalf miles of laid out and established highways within the drainage area.....		3.2

Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.	.6
City of Sioux Falls	1⅛ miles of highways and dedicated streets within the drainage area	.9
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area	25.

Be It Further Resolved that Tuesday, the 5th day of May, 1908, at two o'clock P. M. at the office of the County Auditor of said County be and it is hereby fixed as the time and place for the equalization of such proportion of benefits, and that notice thereof be given, in accordance with the provisions of Sec. 6. of Chap. 134 of the Laws of 1907 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Weekly Argus-Leader, once in each week for two consecutive weekly issues, and one further publication in the Sioux Falls Daily Argus Leader, and by posting copies of such notice in at least three public places near the route of said Drainage Ditch, the said posting and the last of such publications to be made at least 10 days prior to the time of said hearing.

226 Adopted April 11, 1908 THOS. McKINNON,
Chairman.

Attested:
C. E. Hill,
County Auditor.
(Seal)

227 Filed in the office of the Auditor of Minnehaha County, S. D. this 8th day of April, 1908.

C. E. HILL
County Auditor.

Plaintiff offered in evidence pages 53 to 61 inclusive of Ditch Record A, being the record of notice of hearing upon the equalization of benefits with reference to Ditch No. 1. In this notice of hearing the same persons [—] and the same property is described as in the "resolution assessing benefits".

Plaintiff offered in evidence pages 260 to 268, inclusive, of Ditch Record A, the same being a record of the levying of the assessment for Drainage Ditch No. 1. In this assessment the same persons and the same property was assessed as

is described in the "resolution assessing benefits." This record shows that the commissioners ascertained and determined the entire cost of Drainage Ditch No. 1 to be the sum of $46,600.10.

Plaintiff offered in evidence pages 94 to 95 and a portion of page 96 of Ditch Record A, as follows:

April 10, 1908.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioners respectfully represent that they are all residents of the Township of Mapleton in said County, and that each of them is the owner of certain lands in said Township in the valley of the Big Sioux River as follows: The said Iver R. Peterson is the owner of the South Half of the South West Quarter of the North East Quarter of Section Seventeen (17) and the South Half of the East Thirteen (13) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said Bernt Mekvold is the owner of the South-West Quarter of the North West Quarter of Section Seventeen (17) and the West Twen-
228 ty-six and Two-Thirds (26 2/3) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said William O. Quincy is the owner of the West Half of the North West Quarter of Section Twenty (20); and that the said Iver I. Nelson is the owner of the East Half of the South West Quarter of Section Seventeen (17) and the North West Quarter of the South West Quarter of Section Seventeen (17), all in Mapleton Township, Minnehaha County, South Dakota, all of which lands will be affected by the drainage herein proposed;

Your petitioners further represent that it is necessary for the drainage of agricultural lands in said Big Sioux Valley from a point about four miles north of the south line of Sverdrup Township to a point about one and one-half miles north of the south line of Mapleton Township, that the proposed drainage be established;

Your petitioners further represent that the establishment of such drain will be conducive to the general health, convenience and welfare of the inhabitants of said territory, and that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow

in said valley, and will prevent great damage to the buildings and their contents, and will prevent great damage to the highways in said territory, and also to the railroad tracks and the rights of way of the Chicago, Milwaukee and St. Paul Railway Company in said territory, and will prevent damage and destruction of many bridges and their approaches in said territory;

229 Your petitioners further represent that the general purpose of said proposed drainage is, among other things, to prevent the annual or occasional flooding of land in said territory caused by high water in said river by providing a drain to carry off all of the water of said river above its normal stage from about the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the south line of Section Five (5) of Mapleton Township, and running thence southeasterly adjacent to the right of way of the Madison line of the Chicago, Milwaukee and St. Paul Railway Company to the west line of the East Half of the North East Quarter of Section Eight (8) in Mapleton Township, running thence south about three miles to a point about forty (40) rods south of the north line of Section Twenty Nine (29) in Mapleton Township where the said line intersects Silver Creek, running thence southeasterly to the upper end of Drainage Ditch No. 1, as established by said Board;

Your petitioners further represent that, as a part of said plan of drainage, there should be constructed a dike along the south and southeasterly side of said Big Sioux River where the same flows through the North East Quarter of Section Thirty-two (32) in Sverdrup Township, such dike to be of the length of thirty (30) or forty (40) rods.

Your petitioners further represent that the territory likely to be affected thereby embraces Sections Sixteen (16), Seventeen (17), Eighteen (18), Twenty (20), Twenty-one (21), Twenty seven (27), Twenty Eight (28), Twenty Nine (29), Thirty-Two (32), Thirty Three (33) and Thirty Four (34) in Sverdrup Township, and Sections Three (3), Four (4) Five (5), Eight (8), Nine (9), Sixteen (16), Seventeen (17), Nineteen (19), Twenty (20), Twenty One (21), Twenty Eight (28), and Twenty Nine (29) in Mapleton Township.

Dated April 9, 1908

IVER R. PETERSON
IVER I. NELSON
BERNT MEKVOLD
W. O. QUINCY

Petitioners.

Filed in the office of the Auditor of Minnehaha County, S. D., this 10th day of April, 1908.

230 C. E. HILL
County Auditor

Plaintiff offered in evidence page 113 of Ditch Record A, as follows:

January 8, 1909.

Further Petition.

To the Honorable Board of County Commissioners, of Minnehaha County, South Dakota:

The undersigned land owners in the valley north of Sioux Falls respectfully request, pursuant to the trip of inspection made by you on December 15, 1908, that in acting upon the petition of Iver R. Peterson and others for a drainage ditch in Mapleton Township you will cause the proposed drainage ditch to be extended further north and made a part of Ditch No. 1, also that as a part of said proposed drainage system, you will cause a ditch to be established on the west side of the Big Sioux River from a point above the Baltic dam southerly to a suitable place on the river in Section Eighteen (18) in Sverdrup Township, and that you will by a proper outlet on the east side of the river, provide for the taking care of the surplus water so dumped into the river at that point.

A. L. Berg
Ole J. Ustrud
G. T. Gunderson
O. G. Brende
John O. Aasen
P. M. Thompson
Ole O. Langness
H. G. Solem
T. A. Berven
Oluf Lyng
Mrs. Mary Lee
Mrs. Anne Larson by Agt.
K. Larson
J. H. Williamson
E. O. Fossum
John P. Risvold
Gunerius Thompson

Filed in the office of the Auditor of Minnehaha County,
231 S. D., this 8th day of January 1909.

C. E. HILL, County Auditor.

Plaintiff offered in evidence pages 121 to 123, inclusive, of Ditch Record A, as follows:

Resolution for Adjourned Hearing:

(Transcribed from Commissioners Record No. 6, Page 170-1-2-3)

On motion the following resolution was unanimously adopted:

Resolution:

Whereas, on April 10, 1908, Iver R. Peterson and others filed their petition with the County Auditor of Minnehaha County, South Dakota, for the establishment and construction of a certain drainage ditch in Mapleton Township in said County; and

Whereas, this Board did on June 12, 1908, adopt a resolution for the survey thereof; and

Whereas, Mr. S. B. Howe, County Surveyor, employed by this Board for making such survey, did on November 13, 1908, file his report thereof, together with maps and profiles, and

Whereas, this Board did on said last named date fix Friday, December 4, 1908, at the office of the County Auditor of said County as the time and place for the hearing of said petition, and did cause notice of said hearing to be given publication and posting, as required by law; and

232 Whereas, December 4, 1908, a petition was presented by A. L. Berg, and others for the extension of said ditch; and

Whereas, said matter has by successive adjournments been continued until April 9, 1909; and

Whereas, this Board has inspected the route of said drainage ditch as described in said petition and as hereinafter described; and

Whereas, this Board deems it practicable, necessary and best that the route of said drainage ditch be varied from the route described in said petition and its northerly terminal points be materially changed; therefore

Be it Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the line of said drainage ditch be and it is hereby changed from the route described in said petition to run as follows: the same being substantially as petitioned for up to the point where the same crosses the Madison branch of the Chicago, Milwaukee and St. Paul Railway Company, viz:

First Section.

Commencing at a point ten hundred forty-five (1045) feet north and fifty-eight (58) feet west of the Southeast corner

of Section twenty-nine (29) in Township One Hundred and Two (102) North, Range Forty-nine (49); running thence north five hundred forty seven (547) feet; thence north 23° west thirty three hundred eighteen (3318) feet to a point fifty eight (58) feet west of the quarter quarter line in the North East Quarter (NE¼) of Section Twenty Nine (29), in said Township; thence north parallel with, and fifty-eight (58) feet west of said quarter quarter line through Section Twenty Nine (29), Twenty (20), Seventeen (17), and a
233 part of Section Eight (8) Twelve thousand nine hundred thirty five (12935) feet; thence north 50° East twenty seven hundred thirty two (2732) feet to a point thirty three (33) feet west of the west line of the right of way of the Chicago, Milwaukee and St. Paul Railway Company in the North West Quarter of Section Nine (9) in said Township; thence northerly parallel with and thirty three (33) feet west of the said right of way line nineteen thousand three hundred, sixty eight (19368) feet to a connection with a high water channel of the Big Sioux River in the South East Quarter of Section Twenty (20) in Township One Hundred and Three (103) North, Range Forty Nine (49).

Second Section:

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103) North, Range Forty Nine (49); running thence north 33° west thirty one hundred and fifty five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line of Section Seven (7) and Six (6) in said Township, and in Section Thirty One (31) in Township One Hundred and Four (104) North, Range Forty Nine (49) to the center line running East and West through said Section Thirty One (31); thence northeasterly to the creek near the northeast corner of said Section Thirty One (31), the said line being the center line of said proposed drainage ditch; that the width of said drainage ditch be and it is hereby fixed at forty (40) feet at the bottom thereof with a side slope of one and one-half feet to one; and that the fall of said proposed drainage ditch be three (3) feet per mile from
234 north to south, and that the area required for right of way and dump space will be four (4) rods on each side of said line, except where it is adjacent to the right of way of the Chicago, Milwaukee and St. Paul Railway Company, and that the area required for right of way and dump space where

said proposed line runs adjacent to the right of way of said Railway Company shall be two (2) rods on the easterly side of said line and six (6) rods on the westerly side of said line;

That in addition thereto the Big Sioux River be straightened in Section Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred Three (103) North, Range Forty Nine (49) in order to afford better means of communication between the lower end of Section Two (2) of said ditch and the upper end of Section One thereof;

Be It Further Resolved that this hearing be and it is hereby adjourned until Thursday May 6, 1909, at two o'clock P. M. at the office of the County Auditor of said County, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by the Laws of 1909, the same to be signed by the Chairman of this Board and attested by the County Auditor by publishing the same once in each week for two consecutive weeks in the Sioux Falls Daily Argus-Leader, and by posting copies of said notice in at least three public places near the route of said proposed drainage ditch as varied and extended, such posting to be made at least two weeks prior to the time of said hearing.

Adopted April 9, 1909.

THE BOARD OF COUNTY COMMISSIONERS MINNEHAHA COUNTY, SOUTH DAKOTA.
By Thos. McKinnon, Chairman.

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235 Plaintiff offered in evidence pages 135 to 136 of Ditch Record A, as follows:

Resolution Establishing Drainage Ditch No. 2:

The matter of the petition of Iver R. Peterson and others for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on April 10, 1908, coming on to be heard by the Board of County Commissioners of said County at a regularly adjourned meeting on Thursday May 6, 1909, pursuant to notice heretofore given, and said Board having heard and considered said petition and all matters in support of the same and in opposition thereto; Now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said drainage

ditch as extended and varied and as described and set forth in the resolution adopted by this Board on April 9, 1909, is conducive to the public health, convenience and welfare and is necessary and practicable for draining agricultural lands, and it is so found;

Be it Further Resolved that the said drainage ditch as described and set forth in the said resolution of April 9, 1909, be and it is hereby named and designated "Drainage Ditch No. 2";

Be it Further Resolved that the said Drainage Ditch No. 2 be and the same is hereby established;

Be it Further Resolved that in the construction of said drainage ditch the rights of flowage of Wm. G. Milne, the owner of the mill at or near Baltic, S. D., will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch, where the same joins with the creek near the northeast corner of Section Thirty One (31) in Dell Rapids Township that it will not diminish or interfere with such rights of flowage and that a head gate or other protection will be
236 established if necessary, to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

Be it Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same be made a special order for Friday May 7, 1909, at nine o'clock A. M.,

On motion, the Board adjourned to May 7, 1909 at 9 o'clock A. M.

Plaintiff offered in evidence pages 48 to 60 inclusive of Ditch Record B, as follows:

October 7, 1910.

The Board having had under consideration for several days the matter of the preliminary Assessment of Proportion of Benefits which was being prepared by J. H. Gates, Attorney with the assistance of Engineer Wagner and the same being completed, on motion the following resolution was adopted:

Resolution Fixing Proportion of Benefits
Drainage Ditch No. 2.

Whereas the Board of County Commissioners of Minnehaha County, South Dakota, has established the Drainage Ditch No. 2, and has fixed the damages arising therefrom and has been investigating and considering the proportion of benefits that will accrue to the lands, tracts and lots within the drainage area of said drainage ditch; and

Whereas in arriving at this determination of the proportion of benefits it has considered not only the benefits which will accrue directly by virtue of the construction of said drainage ditch, but also the indirect benefits by virtue of such drainage being an outlet for connecting drains that may hereafter be constructed; and

Whereas said Board is of the opinion that the drainage area of Drainage Ditch No. 1 is benefitted by the establishment and construction of Drainage Ditch No. 2, and that both of said drainage ditches are mutually interdependent, and should virtually be considered as one drainage system; and

Whereas in the determination of the proportion of benefits herein fixed and determined upon the several premises embraced within the drainage area of Drainage Ditch No. 1 the proportion of benefits as finally fixed and equalized in the matter of said Drainage Ditch No. 1 have been taken into consideration; and

237 Whereas the number of acres set opposite each tract hereinafter described represent the actual number of acres of land within said tract that are benefitted, and excluding therefrom land taken by said drainage ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said drainage ditch the area therefor taken by the drainage is excluded; and

Whereas in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat in the County Auditor's Subdivision of the particular quarter section in which the land is located, on file in the Register of Deeds' office of said County, and in the description of lands herein by reference to books and pages of deed records such references are to the deed records in the office of said Register of Deeds; and

Whereas, in the consideration of such proportion of benefits said board has assumed that the Southeast Quarter

of the Northeast Quarter of the Northeast Quarter of Section Twenty, in Township One Hundred Three North, Range Forty-nine, West Fifth P. M., owned by Martha R.
238 Roberts, and containing ten acres, be benefitted "One", and taking said tract as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sioux Falls, Wayne, Mapleton, Sverdrup and Dell Rapids; the benefits to the County of Minnehaha; and the benefits to the several railroad companies hereinafter described, arising and accruing by the establishment and construction of Drainage Ditch No. 2, be, and they are hereby fixed and determined in the following proportions, viz:

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
E. S. Carter and S. C. Carter	W½ of NE¼	4	101	49	57.	.570
David Frank	E½ of NE¼	4	101	49	19.50	.244
M. H. Rylatt	W½ of NE¼ of NW¼	4	101	49	19.50	.244
David Frank	(Except right-of-way of C. M. & St. P. Ry. Co.) W½ of NW¼	4	101	49	70.60	.883
David Frank	SE¼ of NW¼	4	101	49	40.	.500
David Frank	(Except right-of-way of C. M. & St. P. Ry. Co) that part of SW¼ lying north and east of the center line of Drainage Ditch No. 1	4	101	49	131.53	1.644
David Frank	(Except right-of-way of C. M. & St. P. Ry Co and S. D. Central Ry. Co) that part of SW¼ lying south and west of the center line of Drainage Ditch No. 1	4	101	49	12.33	.154
Mary C. Brace	NW¼ of SE¼	4	101	49	30.	.375
Margaret Wuest	Tract 1 of SE¼	4	101	49	3.50	.044
Mary C. Brace	(Except tracts 1 and 2 SW¼ of SE¼	4	101	49	8.	.100
Hans Ruvald	(Except right of way of South Dakota Central Ry Co. NE¼ of NE¼	5	101	49	35.04	.438

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Thomas S. Nolan	NW¼ of NE¼	5	101	49	39.66	.496
Arthur Tobin	SW¼ of NE¼	5	101	49	40.	.500
Hans Ruvald	(Except right of way of South Dakota Central Ry. Co.) SE¼ of NE¼	5	101	49	34.45	.431
A. C. Jensen	NE¼ of NW¼	5	101	49	36.22	.453
D. A. Scott	NW¼ of NW¼	5	101	49	38.	.475
South Dakota Water Co.	S½ of NW¼	5	101	49	76.	.950
Hans C. Ruvald	NE¼ of SW¼	5	101	49	39.50	.494
Mary C. Brace	(Except blocks 34, 35, 49, 50 and 61 of North Boulevard Addition to Sioux Falls) S½ of SW¼	5	101	49	66.50	.831
Catherine W. Peck	NW¼ of SW¼	5	101	49	38.50	.471
Hans Ruvald	(Except right-of-way of SD Central Ry Co.) NE¼ of SE¼	5	101	49	34.45	.431
Western Surety Co.	NW¼ of SE¼	5	101	49	40.	.500
Mary C. Brace	(Except Blocks 4, 6, 9, 13 and 29 of North Boulevard Addition to Sioux Falls and except right-of-way of S. D. Central Ry. Co.) S½ of SE¼	5	101	49	62.66	.783
D. A. Scott	N½ of NE¼	6	101	49	40.	.400
Catherine W. Peck	S½ of NE¼	6	101	49	42.	.420
Catherine W. Peck	N½ of SW¼	6	101	49	14.	.140
H. C. Everson and A. H. Everson	S½ of SW¼	6	101	49	40.	.400
Catherine W. Peck	N½ of SE¼	6	101	49	73.	.730
H. C. Everson and A. H. Everson	SW¼ of SE¼	6	101	49	38.50	.385
H. C. Everson	Tract 1 of SE¼	6	101	49	23.	.230
Frances G. Carpenter	Tract 2 of SE¼	6	101	49	15.	.150
Frances G. Carpenter	NE¼ of NE¼	7	101	49	40.	.400

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
H. O. Gates and E. J. Sharon	W½ of NE¼	7	101	49	79.50	.795
Frances G. Carpenter	SE¼ of NE¼	7	101	49	40.	.400
H. O. Gates and E. J. Sharon	E½ of NW¼	7	101	49	50.	.500
J. L. Riedesel	SW¼ of NW¼	7	101	49	5.	.050
E. J. Sharon and F. L. Blackman	The unplatted part of W½ of SE¼ and E½ of SW¼ of (Except that tract lying north of block 37, Meredith's Second Addition to Sioux Falls, and south center line of Mulberry street extended west, and east of center line of Harvard street extended, and west of center line of Hooker street extended; (also except that portion of Tract 1, lying between Monroe street extended west and the center line of Manchester street extended west)	7	101	49	37.	.370

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Amada A. Burtch, Horatio A. Burtch and B. A. Burtch,	That part of tract 1 of SW½ lying N of block 37 Meredith's 2d add. to Sioux Falls, and S. of center line of Mulberry street extended W and E of center line of Harvard street extended, and W of center line of Hooker street extended	7	101	49	1.50	.015
Eliza K. Leyse	That part of tract 1 of SW¼ lying between Monroe street extended W and the center line of Manchester street extended W	7	101	49	1.50	.015
D. R. Howie	NW¼ of SW¼	7	101	49	18.	.180
Frank Richardson and Peter Weinacht	N½ of SW¼ of SW¼	7	101	49	15.	.150

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
O. R. Borneman and Peter Weinacht	SE¼ of SW¼ of SW¼	7	101	49	7.50	.075
Frances G. Carpenter	N½ of NE¼	8	101	49	80.	.800
Frances G. Carpenter	N½ of NW¼	8	101	49	80.	.800
C. E. McKinney	N½ of SW¼	8	101	49	80.	.600
E. B. Northrup	SW¼ of SW¼	8	101	49	40.	.200
C. E. McKinney	SE¼ of SW¼	8	101	49	37.	.370
Elmer S. Gilbert	SE¼ of NE¼ of SE¼	8	101	49	5.	.050
Frances G. Carpenter	(Except block 40 of Central Park add. to Sioux Falls) SW¼ of NW¼	8	101	49	37.50	.375
Frances G. Carpenter	(Except blocks 33, 48 and 49 of Central Park add to Sioux Falls) SE¼ of NW¼	8	101	49	32.50	.325
Frances G. Carpenter	(Except blocks 5, 8, 12 and 21 of Central Park add. to Sioux Falls) SW¼ of NE¼	8	101	49	30.	.300
Frances G. Carpenter	NW¼ of NW¼ of SE¼ of NE¼	8	101	49	2.50	.025
State of South Dakota	That part lying west of the right-of-way of C. M. & St. Ry. Co. of SW¼ of NW¼	9	101	49	23.	.230
State of South Dakota	That part lying east of the right of way of C. M. & St. P. Ry. Co. of S½ of NW¼	9	101	49	14.50	.145
Abbie P. Sherman Annie C. Phillips and Flora C. Phillips	Tract 3 of NW¼	17	101	49	3.	.030
Catherine W. Peck and Porter P. Peck	(Except block 1 and lots 10, 11 and 12 of Block 34 of Millard Park add. to Sioux Falls) tract 1 of NW¼	17	101	49	83.92	.839

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Catherine W. Peck and Porter P. Peck	Tract 2 of NW¼	17	101	49	12.60	.126
Catherine W. Peck and Porter P. Peck	Tract 4 of NW¼	17	101	49	.30	.003
Henry M. Whitehead	Tract 1 of SW¼	17	101	49	12.	.120

Francis D. Hoskins	Tract 2 of SW¼	17	101	49	1.65	.017
Artemas Gale	Tract 3 of SW¼	17	101	49	1.10	.011
Porter P. Peck	(Except lots 1, 2, 3, 4, 5, and 6 of block 3, Lincoln Park add. to Sioux Falls) NE¼ of NE¼	18	101	49	37.25	.373
Porter P. Peck	SE¼ of NE¼	18	101	49	35.	.350
Marcus Russell	SW¼ of NE¼	18	101	49	40.	.400
Marcus Russell	SE¼ of NW¼	18	101	49	40.	.400
W. H. Lyon	SW¼ of NW¼	18	101	49	37.	.370
German State Bank	(Except right of way of C. St. P. M. & O. Ry Co.) NE¼ of SW¼	18	101	49	38.48	.385
W. H. Lyon	(Except right of way of C. St. P. M. & O. Ry. Co.) NW¼ of SW¼	18	101	49	33.96	.340
Marcus Russell	W½ of NW¼ of SE¼	18	101	49	20.	.200
Marcus Russell	SW¼ of NE¼ of NW¼ of SE¼	18	101	49	2.50	.025
Marcus Russell	N½ of NE¼ of NW¼ of SE¼	18	101	49	5.	.050
G. H. Flemmer	That part of NW¼ of NW¼ lying east of the Big Sioux River (except block 89 of Sioux Falls Imp. Co. add to Sioux Falls)	18	101	49	5.	.050
S. Widmark	Tract 1 of NW¼	18	101	49	2.	.020
Porter P. Peck	That part of NW¼ of NW¼ lying west of Big Sioux River (except tract 1 and except lots 1, 2, 3, 4, 12, 13, 14, 15, 16, 17 and 18 of block 91 of Sioux Falls Imp. Co. add. to Sioux Falls	18	101	49	14.	.140
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George J. Morris	(Except right-of-way of C. St. P. M. & O. Ry. Co.) E 10 acres of S½ of SW¼	18	101	49	9.37	.094
German State Bank	(Except right-of-way of C. St. P. M. & O. Ry. Co.) W 70 acres of S½ of SW¼	18	101	49	64.35	.644
W. Braley	(Except right of way of C. St. P. M. & O. Ry. Co.) S½ of SE¼	18	101	49	40.	.400
C. C. Bratrud	N½ of NE¼	19	101	49	9.50	.095
Laura A. Darling	S½ of NE¼	19	101	49	2.	.020

Dan A. Donahoe	(Except blocks 5, 7, and 13 of West Lawn add. to Sioux Falls) E½ of NW¼	19	101	49	66.50	.665
E. V. Rowyle	W½ of NE¼ of NW¼ of NW¼	19	101	49	5.	.050
Ludwig Seubert	SE¼ of NE¼ of NW¼ of NW¼	19	101	49	2.50	.025
Jean Obert	NE¼ of NE¼ of NW¼ NW¼	19	101	49	2.50	.025
Dan A. Donahoe	NW¼ of NW¼ of NW¼	19	101	49	9.	.090
Dan A. Donahoe	S½ of NW¼ of NW¼	19	101	49	19.	.190
Daniel A. Donahoe	SW¼ of NW¼	19	101	49	38.	.380

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Southwestern Investment Co.	N. 50 rods of Tract 1 of SW¼	19	101	49	24.50	.245
Amelia Bauch	(Except the N 50 rods) tract 1 of SW¼	19	101	49	14.50	.145
W. H. Fullerton Thomas Fullerton and George J. Fullerton,	Tracts 2 and 3 of SW¼	19	101	49	7.45	.075
Thomas F. Loughran and John M. Doyle	Tract 4 of SW¼	19	101	49	8.	.080
244						
Mary R. Guertin	Tract 5 of SW¼	19	101	49	8.	.080
Daniel A. Donahoe	Tract 9 of SW¼	19	101	49	.75	.008
Southside Trust Co. et al.	Tract 10 of SW¼	19	101	49	8.	.080
F. C. Whitehouse, receiver	N½ of NW¼	30	101	49	18.	.180
F. C. Whitehouse, receiver	SW¼ of NW¼	30	101	49	32.	.320
F. L. Eaton	NW¼ of SW¼	30	101	49	20.	.200
R. F. Pettigrew	SW¼ of SW¼	30	101	49	33.	.330
John F. Tate	NW¼ of NW¼	31	101	49	20.	.200
John J. Smith	(Except the right of way of C. St. P. M. & O. Ry. Co., and except the west 13 rods and 4 feet) E½ of NE¼	13	101	50	42.	.420
Union National Bank	W½ of NE¼	18	101	50	30.	.300

Union National Bank	W 13 rods and 4 feet of E½ of NE¼	13	101	50	7.50	.075
Daniel Hayward	(Except right of way of C. St. P. M. & O. Ry. Co.) E½ of SW¼	13	101	50	30.90	.309
W. H. Lyon	(Except right of way of C. St. P. M. & O. Ry. Co.) NE¼ of SE¼	13	101	50	32.53	.325
Union National Bank	(Except right of way of C. St. P. M. & O. Ry. Co.) NW¼ of SE¼	13	101	50	36.97	.370
Pine Tree Syndicate	S½ of SE¼	13	101	49	73.	.730
Margaret Filber	A tract beginning at the NE corner of running thence W. 320 feet, thence S. 120 feet, thence S. 70 degrees E. 320 feet, thence N. 20 degrees E. 52 feet, thence N. 180 feet to beginning	24	101	50	1.18	.018
Adelbert Caldwell and Louis P. Caldwell	(Except the tract last above described) NE¼ of NE¼	24	101	50	33.70	.337
245						
William Shay	NW¼ of NE¼	24	101	50	18.	.180
Adelbert Caldwell and Louis P. Caldwell	S½ of NE¼	24	101	50	32.	.320
Edwin D. Clark	E½ of SE¼	24	101	50	20.	.200

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Charles T. Crocker	NE¼ of NE¼	25	101	50	10.	.100
F. L. Eaton	SE¼ of NE¼	35	101	50	8.	.080
F. L. Eaton	NE¼ of SE¼	25	101	50	8.	.080
Charles T. Crocker	SE¼ of SE¼	25	101	50	20.	.200
Gurine Peterson	W½ of NW¼	3	102	49	20.70	1.449
Gurine Peterson	E½ of NE¼	4	102	49	77.14	6.171
Ole O. Eggen	W½ of NE¼	4	102	49	78.49	6.279
Gurine Peterson	E½ of NW¼	4	102	49	78.04	8.194
Ole T. Aspass	(Except right of way of C. M. & St. P. Ry. Co.) W½ of NW¼	4	102	49	63.84	6.703
Ole T. Nessan	NE¼ of SW¼	4	102	49	40.	3.800
Andrew P. Brende	SE¼ of SW¼	4	102	49	39.	3.705

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Martin H. Oyen and Cleopatra H. Oyen	(Except right of way of C. M. & St. P. Ry. Co.) W½ of SW¼	4	102	49	65.10	6.185
Tosten Olsen	SE¼	4	102	49	118.	8.260
Ole Thompson Aspass	E½ of NE¼	5	102	49	72.37	7.049
O. O. Gilseth	NW¼ of NE¼	5	102	49	37.40	2.992
O. O. Gilseth	W¾ of SW¼ of NE¼	5	102	49	29.	2.320
O. O. Gilseth	NE¼ of NE¼ of SW¼ of NE¼	5	102	49	1.50	.120
John Brekke	E½ of SE¼ of SW¼ of NE¼	5	102	49	5.	.400
John Brekke	SE¼ of NE¼ of SW¼ of NE¼	5	102	49	1.50	.120
O. O. Gilseth	(Except right-of-way of C. M. & St .P. Ry. Co.) NW¼	5	102	49	40.	3.200
246						
P. J. Merakergaard	(Except right of way of C. M. & St. P. Ry. Co.) SW¼	5	102	49	73.40	5.138
Martin H. Oyen and Cleopatra H. Oyen	(Except right of way of C. M. & St. P. Ry. Co. and except tract 1) SE¼	5	102	49	140.48	11.809
Erick O. Evjebak	Tract 1 of SE¼	5	102	49	9.32	.652
Martin H. Oyen	(Except right-of-way of C. M. & St. P. Ry. Co.) E½ of of NE¼	8	102	49	71.80	6.821
Martin H. Oyen	That part north and east of right of way of C. M. & St. P. Ry. Co. of W½ of NE¼	8	102	49	2.	.140
Ole Gunderson	That part south and west of right of way of C. M. & St. P. Ry. Co. of W½ of NE¼ (except the north 50 rods of that part west of river)	8	102	49	65.40	5.328
J. L. Ingalls	The north 50 rods of that part west of river of W½ of NE¼	8	102	49	3.	.210
J. L. Ingalls	(Except the south 30 rods) NE¼ of NW¼	8	102	49	22.	1.540

Ole Gunderson	The south 30 rods of NE¼ of NW¼	8	102	49	10.	.700
Ole Gunderson	S½ of NW½	8	102	49	42.40	3.043
Ole Gunderson	NE¼ of SW¼	8	102	49	40.	3.309
Iver Nelson	(Except 2½ acres in square form in SE corner) NW¼ of SW¼	8	102	49	17.50	1.225
Louis Olson	2½ acres in square form in SE corner of NW¼ of SW¼	8	102	49	2.50	.175
Jonas Olson	SW¼ of SW¼	8	102	49	30.	2.100
Ole Gunderson	SE¼ of SW¼	8	102	49	39.	3.218
247						
Leonard Renner	(Except 1 acre in square form in NW corner) NE¼ of SE¼	8	102	49	32.80	3.116
School District No. 2	1 acre in square form in NW corner of NE¼ of SE¼	8	102	49	.84	.080
Ole Gunderson	W½ of SE¼	8	102	49	73.88	7.019
Leonard Renner	SE¼ of SE¼	8	102	49	38.	3.610
Andrew P. Brende	N½ of NE¼	9	102	49	80.	3.500
Christian Christenson	S½ of NE¼	9	102	49	38.	2.660
Ole T. Nessan	NE¼ of NW¼	9	102	49	32.	3.040
Martin H. Oien	That part of the Southern Minn. R. R. right of way of W½ of NW¼ (except right of way of Madison line of C. M. & St. P. Ry. Co.	9	102	49	33.46	3.179
Alfred Christensen	That part east of the Southern Minn. R. R. right of way of W½ of NW¼	9	102	49	31.	2.945
Andrew P. Brende	SE¼ of NW¼	9	102	49	40.	3.800
Jonas Olson	(Except the plat of Olson's add. to Renner E½ of SW¼	9	102	49	71.85	5.530
Leonard Renner	(Except rights of way of C. M. & St. P. Ry. Co. and except the town plat of Renner) W½ of SW¼	9	102	49	66.65	6.037
Christian Christenson	N½ of SE¼	9	102	49	20.	1.400
Jonas Olson	S½ of SE¼	9	102	49	18.	1.260

Jonas Olson	NW¼ of NE¼	16	102	49	2.	.140
Barney Finnegan	SW¼ of NE¼	16	102	49	23.	1.610
John Bliss	E½ of NW¼	16	102	49	75.	5.250
Leonard Renner	(Except right of way of C. M. & St. P. Ry. Co.) W½ of NW¼	16	102	49	73.	6.098
S. P. Brende	NE¼ of SW¼	16	102	49	40.	2.400
Mary P. Brende	(Except right of way of C. M. & St. P. Ry. Co.) NW¼ of SW¼	16	102	49	36.90	2.714
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Ole O. Volden	(Except right of way of C. M. & St. P. Ry. Co.) SW¼ of SW¼	16	102	49	36.	2.648
Ole O. Volden and Thomine O. Volden	SE¼ of SW¼	16	102	49	33.	1.980

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Mary P. Brende	NW¼ of SE¼	16	102	49	19.	1.140
S. P. Brende	SW¼ of SE¼	16	102	49	25.	1.500
Leonard Renner	E½ of NE¼	17	102	49	77.	7.315
Gertie R. Peterson	NW¼ of NE¼	17	102	49	35.24	3.348
Gertie R. Peterson	N½ of SW¼ of NE¼	17	102	49	18.12	1.721
Iver R. Peterson	S½ of SW¼ of NE¼	17	102	49	18.12	1.721
Gertie R. Peterson	NE¼ of NW¼	17	102	49	39.	3.218
Ingeberg Peterson	NW¼ of NW¼	17	102	49	18.	1.260
Bernt Mekvold	SW¼ of NW¼	17	102	49	33.	2.310
Bernt Mekvold	W 26 2-3 acres of SE¼ of NW¼	17	102	49	26.67	2.034
Gertie R. Peterson	N½ of E 13 acres of SE¼ of NW¼	17	102	49	6.50	.618
Iver R. Peterson	S½ of E 13 acres of SE¼ of NW¼	17	102	49	6.50	.618
Iver I. Nelson	E½ of SW¼	17	102	49	79.	5.728
Iver I. Nelson	NW¼ of SW¼	17	102	49	37.	2.220
T. O. Horton	E½ of SW¼ of SW¼	17	102	49	18.	1.080
Nels I. Nelson	W½ of SW¼ of SW¼	17	102	49	20.	1.200
Jonas Olson	E½ of SE¼	17	102	49	78.	6.630
C. J. Orstad	W½ of SE¼	17	102	49	72.48	6.161
W. O. Quincy	E½ of NE¼	19	102	49	3.	.150
Henry J. Schimmel	NE¼ of NE¼	20	102	49	39.	2.925

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Albert N. Allis	W½ of NE¼	20	102	49	71.48	5.361
James A. Leavitt	SE¼ of NE¼	20	102	49	39.	2.925
Albert N. Allis	E½ of NW¼	20	102	49	76.	4.788
W. O. Quincy	W½ of NW¼	20	102	49	74.	3.700
Julia Ann O'Grady, James O'Grady, Patrick O'Grady and Katherine O'Brien	N½ of SW¼	20	102	49	73.	3.420
	and NW¼ of SE¼	20	102	49	35.24	2.291
Sioux Falls Brewing & Malting Co.	S½ of SW¼	20	102	49	70.	3.300
O. S. Pendar	E½ of SE¼	20	102	49	77.	5.005
O. S. Pendar	SW¼ of SE¼	20	102	49	36.24	2.356
Ole O. Volden and Thomine O. Volden	NW¼ of NE¼	21	102	49	12.	.600
E. Larson	(Except right of way of C. M. & St. P. Ry. Co.) NE¼	21	102	49	151.85	8.593
Michael P. Brende	E½ of SW¼	21	102	49	39.50	1.580
Paul H. Brende and Martha O. Brende	(Except right of way of C. M. & St. P. Ry. Co.) NW¼ of SW¼	21	102	49	36.95	1.978
O. S. Pendar	(Except right of way of C. M. & St. P. Ry. Co.) SW¼ of SW¼	21	102	49	35.95	1.926
Esdert Arends	(Except right of way of C. M. & St. P. Ry. Co.) NW¼	28	102	49	142.25	5.793
Esdert Arends	(Except right of way of C. M. & St. P. Ry. Co.) SW¼	28	102	49	118.10	4.086

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Esdert Arends	NE¼	29	102	49	145.64	8.010
Sioux Falls Brewing & Malting Co.	NE¼ of NW¼	29	102	49	39.	1.670
Carrie Erickson and John A. Erickson	W½ of NW¼	29	102	49	57.	1.710

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M. P. Brende and S. P. Brende	(Except tract 1) SE¼ of NW¼	29	102	49	2.50	.075

M. P. Brende and S. P. Brende	Tract 1 of NW¼	29	102	49	36.	1.530
Erick O. Eggen	(Except tracts 1 and 2) NE¼ of SW¼	29	102	49	10.20	.102
M. P. Brende and S. P. Brende	Tract 1 of SW¼	29	102	49	7.80	.078
Ole O. Eggen	Tract 2 of SW¼	29	102	49	21.50	.215
Carrie Erickson and John A Erickson	(Except right of way of South Dakota Central Ry. Co.) W½ of SW¼	29	102	49	38.62	.386
Ellen Berg and Mary Schjodt	(Except right of way of South Dakota Central Ry. Co.) SE¼ of SW¼	29	102	49	36.49	.365
Esdert Arends	NE¼ of SE¼	29	102	49	34.82	1.219
Ellen Berg and Mary Schjodt	(Except ½ acre next below described) NW¼ of SE¼	29	102	49	37.50	1.088
School District No. 17	A tract in the south east corner (8 rods north and south by 10 rods east and west) of NW¼ of SE¼	29	102	49	.38	.005
Ellen Berg and Mary Schjodt	SW¼ of SE¼	29	102	49	35.25	.799
State of South Dakota	SE¼ of SE¼	29	102	49	34.72	1.215
Eston E. Eggen	E½ of NE¼	31	102	49	5.	.045
Thomas Paulson	E½ of SE¼	31	102	49	43.	.387
State of South Dakota	E½ of NE¼	32	102	49	72.90	.911
Ellen Berg and Mary Schjodt	Except right of way of South Dakota Central Ry. Co.) NW¼ of NE¼	32	102	49	35.88	.448
J. E. Colton	(Except right of way of South Dakota Central Ry. Co.) SW¼ of NE¼	32	102	49	37.78	.472
251						
Esten E. Eggen	(Except right of way of South Dakota Central Ry. Co.) N½ of NW¼	32	102	49	66.25	.828
Esten E. Eggen	SW¼ of NW¼	32	102	49	40.	.500
Esten E. Eggen	That part west of river of N½ of SE¼ of NW¼	32	102	49	6.	.063

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Henry F. Bornemann	That part east of river of N½ of SE¼ of NW¼	32	102	49	13.	.163
Ezra M. Shotwell	North 3 acres of S½ of SE¼ of NW¼	32	102	49	3.	.037
W. H. Lyon	South 5 acres of north 8 acres of S½ of SE¼ of NW¼	32	102	49	5.	.053
Thomas Paulson	S 2 acres of N½ of S½ of SE¼ of NW¼	32	102	49	2.	.025
Lars N. Brakke	S½ of S½ of SE¼ of NW¼	32	102	49	10.	.125
Thomas Paulson	SW¼	32	102	49	152	1.900
State of South Dakota	NE¼ of SE¼	32	102	49	37.50	.469
J. E. Colton	(Except right of way of South Dakota Central Ry. Co.) SW¼ of SE¼	32	102	49	37.98	.475
Thomas S. Nolan	(Except right of way of South Dakota Central Ry. Co.	32	102	49	38.01	.475
Hans Ruvald	(Except right of way of South Dakota Central Ry. Co.) SE¼ of SE¼	32	102	49	36.89	.462
Francis A. Miller	(Except right of way of C. M. & St. P. Ry. Co.) N½	33	102	49	124.55	1.331
State of South Dakota	(Except right of way of C. M. & St. P. Ry. Co.) N½ of SW¼	33	102	49	76.	.850
O. Benson	(Except right of way of C. M. & St. P. Ry. Co.) S½ of SW¼	33	102	49	72.	.838
O. Benson	W½ of SE¼	33	102	49	60.	.600
Ole. O. Langness	(Except right of way of C. M. & St. P. Ry. Co.) NE¼ of NW¼	5	103	49	10.29	1.029
252						
Baltic Creamery Co.	A tract 10½ rods E and W by 15 rods N and S in NE corner of NW¼ of NW¼	5	103	49	.85	.085
Oluf N. Lyng	(Except the tract last above described) NW¼ of NW¼	5	103	49	33.93	3.393
Ole O. Langness	That part South of river of SW¼ of SW¼	5	103	49	8.	.800

John O. Langness	(Except right of way of C. M. & St. P. Ry. Co.) SE¼ of NW¼	5	103	49	3.	.300
John O. Langness	NE¼ of SW¼	5	103	49	36.75	3.923
John O. Langness	Tract 1 of SW¼	5	103	49	11.	1.210
John O. Langness	Tract 2 of SW¼	5	103	49	6.	.660
Tom Thompson	Tract 3 of SW¼	5	103	49	3.57	.357
Tom Thompson	Tract 4 of SW¼	5	103	49	1.	.100
John O. Langness	Tract 5 of SW¼	5	103	49	34.43	3.787
Gunerius Thompson	(As shown in Book 5 of Plats page 51) Lot 1 of Tract 6 of SW¼	5	103	49	28.41	2.841

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Sivert E. Bringen	(Except the tract last above described) Tract 6 of SW¼	5	103	49	2.84	.284
Gunerius Thompson	Tract 7 of SW¼	5	103	49	27.	2.700
John O. Langness	(Except right-of-way of C. M. & St. P. Ry. Co.) NW¼ of SE¼	5	103	49	1.50	.165
John O. Langness	(Except right-of-way of C. M. & St. P. Ry. Co.) N 3 acres of SW¼ of SE¼	5	103	49	1.	.110
S. E. Kringen	(Except the N 3 acres and except right-of-way of C. M. & St. P. Ry. Co.) SW¼ of SE¼	5	103	49	17.33	1.906
Mari Lee, Libbie Lyng, Carrie Lee, Etta M. Lee, Tilda Lee, Mabel O. Lee, and Thomas Edward Lee	NE¼ of NE¼	6	103	49	38.81	4.388
253						
	and S½ of NE¼	6	103	49	69.82	8.278
	and N½ of SE¼	6	103	49	75.82	8.978
John H. Williamson	NW¼ of NE¼	6	103	49	38.69	4.836
Even O. Fossum	NE¼ of NE¼	6	103	49	35.11	5.266
Knud Larson	W½ of NW¼	6	103	49	43.	6.325
Lina Hanson	N½ of N½ of SE¼ of NW¼	6	103	49	9.05	1.358
K. P. Sorkilmo	(As described in Book 53 of Deeds page 434) Lot 1 of SE¼ of NW¼	6	103	49	17.64	2.646

Gunerius Thompson	That part South of Lot 1 as last above described of SE¼ of NW¼	6	103	49	9.50	1.425
Gunerius Thompson	N½ of NE¼ of SW¼	6	103	49	18.09	2.714
Tom I. Bervin	S½ of NE¼ of SW¼		103	49	18.09	2.714
A. L. Berg	W½ of SW¼	6	103	49	59.75	8.456
Gunerius Thompson	SE¼ of SW¼	6	103	49	35.18	5.277
Gunerius Thompson	S½ of SE¼	6	103	49	77.82	9.240
Gunerius Thompson	N½ of NE¼	7	103	49	77.	9.158
Julia Johnson	S½ of NE¼	7	103	49	78.32	9.315
Ole J. Ustrud and H. O. Ustrud	NE¼ of NW¼	7	103	49	35.18	3.277
Anne Larson	W½ of NW¼	7	103	49	59.75	8.456
Ole J. Ustrud and O. O. Sando	SE¼ of NW¼	7	103	49	36.18	5.427
H. H. Sandvig	NE¼ of SW¼					
Ole O. Floren	W½ of SW¼	7	103	49	36.18	5.427
Ole O. Floren	SE¼ of SW¼	7	103	49	34.40	5.085
Julia Johnson	N½ of SE¼	7	103	49	35.18	5.277
John Thompson	SW¼ of SE¼	7	103	49	78.32	9.315
John P. Reisvold	Tract 1 of SE¼	7	103	49	38.82	4.853
Anders S. Aas 254	Tract 2 of SE¼	7	103	49	3.21	.361
Andres P. Risvold	Tract 3 of SE¼	7	103	49	15.50	1.850
Peder P. Risvold	Tract 4 of SE¼	7	103	49	12.	1.200
Sivert E. Kringen	(Except right-of-way of C. M. & St. P. Ry. Co.) N½ of NE¼		103	49	4.87	.487
		8	103	49	38.67	4.254

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
John P. Risvold	(Except right-of-way of C. M. & St. P. Ry. Co.) SW¼ of N. E. ¼	8	103	49	36.	3.960
John P. Risvold	N 25 acres of SE¼ of NE¼	8	103	49	21.	2.310
Peder P. Risvold	S 15 acres of SE¼ of NE¼	8	103	49	15.	1.650
John O. Langness	NE¼ of NW¼	8	103	49	35.50	3.550

Gunerius Thompson	(As shown in Book 5 of of Plats, page 51) Tract 1 of NW¼ of NW¼	8	103	49	6.70	.670
Sivert E. Kringen	(Except Tract 1 last above described) NW¼ of NW¼	8	103	49	29.16	2.916
Annie M. Kringen	(As described in Book 26 of Deeds page 507) SW 4½ acres of SW¼ of NW¼	8	103	49	4.50	.450
John O. Langness	(Except the tract last above described) SW¼ of NW¼	8	103	49	33.50	3.350
Jens Erickson	SE¼ of NW¼	8	103	49	39.	3.900
Jens Erickson	NE¼ of SW¼	8	103	49	39.	3.900
Sara Vollen	NW¼ of SW¼	8	103	49	37.50	3.750
Anders P. Risvold	N 30 acres of SW¼ of SW¼	8	103	49	29.50	2.950
Peder P. Risvold	S 10 acres of SW¼ of SW¼	8	103	49	9.	.900
Andres P. Risvold	N½ of SE¼ of SW¼	8	103	49	19.50	1.950
Peder P. Risvold	S½ of SE¼ of SW¼	8	103	49	18.50	1.850
Peder P. Risvold	NE¼ of SE¼	8	103	49	40.	4.000
255						
Peder P. Risvold	The N 11 acres of that part East of right-of-way of C. M. & St. P. Ry. Co. of NW¼ of SE¼	8	103	49	11.	1.100
Ingeberg T. Risvold	(Except right-of-way of C. M. &. St. P. Ry. Co. and except the N 11 acres East of such right-of-way NW¼ of SE¼	8	103	49	25.	2.500
Andres P. Risvold	(Except right-of-way of C. M. & St. P. Ry. Co.) SW¼ of SE¼	8	103	49	35.	3.500
Lars Paulson, G. P. Wilson and C. T. Nyhus	SE¼ of SE¼	8	103	49	39.	3.900
Sara Vollan	SW¼ of NW¼	9	103	49	8.	.880
Sara Vollan	N½ of SW¼	9	103	49	47.90	4.919
Torger H. Nyhus	SW¼ of SW¼	9	103	49	39.	3.900
Peder Reisvold	SE¼ of SW¼	9	103	49	38.	4.180
Peder Reisvold	SW¼ of SE¼	9	103	49	19.10	2.101
Ole Johnson	NW¼ of NE¼	16	103	49	37.10	4.081
Torger H. Nyhus	SW¼ of NE¼	16	103	49	38.	3.800
Peder Risvold	NE¼ of NW¼	16	103	49	39.	4.290
John Johnson	NW¼ of NW¼	16	103	49	39.	3.900

Paul A. Riswold	S½ of NW¼	16	103	49	78.	7.800
Gilbert C. Brende	N½ of SW¼	16	103	49	78.	7.800
Joseph C. Brende	SW¼ of SW¼	16	103	49	40.	4.000
Gilbert O. Brende	SE¼ of SW¼	16	103	49	40.	4.000
Ole C. Brende	W½ of SE¼	16	103	49	78.	7.800
Ole C. Brende	SE¾ of SE¼	16	103	49	4	.440

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
G. T. Nyhus	NE¼ of NE¼	17	103	49	39.	3.900
Sara Vollan	(Except right-of-way of C. M. & St. P. Ry. Co.) W½ of NE¼	17	103	49	70.	7.000
Gilbert G. Brende and O. L. Brende	SE¼ of NE¼	17	103	49	39.	3.900
256						
Gilbert T. Gunderson	E½ of NW¼	17	103	49	77.	7.700
Peder P. Risvold	NW¼ of NW¼	17	103	49	37.	3.700
Gilbert T. Gunderson	SW¼ of NW¼	17	103	49	40.	4.000
G. T. Nyhus	Tract 1 of SW¼	17	103	49	7.40	.925
Thomas O. Brende Torsten O. Brende and Joseph O. Brende	Tract 2 of SW¼	17	103	49	2.18	.273
Ingeborg Gunderson and Gilbert T. Gunderson	Tract 3 of SW¼	17	103	49	4.70	.588
Ingeborg Gunderson and Gilbert T. Gunderson	Tract 4 of SW¼	17	103	49	1.	.125
Ole O. Floren	Tract 5 of SW¼	17	103	49	4.80	.600
Ingeborg Gunderson and Gilbert T. Gunderson	Tract 6 of SW¼	17	103	49	2.04	.255
Nelge Aanestad	Tract 7 of SW¼	17	103	49	1.34	.168
Torger H. Nyhus	Tract 8 of SW¼	17	103	49	3.	.375
Ole O. Haugtro	Tract 9 of SW¼	17	103	49	2.96	.370
Gudmund O. Brende	Tract 10 of SW¼	17	103	49	3.	.375
Iver Paulson	Tract 11 of SW¼	17	103	49	1.03	.129
Gudmund O. Brende	Tract 12 of SW¼	17	103	49	2.	.250
Ingeborg Gunderson and Gilbert T. Gunderson	Tract 13 of SW¼	17	103	49	21.56	2.695

Ingeborg Gunderson and Gilbert T. Gunderson	Tract 14 of SW¼	17	103	49	18.	2.250
Ingeborg Gunderson and Gilbert T. Gunderson	Tract 15 of SW¼	17	103	49	28.80	3.600
Ingeborg Gunderson and Gilbert T. Gunderson	Tract 16 of SW¼	17	103	49	35.72	3.572
Nidros Norwegian Evangelical Lutheran Congregation	Tract 17 of SW¼	17	103	49	8.60	.860

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Knud Thompson and Jacob Olson	Tract 18 of SW¼	17	103	49	1.83	.229
Erick H. Oien	NE¼ of SE¼	17	103	49	39.	3.900
Bortinus Pederson	(Except right-of-way of C. M. & St. P. Ry. Co.) W½ of SE¼	17	103	49	70.65	7.065
Martha R. Roberts	SE¼ of SE¼	17	103	49	40.	4.000
John O. Assen	(Except tracts 1 and 2) NE¼	18	103	49	126.79	16.099
Peder P. Risvold	Tract 1 of NE¼	18	103	49	10.14	1.014
Ole J. Stordahl	Tract 2 of NE¼	18	103	49	1.40	.140
Andrew Swenson Aas	NW¼	18	103	49	51.65	7.748
Oliver Olson	That part East of river of NE¼ of SE¼	18	103	49	11.67	1.459
Martha R. Roberts	NE¼ of NE¼	20	103	49	40.	4.000
Jens J. Flamoe	(Except right-of-way of C. M. & St. P. Ry. Co.) NW¼ of NE¼	20	103	49	34.50	3.450
Hagen O. Skatvold	(Except right-of-way of C. M. & St. P. Ry. Co.) S½ of NE¼	20	103	49	70.20	8.775
Frederick Johnson, Jens Johnson and Torborn Olson	Tract 1 of NW¼	20	103	49	4.28	.535
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. H. Thompson, Fred R. Thompson Reuben V. Thompson, Mabel J. Thompson and Carl M. Thompson,	(Except Tract 1 and except the tract next hereinafter described) NE¼ of NW¼	20	103	49	10.	1.250

James J. Flamoe	A tract as described in Book 67 of Deeds page 106 in NE¼ of NW¼	20	103	49	10.	1.250
John J. Almlie, Jr	NW¼ of NW¼	20	103	49	3.33	.416
Bernt G. Flamoe	SE¼ of NW¼	20	103	49	8.10	1.013
258						
Peter Paulson	(Except right-of-way of C. M. & St. P. Ry. Co.) E½ of SE¼	20	103	49	63.65	7.956
Haagen O. Skatvold	NW¼ of SE¼	20	103	49	15.	1.875
Peter Paulson	(Except tract 1) that part lying East of river of SW¼ of SE¼	20	103	49	13.	1.625
C. T. Nyhus,	Tract 1 of SE¼	20	103	49	1.60	.200
Martha R. Roberts	North half	21	103	49	251.75	25.803
Peter Paulson	N½ of SW¼	21	103	49	79.	9.510
Erick G. Brende	E½ of SW¼	21	103	49	79.	7.900
Erick G. Brende	SE¼	21	103	49	101.42	9.576
G. T. Nyhus	SW¼ of NW¼	27	103	49	7.10	.639
Erick O. Eggen	NW¼ of SW¼	27	103	49	15.75	1.418
Martha R. Roberts John H. Roberts, and Thomas S. Roberts	E½ of SW¼ of SW¼	27	103	49	2.	.180
Erick O. Eggen and D. D. Russell	W½ of SW¼ of SW¼	27	103	49	17.75	1.421

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
G. T. Nyhus	(Except the N 5 acres) NE¼ of NE¼	28	103	49	29.75	2.381
Erick C. Brende	N 5 acres of NE¼ of NE¼	28	103	49	3.	.270
G. T. Nyhus	NW¼ of NE¼ (Except the N 5 acres)	28	103	49	35.	2.500
C. O. Brende	N 5 acres of NW¼ of NE¼	28	103	49	5.	.450
G. T. Nyhus	S½ of NE¼	28	103	49	78.	6.240
O. S. Thompson	(Except the E 19 acres) E½ of NW¼	28	103	49	60.24	5.572
G. T. Nyhus	E 19 acres of E½ of NW¼	28	103	49	18.76	1.501
O. S. Thompson	(Except right of way of C. M. & St. P. Ry. Co.) W½ of NW¼	28	103	49	73.15	7.681

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O. S. Thompson	(Except right of way of C. M. & St. P. Ry. Co.) N½ of SW¼	28	103	49	70.90	7.070
O. S. Thompson	E 18¼ acres of E½ of SW¼ of SW¼	28	103	49	17.80	1.869
Ole Peterson	W 1⅝ acres of E½ of SW¼ of SW¼	28	103	49	1.70	.179
Ole Peterson	(Except right of way of C. M. & St. P. Ry. Co.) W½ of SW¼ of SW¼	28	103	49	12.95	1.360
Thomas S. Roberts	SE¼ of SW¼	28	103	49	39.	3.970
C. T. Nyhus	N 3½ acres of N½ of SE¼	28	103	49	1.50	.120
Erick O. Eggen	(Except the N 3½ acres) N½ of SE¼	28	103	49	76.50	5.738
Thomas S. Roberts	SW¼ of SE¼	28	103	49	39.	3.120
Erick O. Eggen	SE¼ of SE¼	28	103	49	39.	3.120
Bertha Peterson Alice C. Thompson John O. Thompson Wm. H. Thompson, Fred R. Thompson, Reuben V. Thompson, Mabel J. Thompson, and Carl M. Thompson	Tract 1 of NE¼	29	103	49	30.	3.150
Joseph C. Thompson	Tract 2 of NE¼	29	103	49	15.	1.575
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry. Co.) Tract 3 of NE¼	29	103	49	61.31	6.438
O. S. Thompson	N½ of SE¼	29	103	49	52.	5.460
O. S. Thompson	SW¼ of SE¼	29	103	49	3.	.240
Ole Peterson	SE¼ of SE¼	29	103	49	29.	3.045
Andrew J. Aasen	N½ of NE¼	32	103	49	67.20	7.023
Andrew J. Aasen	SW¼ of NE¼	32	103	49	37.	3.330
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. H. Thompson, Fred R. Thompson, Reuben V. Thompson, Mabel J. Thompson, and Carl M. Thompson	N½ of SE¼ of NE¼	32	103	49	19.50	2.243
Joseph C. Thompson	S½ of SE¼ of NE¼	32	103	49	19.50	2.243

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Andrew J. Aasen	E½ of NW¼	32	103	49	11.	.990
Thomas Hendrickson	E½ of SW¼	32	103	49	20.	1.600

James L. Finnegan	N½ of SE¼	32	103	49	76.	7.080
John Finnegan	SW¼ of SE¼	32	103	49	36.	2.880
Margaret L. Finnegan	SE¼ of SE¼	32	103	49	37.25	3.911
Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Martha R. Roberts John H. Roberts Thomas S. Roberts	NE¼ of NE¼	33	103	49	39.	3.120
Thomas S. Roberts	NW¼ of NE¼	33	103	49	39.	3.510
Gurine Peterson	S½ of NE¼	33	103	49	80.	6.800
Thomas S. Roberts	NE¼ of NW¼	33	103	49	39.	4.485
Andrew J. Aason	(Except right of way of C. M. & St. P. Ry. Co.) NW¼ of NW¼	33	103	49	32.10	3.692
Bertha Peterson Alice C. Thompson John O. Thompson, Wm. H. Thompson Fred R. Thompson, Reuben V. Thompson, Mabel J. Thompson and Carl M. Thompson	(Except right of way of C. M. & St. P. Ry. Co.) SW¼ of NW¼	33	103	49	33.	3.795
Gurine Peterson	SE¼ of NW¼	33	103	49	40.	4.600
Anne O. Haugan Amanda B. Haughan and Jennie A. Haugan	E½ of SW¼	33	103	49	79.	8.295
Joseph C .Thompson	(Except right of way of C. M. & St. P. Ry. Co.) NW¼ of SW¼	33	103	49	33.	3.465
Thomas Hendrickson and B. B. Hendrickson	(Except right of way of C. M. & St. P. Ry. Co.) SW¼ of SW¼	33	103	49	32.10	3.371
Gurine Peterson	N½ of SE¼	33	103	49	80.	6.000
Gurine Peterson	SW¼ of SE¼	33	103	49	39.	3.120
Gurine Peterson	SE¼ of SE¼	33	103	49	39.	2.730
Martha R. Roberts, John H. Roberts and Thomas S. Roberts	NW¼ of NW¼	34	103	49	20.75	1.661
261						
Gurine Peterson	SW¼ of NW¼	34	103	49	21.	1.680
Gurine Peterson	W½ of SW¼	34	103	49	35.50	2.490

Lars Simonson	SW¼ of SW¼	29	104	49	6.67	.667
Ole O. Langness	SE¼ of SW¼	29	104	49	12.67	1.267
John M. J. Bruaas	(Except right of way of C. M. & St. P. Ry. Co.) S½ of SE¼	29	104	49	14.	1.400
Lars Simonson	E½ of NE¼	31	104	49	37.	4.625
Hans Nelson,	SW¼ of NE¼	31	104	49	20.	2.625
Lars Simonson	SE¼ of NW¼	31	104	49	11.67	1.751
Gunder Thompson Eklo	NE¼ of SW¼	31	104	49	32.85	4.928
Ole L. Mulo	W½ of SW¼	31	104	49	19.60	2.940
P. G. Thompson	SE¼ of SW¼	31	104	49	35.18	5.277
P. M. Thompson,	NE¼ of SE¼	31	104	49	39.	4.525
Julie L. Moe or Julie L. Hustoft	NW¼ of SE¼	31	104	49	39.82	4.978
Oluf N. Lyng	E½ of SW¼ of SE¼	31	104	49	19.50	2.438
P. O. Thompson	W½ of SW¼ of SE¼	31	104	49	19.32	.2415

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Oluf N. Lyng	SE¼ of SE¼	31	104	49	38.	4.288
John M. J. Bruass	(Except right-of-way of C. M. & St. P. Ry. Co.) N½ of NE¼	32	104	49	49.	4.900
Ole O. Langness	(Except right-of-way of C. M. & St. P. Ry. Co.) S½ of NE¼	32	104	49	50.	5.000
Ole O. Langness	E½ of NW¼	32	104	49	53.	5.425
Lars Simonson,	W½ of NW¼	32	104	49	53.	6.375
Ole O. Langness	N½ of SW¼	32	104	49	78.	7.800
Gunerius Thompson	SW¼ of SW¼	32	104	49	38.	3.800
Columbia Creamery Co.	A tract as described in Book 59 of Deeds, page 70 in SE¼ of SW¼	32	104	49	.11	.011
262						
Mrs. M. O. Nyhus	(Except the tract last above described) SE¼ of SW¼	32	104	49	36.	3.600
Ole O. Langness	(Except right-of-way of C. M. & St. P. Ry. Co. and except Tract 9) NW¼ of SE¼	32	104	49	17.93	1.793

R. F. Pettigrew	The west 500 feet of Tract 9 of SE¼	32	104	49	1.73	.173
R. F. Pettigrew	(Except that part in St. Oluf Mill tract as shown in Book 5 of Plats, page 63) Tract 3 of SE¼	32	104	49	7.29	.729
Wm. G. Milne	The St. Oluf Mill Tract as described in Book 5 of Plats, page 63, being part of Tracts 2, 3, and 9 of SE¼	32	104	49	4.37	9.537

Town of Renner.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
Leonard Renner	Lots 1, 2, 3, 4, 5, 6, 7 and	8		.009

Olson's Addition to Renner.

Jonas Olson		1		.001
James W. Parker	Lots 2, 3, and	4		.001
Jonas Olson	Lots 5 to 13 inclusive			.005
James W. Parker	Lots 14, 15, 16, 17, 18 and	19		.003
Jonas Olson	Lots 20, 21, 22, 23, and	24		.003

Berwick Addition to Sioux Falls.

J. N. Weston		3	1	.001
Susan W. Nowland		4	1	.001
J. N. Weston	Lots 5 and	6	1	.003
E. B. Mallet	Lots 7, 8, 9, 10, 11 and	12	1	.008
Moses M. Robinson	Lots 1, 2, 3, and	4	2	.005
Abiel Abbott	Lots 5, 6, 7, 8, 9, 10, 11 and	12	2	.010
Frank C. Frizzell	Lots 1 and	2	2	.003
E. N. Frizzell,	Lots 3, 4, 5 and	6	3	.005
F. W. Williams	Lots 7 and	8	3	.003
263				
E. N. Frizzell	Lots 9 and	10	3	.003
F. C. Frissel	Lots 11 and	12	3	.003

Name of Owner	Description	Lot	Block	Proportion of Benefits.
John W. Horton and A. D. Horton			4	.010
Elwin N. Potter			5	.014
E. B. Mallet			6	.009
E. S. W. Packer	Lots 1 and	2	7	.003

G. W. Shattuck	Lots 3 and	4	7	.003
Martha G. Shattuck	Lots 5 and	6	7	.003
F. W. Williams	Lots 7 and	8	7	.003
Martha G. Shattuck	Lots 9 and	10	7	.003
Cotherin F. Taylor	Lots 11 and	12	7	.003
F. C. Frizzell	Lots 1, 2, 3, and	4	8	.005
G. W. Shattuck	Lots 5 and	6	8	.003
John Kennedy	Lots 7 and	8	8	.003
F. C. Frizzell	Lots 9 and	10	8	.003
F. E. Payne		11	8	.001
Martha G. Shattuck		12	8	.001
Abiel Abbott	Lots 1, 2, 3, 4, 5 and	6	9	.008
Mathias Blumer		7	9	.001
Abiel Abbott		8	9	.001
Moses M. Robinson	Lots 9, 10, 11 and	12	9	.005
P. C. Pinkham	Lots 1 and	2	10	.003
C. B. Rosengren		3	10	.001
G. W. Shattuck	Lots 4, 5, 6, 7, 8 and	9	10	.008
J. N. Weston	Lots 10, 11 and	12	10	.004
E. B. Mallett	East Half of		11	.003
City of Sioux Falls	West half of		11	.005
Security Savings Bank	Lots 1, 2, 3, 4, 5, 6, 7, 8, and	9	12	.012
F. L. Blackman	Lots 10, 11 and	12	12	.004
264				
E. B. Mallet	Lots 1, 2, 3, 4, 5 and	6	13	.006
Elwin N. Potter	Lots 7, 8, 9, 10, 11 and	12	13	.008
E. B. Mallet			14	.009
E. B. Mallet			15	.016
Fred Nelson	Lots 1 and	2	16	.003
Security Savings Bank		3	16	.001
C. F. McCormack		4	16	.002
G. W. Hanson		5	16	.001
C. L. Norton		6	16	.002
Security Savings Bank	Lots 7, 8, 9, 10, 11 and	12	16	.008
Martha Hurst	Lots 1 and	2	17	.003
Susan Howland	Lots 3 and	4	17	.003
Security Savings Bank	Lots 5 and	6	17	.001

Abiel Abbott	Lots 7, 8, 9 and	10	17	.005
Moses M. Robinson	Lots 11 and	12	17	.003
E. B. Mallet	Lots 1, 2 and	3	18	.004
Minnehaha Trust Co.		4	18	.001
Lewis J. Krull	Lots 5 and	6	18	.002
E. B. Mallet	Lots 10, 11 and	12	18	.003
E. B. Mallet			19	.014
E. B. Mallet			20	.016
Abiel Abbott	Lots 1, 2, and 3	4	21	.005
Moses M. Robinson	Lots 5 and	6	21	.003
H. K. Richards, et al trustees	Lots 7, 8, 9, 10, 11 and	12	21	.008
E. B. Mallet			22	.003
Security Savings Bank	Lots 1, 2 and	3	24	.004

Name of Owner	Description	Lot	Block	Proportion of Benefits.
F. W. Clarke		4	24	.001
J. C. Boynton		5	24	.001
265				
L. J. Modde		6	24	.002
M. W. Potter	Lots 7 and	8	24	.003
Elwin N. Potter		9	24	.001
Rufus Gunn	Lots 10, 11 and	12	24	.004
E. B. Mallet			25	.010
E. B. Mallet			27	.003
Moses M. Robinson	Lots 1, 2 and	3	28	.004
Abiel Abbott	Lots 4, 5, 6, 7 and	8	28	.007
E. B. Mallet			29	.010
E. B. Mallet			30	.010
Abiel Abbott		2	31	.001
A. L. Baker		3	31	.002
Peter Graffam		4	31	.002
Wilhelmina Hurst	Lots 5 and	6	31	.003
Abiel Abbott	Lots 7 and	8	31	.003
City of Sioux Falls	Block "A"			.075

Brookings Addition to Sioux Falls.

Wigant Ludewig	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12 and	13	5	.017

Hans C. Ruwald	Lots 1, 2 and	3	11	.002
James Spaulding, et. al.	Lots 1 and	2	12	.003
H. Ruwald	Lots 3, 4, and	5	12	.004
Hans C. Ruwald		6	12	.001

Brook's Addition to Sioux Falls.

Southside Trust Co.	Lots 14, 15, 16 and	17	1	.003

Bunker's Addition to Sioux Falls.

Hans Ruwald	Lots 1, 2, 3, 4, 5, 6 and	7	1	.008
N. S. Johnson and C. O. Waade		8	1	.001
Geo. G. Hull		9	1	.001
Hans Ruwald	Lots 10, 11, 12, 13 and	14	1	.006
W. W. Ormiston		15	1	.001

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H. T. Richardson	Lots 16 and	17	1	.002
Hans Ruwald	Lots 18, 19 and	20	1	.004
R. A. Ormiston		1	2	.001
Hans Ruwald	Lots 2, 3, 4, 5, 6 and	7	2	.007
Joseph Elott	Lots 8 and	9	2	.002
Minnie E. Espe and F. L. Blackman		10	2	.001
Hans Ruwald		11	2	.001
C. C. Cadwell		12	2	.001
Hans Ruwald	Lots 13, 14, 15, 16, 17, 18, 19 and	20	2	.010

Cantral Park Addition to Sioux Falls.

Eliza Halpin	Lot 1 and	2	1	.003
George A. Ludlow	Lots 3 and	4	1	.002
Helen E. Phelps		5	1	.001
Frances G. Carpenter and Anne Pohle		6	1	.001
Wilhelmina Josweski	Lots 7 and	8	1	.002

Name of Owner	Description	Lot	Block	Proportion of Benefits.
Helen E. Phelps	Lots 9 and	10	1	.002
Benjamin F. Barnes	Lots 11, 12 and	13	1	.003
Helen E. Phelps	Lots 14, 15 and	16	1	.003
John P. Shoemaker			2	.016

Frances G. Carpenter			3	.016
Henry D. Norris			4	.016
Alph H. Sears			5	.016
Geo. H. Brace, trustee and Mary C. Brace			8	.016
William E. Bell			12	.016
Mariette Blomiley			13	.016
Frances G. Carpenter			14	.016
Clara L. Hambright	Lots 1, 2, 3, and	4	15	.004
Abe Davison and Sippie Davison	Lots 5, 6, 7 and	8	15	.004
Michael Marousek	Lots 9, 10, 11, and	12	15	.004
267				
Clara L. Hambright	Lots 13, 14, 15 and	16	15	.004
Frances G. Carpenter			16	.016
J W. Werner			17	.016
Anna E. Ploog			18	.016
Frances G. Carpenter			19	.016
Peter Jameson	Lots 1, 2, 3 and	4	20	.004
Nora Connell	Lots 5, 6, 7 and	8	20	.004
Peter Jameson	Lots 9, 10, 11, 12, 13, 14, 15 and	16	20	.008
W. R. Timpe and H. L. Schroeder	Lots 1, 2 and	3	21	.003
		4	21	.001
D. J. Carpenter	Lots 5, 6, 7 and	8	21	.004
Mattie M. Hanson				
E. G. Tibbels and	Lots 9 and	10	21	.002
James Ross		11	21	.001
H. B. Muir		12	21	.001
N. E. Stringham		13	21	.001
D. J. Carpenter W. R. Timpe and H. L. Schroeder	Lots 14, 15 and	16	21	.003
G. H. Brace and			30	.016
Mary C. Brace			31	.016
Laura L. Pomeroy Frances G. Carpenter Artemas Gale and C. A. Greeley	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and	14	32	.014
May Sanders and May B. Sanders	Lots 15 and	16	32	.002

Alph Sears				
George T. Greeley and Frances G. Carpenter			40	.016
			48	.016
Frances G. Carpenter			49	.016
Geo. H. Brace, A. Gale, C. A. Greeley, C. C. Carpenter and	Outlot "A"			.010
G. H. Brace James Jameson trustees	Outlot "B"			.010
Geo. H. Brace and James Jameson, trustees	Outlot "C"			.010

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Englewood Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
Marcus Russell			1	.016
William Fuller			2	.016
Marcus Russell			3	.016
Annie A. W. Nook			4	.016
James B. Adams			12	.016
Marcus Russell			13	.016
Mark M. Powers			14	.016
Marcus Russell			15	.016
Marcus Russell			16	.016
Marcus Russell			17	.016
James B. Adams			18	.016
F. I. Russell, Martin Olson and S. O. Detlie		1	19	.001
Frank E. Orr and F. I. Russell		2	19	.001
M. T. Botsford	Lots 3 and	4	19	.002
Addie B. Woodsworth	Lots 5, 6, 7 and	8	19	.004
Marcus Russell	Lots 9, 10 and	11	19	.003
Sarah Walker		12	19	.001
Alice M. Steinbach		13	19	.001
Lillie M. Darrow	Lots 14, 15 and	16	19	.003
Guda Detlie and Lena Gunderson	Lots 1, 2, 3, and	4	20	.004
F. I. Russell, and M. Grigsby		5	20	.001
Marcus Russell		6	20	.001

F. I. Russell, J. A. Johnson and H. H. Gulstine	Lots 7 and	8	20	.002
Marcus Russell	Lots 9, 10, 11, 12, 13, 14, 15 and	16	20	.008
F. I. Russell and S. D. Kennedy		1	21	.001
S. D. Kennedy	Lots 2, 3, 4 and	5	21	.004
269				
F. I. Russell and S. D. Kennedy		6	21	.001
M. J. Tinkham	Lots 7 and	8	21	.002
F. I. Russell and S. D. Kennedy	Lots 9, 10, 11, 12, 13, 14, 15 and	16	21	.008
F. L. Blackman			22	.016
F. L. Blackman			27	.016
F. L. Blackman			28	.016
Marcus Russell			29	.016
Edward A. Benson and Chas E. Anderson			30	.016
Marcus Russell			31	.016
Marcus Russell	Lots 1, 2, 3, and	4	32	.004
F. I. Russell and E. T. Newhall	Lots 5 and	6	32	.002
J. H. Ryan	Lots 7 and	8	32	.003
F. I. Russell and E. T. Newhall	Lots 9, 10, and	11	32	.003
F. I. Russell and Joe Kirby		12	32	.001
Marcus Russell	Lots 13, 14, 15 and	16	32	.004

Harrison Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
Carroll Whitney Ellen Whitney, Alfred Perry, Herbert Percy and H. B. Burtch	Lots 5, 6, and	7	16	.003
Porter P. Peck			17	.016
Porter P. Peck			18	.016
C. A. Mitchell	Lots 1, 2 and	3	19	.004
Oscar C. Potter	Lots 4, 5, 6, 7, 8, 9, 10, 11 and	12	19	.012
Lester D. Sharon			20	.016

O. C. Potter			21	.016
O. C. Potter	Lots 2, 3, 4, 5, 6, 7 and	8	22	.009
270				
G. H. Flemmer			25	.016
Fred W. McMullen			26	.016
Fred W. McMullen			27	.016
Fred W. McMullen			28	.016
Fred W. McMullen			29	.016
Oscar C. Potter			30	.016
Porter P. Peck			31	.016
Porter P. Peck			32	.016

Lakeview Addition to Sioux Falls.

Wm. Klauson	Lots 5 and	6	2	.001
Ingabret Thorson		7	2	.001
H. H. Keith and Mary S. Keith		8	2	.001
H. H. Keith and Mary S. Keith			3	.008

Lincoln Park Addition to Sioux Falls.

Soren Mason and Emma S. Miller	Lots 1 and	2	3	.003
Belle Payne	Lots 3 and	4	3	.003
Soren Mason and S. E. Young	Lots 5 and	6	3	.003

McClellan's Second Addition to West Sioux Falls.

John McClellan	Lots 1, 2, 3, 4, 5, 6, 7, 8 and	9	29	.007
Wm. Van Eps and Joe Kirby	Lots 17 and	18	29	.001
John McClellan	Lots 4, 5, 6, 7, 8, 9, 10, 11 12, 13, and	14	30	.014
G. H. Brace and John McClellan		15	30	.001

Meredith's First Addition to Sioux Falls.

R. E. Bach			1	.008
Herbert C. Everson and Hattie A. Everson			4	.008
Chas. A. Scott	Lots 1, 2 and	3	8	.002
R. E. Bach and Fred Diver	Lots 4, 5, and	6	8	.002

Union National Bank	Lots 7, 8 and	9	8	.002

271 Meredith's First Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
R. E. Bach and Fred Diver	Lots 10, 11 and	12	8	.002
E. J. Sharon			9	.008
Lizie L. Baker			16	.008
Mariette Blomiley			17	.008
Soren Monson			18	.008
Soren Monson			23	.008
Marion Chase			24	.008
William Klauson, and J. C. Wasem			25	.008
William Klauson, and J. C. Wasem			26	.008
W. H. Lyon			31	.008
Charles M. Thompson	Lots 1, 2, 3, 4, 5, and	6	32	.004
William Klauson, and J. C. Wasem	Lots 7, 8, 9, 10, 11 and	12	32	.004

Meredith's Second Addition to Sioux Falls.

E. J. Sharon			33	.016
E. J. Sharon			34	.010
Amanda A. Burtch, Horatio A. Burtch, B. A. Burtch and P. G. Honnegger, guardian.			37	.005
Oscar C. Potter			38	.015
L C. Potter	Lots 1, 2 and	3	39	.004
Leon A. Potter	Lots 4, 5, 6, 7, 8 and	9	39	.008
O. C. Potter	Lots 10, 11 and	12	39	.004
John E. Patheal			40	.004
O. C. Potter			43	.012
Amanda A. Burtch, Horatio A. Burtch, B. A. Burtch and P. G. Honegger, Guardian			44	.016
F. L. Blackman and E. J. Sharon			45	.008

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F. L. Blackman and E. J. Sharon			46	.008
F. L. Blackman and E. J. Sharon			47	.016
Amanda A. Burtch, Horatio A. Burtch, B. A. Burtch and P. G. Honegger, guardian			48	.008
M. E. McDougal			56	.002
F. L. Blackman and E. J. Sharon			57	.012
F. L. Blackman and E. J. Sharon			58	.009
Eliza K. Leyse			59	.004
F. L. Blackman and Carrie Lundell			60	.008
Elisa K. Leyse			74	.012
Charles E. Baker	Lots 1 and	2	75	.001
Eliza K. Leyse	Lots 4, 5, 6, 7, 8, 9, 10, 11 and	12	75	.005

Millard Park Addition to Sioux Falls.

Porter P. Peck			1	.016
Porter P. Peck	Lots 10, 11 and	12	34	.004

North Boulevard Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
Arthur D. Story and Lyman J. Story and Geo. H. Brace			4	.016
Mary C. Brace			6	.016
Mary C. Brace			9	.016
Mary C. Brace			13	.016
E. H. Doble, H. F. Doble, Geo. H. Brace			29	.016
S. W. McCall and Geo. H. Brace			34	.016
Charles Brigham, John C. Spofford, and Geor. H. Brace			35	.016

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John H. Spofford Charles Brigham, Geo. H. Brace			49	.016

Obed F. Smith			50	.016
Geo. H. Brace			61	.016

North Park Addition to Sioux Falls.

Lilly E. Braley	Lots 1 and	2	1	.002
James A. Guest	Lots 3, 4, 5, and	6	1	.004
Hans Ruwald	Lots 7 and	8	1	.002
Hans Ruwald and M. D. Skinner	Lots 9 and	10	1	.002
Hans Ruwald	Lots 1, 2, 3, 4, 5, 6, and	7	1	.007
D. S. Glidden, trustee and Hans Ruwald		8	2	.001
John Kadinger	Lots 9, 10, 11 and	12	2	.004
Hans Ruwald and Willey & Williams		13	2	.001
Hans Ruwald and Frank R. Richardson	Lots 14, 15 and	16	2	.003
W. G. Scripture and Hans Ruwald		1	3	.001
Hans Ruwald		2	3	.001
W. G. Scripture and Hans Ruwald		3	3	.001
W. G. Hollister and Hans Ruwald	Lots 4, 5, and	6	3	.003
N. A. Albers	Lots 7, 8, and	9	3	.003
Amelia Albers		10	3	.001
Hans Ruwald and W. C. Hollister	Lots 11, 12, 13, 14, 15 and	16	3	.006
J. W. Hutchinson			4	.016
John Farren	Lots 1 and	2	5	.002
Charles D. Nelson	Lots 3, 4, 5, 6, 7 and	8	5	.006
John Farren	Lots 9, 10, 11, 12, 13, 14, 15 and	16	5	.008
Hans Ruwald	Lots 1, 2, 3, 4 and	5	6	.005
John Frederickson Peter Helland and Hans Ruwald		6	6	.001
274				
Hans Ruwald and Leopold Guertin	Lots 7 and	8	6	.002

North Park Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
R. A. Morris	Lots 9 and	10	6	.002
Hans Ruwald and Wm. B. Allen	Lots 11, 12, 13, 14, 15 and	16	6	.006
Hans Ruwald	Lots 1 and north half	2	7	.002
F. W. Pieper	Lot 3 and south half	2	7	.002
F. W. Pieper	Lots 4 and	5	7	.002
P. C. Stiles		6	7	.001
T. Y. Stevenson	Lots 7 and	8	7	.002
E. C. Lord, George Dillon and Ella E. Dillon		9	7	.001
R. A. Morris	Lots 10 and	11	7	.002
Hans Ruwald	Lots 12, 13, 14, 15 and	16	7	.005
Hans Ruwald and Amy M. Skinner	Lots 1 and	2	8	.002
Hans Ruwald, Amy M. Skinner and E. W. Skinner	Lots 3, 4 and	5	8	.003
J. W. Parker	Lot 6 and north half	7	8	.001
Hans Ruwald and John W. Harding	Lot 8 and south half	7	8	.001
Lena H. Bessler		1	10	.002
Minnehaha Trust Co. and S. C. Hunter		2	10	.001
W. A. Shindlar	Lots 3, 4 and	5	10	.002
J. M. Warren	Lots 10, 11 and south half	12	10	.003
Lena Bessler	Lot 13 and north half	12	10	.002
Barbara O. Listman and Hans Ruwald	Lots 1 and	2	11	.002
James A. Guest	Lots 3 and	4	11	.002
Hans Ruwald and H. T. Dolloff	Lots 5, 6 and	7	11	.003
Sarah M. Buckley and Peter P. Simeon	Lots 1 and	2	12	.002
275				
Hans Ruwald and W. C. Hollister		3	12	.001
Union National Bank		4	12	.001
Hans Ruwald	Lots 5, 6 and	7	12	.003
S. C. Hunter		8	12	.001

North Park Second Addition to Sioux Falls.

Julia W. Anderson	1		.016
Hans Ruwald	2		.016
Hans Ruwald	3		.024
Hans Ruwald	4		.016
Hans Ruwald	5		.016
Hans Ruwald	6		.016
Theron S. Swain and Henry E. Shaw	7		.016
Hans Ruwald	8		.016
Hans Ruwald	9		.016
Hans Ruwald	10		.016
Hans Ruwald	11		.016
Julia W. Anderson Lots 1 to 16 inclusive,	12		.016

Name of Owner	Description	Lot	Block	Proportion of Benefits.

North Park Second Addition to Sioux Falls.

Hans Ruwald	Lots 17 and	18	12	.002
Julia W. Anderson	Lots 19, 20, 21, 22, 23 and	24	12	.006
Hans Ruwald			13	.016
Thomas E. Powers			14	.017
Hans Ruwald			15	.024
George J. Fullerton	Lots 1 and	2	16	.002
S. Olney		3	16	.001
S. Olney and J. Guertin		4	16	.001
S. Olney		5	16	.001
F. C. Whitehouse and H. C. Newell		6	16	.001
276				
J. F. Hawyer	Lots 7 and	8	16	.002
Edward H. Story and C. H. Wagner		9	16	.001
Hans Ruwald and Lena Hanson		10	16	.001
Hans Ruwald		11	16	.001
Hans Ruwald and Lena Hanson		12	16	.001
Hans Ruwald		13	16	.001

W. W. Ormiston		14	16	.001
Hans Ruwald and Basha L. Smith		15	16	.001
Hans Ruwald and F. C. Whitehouse		16	16	.001
Hans Ruwald and Rena Paulson	Lots 1 and	2	17	.002
Bell Pederson	Lots 3, 4, 5, 6, 7 and	8	17	.006
Hans Ruwald and Alice T. Newell	Lots 9 and	10	17	.002
Hans Ruwald	Lots 11, 12, 13, 14, 15 and	16	17	.006
W. R. Quincy	Lots 1 and	2	18	.002
Hans Ruwald		3	18	.001
Hans Ruwald and John M. Watson		4	18	.001
Hans Ruwald	Lots 5 and	6	18	.002
S. E. White		7	18	.001
Hans Ruwald	Lots 8, 9, 10, 11, 12 and	13	18	.006
Hans Ruwald, T. M. Robinson and C. H. Eastlock	Lots 14, 15 and	16	18	.003
Hans Ruwald			19	.016
Hans Ruwald			20	.016
Guy A. Newell	Lots 1, 2 and	3	21	.003
F. C. Whitehouse		4	21	.001
F. L. Blackman Edward E. Whitney, and I. P. Lounsbury		5	21	.001
277				
F. L. Blackman and John Hilton		6	21	.001
F. L. Blackman	Lots 7 and	8	21	.002

North Park Second Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
Hans Ruwald, I. Scott and E. R. Oldfield	Lots 9, 10, 11, 12, 13, 14, 15 and	16	21	.002
Hans Ruwald	Lots 1, 2, 3, 4, 5, and	6	22	.006
F. L. Blackman,		7	22	.001
Hans Ruwald and Carrie W. Nowell		8	22	.001
F. L. Blackman	Lots 9 and	10	22	.002

Hans Ruwald	Lots 11, 12, 13, 14, 15 and	16	22	.006
Hans Ruwald			23	.016
Wigant Ludewig			24	.024

Sioux Falls Improvement Co. Addition to Sioux Falls.

B. H. Lien, treasurer			89	.030
S. Widmark	Lots 1, 2, 3, and	4	91	.003
Sarah F. Foster	Lots 12, 13 and	14	91	.002
J. Reichard and J. W. Reichard	Lots 15 and	16	91	.001
Moses Hawkins		17	91	.001
James W. Bowles		18	91	.001

Summit Addition to Sioux Falls.

Esther F. Hitchcock and N. J. Ronlund		1	17	.001
Peter Larson		2	17	.001
Ella H. Pyle	Lots 23, 24, 25 and	26	17	.005
Frederic Gardiner, Jr.		1	18	.002
Margaret M. Matthews, and Hannah L. Matthews		2	18	.002
Union National Bank		3	18	.002
Mike Henle		4	18	.002
Ellen Bennett and R. M. Bennett	Lots 5, 6, and	7	18	.004
J. B. Fearon		8	18	.001
278				
Minnie S. Neason and Gertrude E. Neason		9	18	.001
Ellen Bennett and R. M. Bennett	Lots 16, 17, 18 and	19	18	.006
M. I. Bach		20	18	.002
Ellen Bennett and R. M. Bennett	Lots 21, 22, 23, 24, 25 and	26	18	.009

West Lawn Addition to Sioux Falls.

D. A. Donahoe	N½ of NE¼ of	5	.002
Katherine E. Sherman	S½ of NE¼ of	5	.002
Henry Reichelt	E½ of E½ of NW¼	5	.001
Wm. Quinn and	W½ of E½ of NW¼ of	5	.001
Minnehaha County	And E½ of W½ of NW¼	5	.001

West Lawn Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefits.
Warner & Rogers and Minnehaha County	W½ of W½ of NW¼ of		5	.001
Katherine E. Sherman	E½ of E½ of SW¼ of		5	.001
Laura M. Mellon	W½ of E½ of SW¼ of		5	.001
Laura M. Mellon	W½ of SW¼ of		5	.002
Emma Martin	N½ of SE¼ of		5	.002
Minnie L. Murphy	S½ of SE¼ of		5	.002
C. S. Newcomer and R. W. Barnes			7	.016
Clara L. Hambright			13	.016

West Park Addition to Sioux Falls.

David R. Rector	Lots 1 and	2	1	.001
Sioux Falls Trust Co. and Minnehaha Nat'l Bank	Lots 14 and	15	1	.001

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Northwestern Investment Co. and Minnehaha National Bank		16	1	.001
The Williams Estate Co. and Minnehaha National Bank	Lots 17, 18, 19 and	20	1	.005
The Williams Estate Co. and Minnehaha National Bank	Lots 1, 2, 3, and	4	2	.005
Northwestern Investment Co. and Minnehaha National Bank	Lots 5, 6, and	7	2	.004
Anders C. Blomquist		8	2	.001
Northwestern Investment Co. and Minnehaha National Bank	Lots 9, 10, 11, 12 and	13	2	.007
Minnehaha Nat'l Bank		14	2	.001
Board of Education of the City of Sioux Falls-	Lots 15, 16, 17 and	18	2	.005
Minnehaha Nat'l Bank	Lots 19 and	20	2	.003
Sioux Falls Trust Co. and Minnehaha Nat'l Bank	Lots 13 and	14	3	.002
Northwestern Investment Co. and Minnehaha National Bank	Lots 15 and	16	3	.003

280

Name.	Description	Acres	Proportion of Benefits.
City of Sioux Falls	One and one eighth miles of highways and dedicated streets within the drainage area.....		.090
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area		.320
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area		.060
Mapleton Township	Twelve miles and 52 rods of laid out and established highways within the drainage area		8.723
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area		17.710
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area		1.936
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area		9.100

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Name	Description	Acres	Proportion of Benefits.
Chicago, St. Paul, Minneapolis & Omaha R. R. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50, West 5th P. M., within the drainage area (1.5 miles)	18	20.320
South Dakota Central Railway Co.	Right-of-way as laid out and located across Sections 4, 5 and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49 West; 5th p. m. within the drainage area (2 6 miles)	20.80	59.980
Chicago, Milwaukee & St. Paul Railway Co.	Right-of-way as laid out and located across Sections 4 and 9, Township 101, Range 19, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29 and 33, Township 103, Range 49, and Section 32, Township 104, Range 49 West, 5th p. m. within the drainage		

area (the above being the Sioux Falls and Egan line); also across Sections 5, 8, and 9, Township 102, Range 49 West, 5th P. M., within the drainage area (being the Renner and Madison line) Total 14.5 miles	167.06	383.130

Be it Further Resolved that Thursday, the 3d day of November, 1910, at two o'clock P. M. at the office of the County Auditor of said County be, and it is hereby fixed as the time and place for the equalizing of said proportion of benefits, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909 of said State, such notice to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Daily Argus Leader once in each week for two consecutive weeks, and by posting copies of said notice in at least three (3) public places near the route of said drainage ditch, said posting and the last publication of said notice to be made at least ten (10) days prior to the time of said hearing.

Adopted October 7th, 1910.

THOMAS McKINNON, Chairman.

Attest:

(Seal) Henry Howe, County Auditor.

282 Filed in the office of the Auditor of Minnehaha County, S. D., this 7th day of October 1910.

HENRY HOWE,
County Auditor.

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283 Plaintiff offered in evidence pages 61 to 71, inclusive, of Ditch Record "B", being a record of the notice of hearing on the questioning of equalization of benefits of Ditch No. 2. This notice of hearing named the same persons and the same property specified in the resolution of the County Commissioners fixing the proportion of benefits of Ditch No. 2.

Plaintiff offered in evidence pages 153 to 165, inclusive, of Ditch Record "B", the same being a record of the assessment made by the County Commissioners for Drainage Ditch No. 2. This assessment named the same persons and the same property specified in the resolu-

tion fixing the proportion of benefits of Drainage Ditch No. 2 and the assessment was made as provided for in said resolution. This record shows that the Commissioners ascertained and determined the entire costs of Drainage Ditch No. 2 to be the sum of $81,106.11.

The foregoing exhibits with reference to Drainage Ditch No. 1 and Drainage Ditch No. 2 were received in evidence.

It is stipulated that filed herein as a part of the answer of the defendants are correct copies of the following records of the Board of Commissioners of Minnehaha County, with reference to Drainage Ditch No. 1 and 2, to-wit: the petition of F. L. Blackman and others upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had, the order for filing said petition, the resolution for survey under said petition, the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman and others, the published notice of hearing petition, (such notice not being attached to the answer, but having been filed after the filing of the answer with a stipulation that it might be considered as a part of the answer), and resolution establishing Drainage Ditch No. 1 and 2. Said exhibits were offered in evidence by plaintiff and received in evidence.

(The foregoing exhibits relating to Drainage Ditch No. 1 and 2 are printed herein as a portion of the answer of the defendants and are consequently not herewith reprinted.)

Plaintiff's exhibit "A" was identified by the witness F. E. Ward as one of the records of the office of the County Auditor of Minnehaha County, and was offered in evidence by plaintiff.

To the offer in evidence of plaintiff's exhibit "A" the defendants and intervening defendants objected as incompetent, irrelevant and immaterial to any issue in the case, the same not being pleaded in plaintiff's bill of complaint
284 and part of their case. For the further reason that the apportionment made and set forth in plaintiff's bill of complaint affirmatively appears to be an apportionment made during the year 1921. Plaintiff's exhibit "A" was received in evidence subject to objection.

285 Filed
Dec 15 1921
At .....M
Jerry Carleton, Clerk

Plaintiffs A
Exhibit B. O. C.

Drainage Notice

To Whom It May Concern:

Notice is hereby given that Tuesday, April 25th, 1919, at Two o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, at the Court House in the City of Sioux Falls, in said County, have been fixed by the Board of County Commissioners of said County as the time and place for equalizing the proportion of benefits to the several lands, tracts, lots, roads, streets and railroad right-of-way embraced within the district of Drainage Ditch No. 1 and 2, and benefitted by the construction of said Drainage Ditch, and that the route of said Drainage Ditch No. 1 and 2 is as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of Section twenty-nine (29) Township One Hundred Two (102), Range Forty-nine (49), West of the 5th P. M., running thence south parallel to the adjacent highway two thousand and eighty-five (2085) feet to station one hundred and fourteen (114); also commencing at a point Six hundred and seventy-four (674) feet north, and about thirty-five (35) degrees west of said station number one hundred and fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south forty-five (45) degrees, east three thousand seven hundred (3700) feet to Station number zero (0), the same being on high water line, thence south fifty-nine (59) degrees and thirty-six (36) minutes, east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact loca-
286 tion of drainage ditch Number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five (1035) feet north and fifty-eight (58) feet west of the southeast corner of Section twenty-nine (29), in Township One Hundred and Two (102), Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north five hundred and forty-seven

(547) feet, thence north twenty-three (23) degrees, west Thirty-three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the Northeast Quarter of Section Twenty-nine (29), in said Township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17), and a part of Section Eight (8), Twelve thousand nine hundred and thirty-five (12,935) feet, thence north fifty (50) degrees east, twenty-seven hundred and thirty-two (2732) feet to a point thirty-three (33) feet west of the west lines of the right of way of the Chicago, Milwaukee & St. Paul Railway Co., in the Northwest Quarter of Section Nine (9), in said Township, thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with the high water channel of the Big Sioux River, in the southeast Quarter of Section Twenty (20), in Township One Hundred and Three (103), north of Range Forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18), in Township One Hundred and Three (103), Range Forty-nine (49);
running thence north thirty-three (33) degrees west
287 thirty one hundred fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8), in said Township; thence north parallel with and sixty (60) feet west of the quarter line in Section Seven (7) and Six (6) in said Township, and in Section Thirty-one (31), in Township One Hundred and Four (104), North of Range Forty-nine (49), to the center line running east and west through said Section Thirty-one (31); thence northeasterly to the creek near the northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River has been or is being straightened and the channel changes made as follows: Channel changes on Sections Five (5) and Seven (7), Township One Hundred and One (101), Range Forty-nine (49); Channel changes on Section Thirty-two (32), Twenty-nine (29), Twenty (20), Eighteen (18), Seventeen (17), Eight (8) and Five (5), Township One Hundred and Two (102), Range Forty-nine (49); and Channel changes on Sections Thirty-two (32), and Twenty-nine (29), Township One Hun-

dred and three (103), Range Forty-nine (49); the same being in accordance with the lines of said Drainage Ditch as actually constructed and for which the said Board of County Commissioners has heretofore assessed condemnation damages; that maps and profiles of said Drainage Ditch are now on file in the office of the County Auditor of said County, to which reference is hereby made.

That there have been included within the drainage area of Drainage Ditch 1 and 2 the entire drainage area of Drainage Ditches No. 1 and No. 2 heretofore established and constructed, and additional territory contiguous thereto, which is benefitted by the establishment and construction of said Drainage Ditch No. 1 and 2, and that in the judgment
288 of said Board of County Commissioners all of said territory is interdependent, and is considered as one drainage system, that in the determination of the proportion of benefits fixed upon the lands and premises embraced within said drainage area, the amounts of the assessments heretofore made in the matter of Drainage Ditch No. 1 and Drainage Ditch No. 2 have been taken into consideration.

That in the consideration and assessment of benefits, as hereinafter set forth, the said Board of County Commissioners have assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section 20, in Township 103, Range 49, West of the 5th P. M., owned by Martha R. Roberts, and containing ten acres, is benefitted "one"; also that Lot 1, in Block 22 of J. L. Phillips' Addition, owned by G. Keriakedes, containing a single lot, is benefitted "one", and that County Auditor's Tract 14 of the Southwest Quarter of Section 16, Township 101, Range 49, except the east 132 feet thereof, owned by Albert Larson and George E. Larson, is benefitted "one", and taking the said lands, tracts and lots as a unit, the proportion of benefits to each and all of the lands, tracts, lots, roads, streets and railroad right-of-way and the description of each tract of land affected by said drainage, and the names of the owners thereof, as they appear from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, at the date of said petition and at the date of filing said petition, was fixed as follows:
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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Fred Nelson	W½ of NE¼	4	101	49	57.00	6.897
State of South Dakota	E½ of SE¼ of NW¼	4	101	49	19.5	2.952

State of South Dakota	W½ of SE¼ of NW¼	4	101	49	19.5	2.952
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry. Co. and S. D. Central Ry.) that part of SW¼ Lying South and West of the center line of Drainage Ditch No. 1	4	101	49	12.33	1.863
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry) W½ of NW¼	4	101	49	70.6	10.684
Fred Nelson	SE¼ of NW¼	4	101	49	40.0	6.05
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry) that part of SW¼ lying North and East of the center line of Drainage Ditch No. 1	4	101	49	131.53	19.898
Mary C. Brace	NW¼ of SE¼	4	101	49	30.00	4.538
Mary Brix	Tract 1 of SE¼	4	101	49	3.50	.0532
Mary C. Brace	(Except Tracts 1 and 2) SW¼ of SE¼	4	101	49	8.00	1.21
Hans Ruvald	(Except right-of-way of S. D. Central Ry) NE¼ of NE¼	5	101	49	35.04	5.299
Olander Beason	NW¼ of NE¼	5	101	49	39.66	6.001
Sam Helm	SW¼ of NE¼	5	101	49	40.00	6.05
Hans Ruvald	(Except right-of-way of S. D. Ry) SE¼ of NE¼	5	101	49	34.45	5.215
A. C. Jensen	NE¼ of NW¼	5	101	49	36.22	5.481
D. A. Scott	NW¼ of NW¼	5	101	49	38.00	5.748
F. H. Johnson	SW¼ of NW¼	5	101	49	38.00	5.750
Hans Ruvald	SE¼ of NW¼	5	101	49	38.00	5.750
Hans C. Ruvald	NE¼ of SW¼	5	101	49	39.50	5.977
290						
Mary C. Brace	(Except Blocks 34, 35, 49, 50 and 61 of N. Boulevard Addition to Sioux Falls) S½ of SW¼	5	101	49	66.80	9.523

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
F. H. Johnson	NW¼ of SW¼	5	101	49	38.50	5.699
State of South Dakota	(Except right-of-way of S. D. Central Ry Co.) NE¼ of SE¼	5	101	49	34.45	5.215
Hans Ruvald	NW¼ of SE¼	5	101	49	40.00	8.05

Mary C. Brace	(Except Blocks 4, 6, 9, 13 and 29 of N. Boulevard Addition to Sioux Falls, and except right-of-way of S. D. Central Ry. Co.) S½ of SE¼	5	101	49	62.66	9.474
D. A. Scott	N¼ of SE¼	6	101	49	40.00	4.84
F. H. Johnson	S½ of NE¼	6	101	49	42.00	5.022
F. H. Johnson	N½ of SW¼	6	101	49	14.00	1.694
George E. Barkley	S½ of SW¼	6	101	49	40.00	4.84
F. H. Johnson	N½ of SE¼	6	101	49	73.00	8.803
George E. Barkley	SW¼ of SE¼	6	101	49	38.50	4.659
A. G. Erskine	Tract 1 of SE¼	6	101	49	23.00	2.783
Frances G. Carpenter	Tract 2 of SE¼	6	101	49	15.00	1.815
Frances G. Carpenter	NE¼ of NE¼	7	101	49	40.00	4.84
Frances G. Carpenter	SE¼ of NE¼	7	101	49	40.00	4.84
H. O. Gates & E. J. Sharon	W½ of NE¼	7	101	49	79.50	9.295
H. O. Gates & E. J. Sharon	E¼ of NW¼	7	101	49	50.00	6.05
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F. H. Johnson	SW¼ of NW¼	7	101	49	5.00	0.605
E. J. Sharon & F. L. Blackman	The unplatted part of W½ of SE¼ and of E½ of SW¼ of (Except that tract lying North of Block 37 of Meredith's Second Addition to Sioux Falls, and South of center line of Mullberry St., extended West and East of center line of Harvard St., extended and West of center line of Hooker St. extended; also except that portion of Tract 1 lying between Monroe St., extended West and the center line of Manchester Street extended West	7	101	49	37.00	4.477

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
B. A. Burtch & Henry Brookhouse, Jr.	That part of Tract 1 of SW¼ lying N. of Block 37 Meredith's Second Addition to Sioux Falls, and S. of cen-	7	101	49		

	ter line of Mullberry St. extended West and East of center line of Harvard St., extended and West of center line of Hooker St. extended.				1.50	1.815
Henry Brookhouse, Jr.	That part of Tract 1 of SW¼ lying between Monroe St. extended and West of center line of Manchester Street extended West,	7	101	49	1.50	0.182
Richard J. Ford	NW¼ of SW¼	7	101	49	18.00	2.178
J. A. Redfield	N½ of SW¼ of SW¼	7	101	49	15.00	1.815
J. A. Redfield	SE¼ of SW¼ of SW¼	7	101	49	7.5	0.908
Frances G. Carpenter	N½ of NE¼	8	101	49	80.0	9.68
Frances G. Carpenter	N½ of NW¼	8	101	49	80.0	9.68
C. E. McKinney	N½ of SW¼	8	101	49	80.0	9.68
E. B. Northrup	SW¼ of SW¼	8	101	49	40.0	4.84
Elmer S. Gilbert	SE¼ of NE¼ of SE¼	8	101	49	5.0	1.10
Frances G. Carpenter	(Except Block 40 of Central Park Add. to Sioux Falls) SW¼ of NW¼	8	101	42	37.50	4.537
292						
Frances G. Carpenter	(Except Blocks 5, 8, 13, and 21 of Central Park Add. to Sioux Falls) SW¼ of NE¼	8	101	49	30.00	3.63
Frances G. Carpenter	NW¼ of NW¼ of SE¼ of NE¼	8	101	49	2.50	0.302
State of South Dakota	That part lying East of the right-of-way of the C. M. & St. P. Ry. Co. of S½ of NW¼	9	101	49	14.5	1.755
Fraces C. Carpenter	(Except Blocks 33, 48 and 49 of Central Park Add. to Sioux Falls) SE¼ of NW¼	8	101	49	32.50	3.933
Catherine W. Peck & Porter P. Peck	(Except Block 1 and Lots 10, 11 and 12 of Block 34 of Millard Park Add. to Sioux Falls) Tract 1 of NW¼	17	101	49	83.9	10.152

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Catherine W. Peck & Porter P. Peck	Tract 2 of NW¼	17	101	49	13.6	1.524

Catherine W. Peck & Porter P. Peck	Tract 4 of NW¼	17	101	49	0.3	0.036
Maria Winker	Tract 1 of SW¼	17	101	49	12.0	1.452
Francis D. Hoskins	Tract 3 of SW¼	17	101	49	1.65	0.205
Frances G. Carpenter	Tract 3 of SW¼	17	101	49	1.1	0.133
Security & Guaranty Co.	(Except lots 1, 2, 3, 4, 5, and 6 of Block 3, Lincoln Park Add. to Sioux Falls) NE¼ of SE ¼	18	101	49	37.25	4.513
Porter P. Peck	SE¼ of NE¼	18	101	49	35.00	4.235
August Gustafson	SW¼ of NE¼	18	101	49	40.00	4.84
August Gustafson	SE¼ of NW¼	18	101	49	40.00	4.84
293						
W. H. Lyon	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SW¼	18	101	49	33.96	4.114
W. H. Lyon	SW¼ of NW¼	18	101	49	37.00	4.477
S. A. Gehrig	(Except right of way of C. M. & St. P. Ry. Co) NE¼ of SW¼	18	101	49	38.48	4.658
Marcus Russell	W½ of NW¼ of SE¼	18	101	49	30.00	2.42
Marcus Russell	SW¼ of NE¼ of NW¼ of SE¼	18	101	49	2.5	0.301
Marcus Russell	N½ of NE¼ of NW¼ of SE¼	18	101	49	5.0	0.605
Soo Valley Granite Co.	That part of NW¼ of NW¼, lying East of the Big Sioux River (Except Block 89 of Sioux Falls Imp. Co Add to Sioux Falls					0.605
S. Widmark	Tract 1 of NW¼	18	101	49	2.0	0.242
Soo Valley Granite Co.	That part of NW¼ of NW¼ lying West of Big Sioux River (Except Tract 1 and lots 1, 2, 3, 4, 12, 13, 14, 15 1,6, 17, & 18 of Block 91 of Sioux Falls Imp. Co. Add. to Sioux Falls	18	101	49	14.00	1.694

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
George J. Morris	(Except right-of-way of C. St. P. M. & O. Ry. Co) East 10 acres of S½ of SW¼	18	101	49	9.37	1.137
German State Bank	(Except right-of-way of C. St. P. M. & O. Ry Co) W. 70 acres of S½ of SW¼	18	101	49	64.35	7.792

C. C. Bratrud	N½ of NE¼	19	101	49	9.5	1.149
Laura A. Darling	S½ of NE¼	19	101	49	2.0	0.242
Den Donahoe & W. M. Donahoe	(Except Block 13 of West Lawn Add. to Sioux Falls) E½ of NW¼	19	101	49	77.5	8.525
E. V. Rowley	W¼ of NE¼ of NW¼ of NW¼	19	101	49	5.0	0.550
Ludwig Seubert	SE¼ of NE¼ of NW¼ of NW¼	19	101	49	2.5	0.275
294						
Jean Obert	NE¼ of NE¼ of NW¼ of NW¼	19	101	49	2.5	0.275
Dan A. Donahoe	NW¼ of NW¼ of NW¾	19	101	49	9.0	0.990
Dan A. Donahoe	S½ of NW¼ of NW¼	19	101	49	19.0	2.090
Daniel A. Donahoe	SW¼ of NW¼	19	101	49	38.00	4.150
Amelia Bauch	(Except the N. 50 rods) Tract 1 of SW¼	19	101	49	14.5	1.505
W. H. Fullerton, Thomas Fullerton, Geo. J. Fullerton & Leopold Guertin	Tracts 2 & 3 of SW¼	19	101	49	7.45	0.825
Thomas F. Loughran & Louis Bauch	Tract 4 of SW¼	19	101	49	8.0	0.880
Mary R. Guertin	North 4 acres of Tract 5 of SW¼	19	101	49	4.0	0.440
J. H. Fernyhough	S 4 acres of Tract 5 of SW¼	19	101	49	4.0	0.440
Daniel A. Donahoe Den Donahoe & Wm. Donahoe	Tract 8 of SW¼	19	101	49	0.75	0.088
Daniel A. Donahoe Den Donahoe and Wm. Donahoe	Tract 10 of SW¼	19	101	49	8.0	0.880
Stella I. Simpson	N½ of NW¼	30	101	49	18.0	1.980
Stella I. Simpson	SW¼ of NW¼	30	101	49	32.0	3.520
Harry A. Chetham	NW¼ of SW¼	30	101	49	20.0	2.200

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
J. T. Norris	SW¼ of SW¼	30	101	49	33.0	3.630
Lottie Frank and Ethel F. Neister	(Except the right-of-way of C. St. P. & M. O. Ry. Co. and except the West 13 rods and 4 ft) E½ of NE¼	13	101	50	42.0	5.082

Lottie Frank and Ethel F. Neister	W½ of NE¼	13	101	50	30.0	3.630
Lottie Frank and Ethel F. Neister	W. 13 rods and 4 ft. of E½ of NE¼	13	101	50	7.5	0.908
Hayward Investment Co.	(Except right-of-way of C. St. P. M. & O. Ry Co) E½ of SW¼	13	101	50	30.9	3.729
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W. H. Lyon	(Except right-of-way of C. St. P. M. & O. Ry Co) NE¼ of SE¼	13	101	50	32.53	3.933
Lottie Frank and Ethel F. Neister	(Except right-of-way of C. St. P. M. & O. Ry Co) NW¼ of SE¼	13	101	50	36.97	4.477
Louis Lissinger	S½ of SE¼	13	101	50	73.0	8.833
Charley Gibson	A tract beginning at the N/E. Corner of running thence W. 320 ft. thence S. 120 ft. thence S. 70 degrees E. 320 ft. thence N. 20 degrees E. 52 ft. thence North 180 ft. to beginning	24	101	50	1.78	0.217
Louis P. Caldwell	(Except the tract last above described) NE¼ of NE¼	24	101	50	33.7	4.078
William Gage	NW¼ of NE¼	24	101	50	18.0	2.198
P. M. Smith	W½ of NW¼	3	102	49	20.7	1.773
John Sittig	E½ of NE¼	4	102	49	77.10	9.329
Ole E. Eggen	W½ of NE¼	4	102	49	78.49	9.492
Gurine Peterson	E½ of NW¼	4	102	49	78.04	11.527
Ole T. Aspass	(Except right-of-way of C. M. & St. P. Ry. Co.) W½ of NW¼	4	102	49	69.65	9.672

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Ole T. Nessen	NE¼ of SW¼	4	102	49	40.00	5.95
Andrew P. Brende	SE¼ of SW¼	4	102	49	40.00	5.535
Martin H. Oyen and Cleopatra H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) W½ of SW¼	4	102	49	72.00	9.972
Ole T. Nessen	SE¼	4	102	49	118.00	14.278
Ole Thompson Aspass	E½ of NE¼	5	102	49	72.37	11.052
O. O. Gilseth	NW¼ of NE¼	5	102	49	37.4	4.934
O. O. Gilseth	W¾ of SW¼ of NE¼	5	102	49	29.0	3.828

O. O. Gilseth	NE¼ of NE¼ of SW¼ of NE¼	5	102	49	1.5	0.198
John Brekke	E½ of SE¼ of SW¼ of NE¼	5	102	49	5.0	0.66
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John Brekke	SE¼ of NE¼ SW¼ of NE¼	5	102	49	1.5	0.198
O. O. Gilseth	(Except right-of-way of C. M. & St. P. Ry Co.) NW¼	5	102	49	40.00	4.80
P. J. Merakergaard	(Except right-of-way of C. M. & St. P. Ry. Co) SW¼	5	102	49	73.4	6.948
297						
Martin H. Oyen and Cleopatra H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) SE¼	5	102	49	140.48	20.915
Erick O. Evjebak and Olaf Gilseth	Tract 1 of SE¼	5	102	49	9.32	2.186
Martin H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) E½ of NE¼	8	102	49	72.3	11.653
Martin H. Oyen	That part North and East of right-of-way of C. M. & St. P. Ry Co. of W½ of NE¼	8	102	49	2.0	0.264
Ole Gunderson	That part South and West of right-of-way of C. M. & St. P. Ry Co., of W½ of NE¼ (except the north 50 rods of that part West of river	8	102	49	65.4	9.537
J. L. Ingalls	The North 50 rods of that part West of River of W½ of NE¼	8	102	49	3.0	0.64
Ole Gunderson	(Except the South 50 rods of) NE¼ of NW¼	8	102	49	22.00	2.904

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Ole Gunderson	The South 30 rods of NE¼ of NW¼	8	102	49	10.00	1.032
Ole Gunderson	S½ of NW¼	8	102	49	38.00	5.475
Ole Gunderson	NE¼ of SW¼	8	102	49	40.00	5.858
Iver Nelson	(Except 2½ acres in square form in SE Corner) NW¼ of SW¼	8	102	49	17.5	2.310
M. O. Benrud	2½ acres in square form in SE corner of NW¼ of SW¼	8	102	49	2.5	0.33
Jonas Olsen	SW¼ of SW¼	8	102	49	30.00	3.96
Ole Gunderson	SE¼ of SW¼	8	102	49	39.00	5.735

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Nellie A. Walkins	(Except 1 acre in square form in NW corner) NE¼ of SE¼	8	102	49	38.16	5.575
School District No. 2	1 acre in square form in NW Corner) of NE¼ of SE¼	8	102	49	0.84	0.136
Ole Gunderson	W½ of SE¼	8	102	49	76.0	12.705
C. H. Renner	SE¼ of SE¼	8	102	49	38.0	6.156
Andrew P. Brende	N½ of NE¼	9	102	49	50.00	6.05
Alfred Christianson	S½ of NE¼	9	102	49	38.00	4.598
Ole T. Nessen	NE¼ of NW¼	9	102	49	32.00	4.752
Martin H. Oyen	That part West of the Southern Minn. R. R. right-of-way of W½ of NW¼ (except right-of-way of Madison Line of C. M. & St. P. Ry. Co.	9	102	49	41.4	5.565
Alfred Christianson	That part East of the Southern Minn. R. R. Right-of-way of W½ of NW¼	9	102	49	31.0	4.604
Andrew P. Brende	SE¼ of NW¼	9	102	49	40.00	5.313
Jonas Olsen	(Except the plat of Olsen's Add. to Renner) E½ of SW¼	9	102	49	71.85	9.34

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. H. Renner	(Except rights-of-way of C. M. & St. P. Ry Co. and except the town plat of Renner) W½ of SW¼	9	102	49	69.7	9.71
Christian Christianson	N½ of SE¼	9	102	49	20.00	2.42
Jonas Olsen	S½ of SE¼	9	102	49	18.00	2.078
Jonas Olsen	NW¼ of NE¼	16	102	49	2.00	0.242
Barney Finnegan	SW¼ of NE¼	16	102	49	23.00	2.783
John Bliss	E½ of NW¼	16	102	49	75.00	9.075
Leonard Renner	(Except right-of-way of C. M. & St. P. Ry Co) W½ of NW¼	16	102	49	73.00	9.92
Michael P. Brende	NE¼ of SW¼	16	102	49	40.00	4.84
Mary P. Brende	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SW¼	16	102	49	36.9	5.02

Ole O. Velden	(Except right-of-way of C. M. & St. P. Ry. Co) SW¼ of SW¼	16	102	49	36.95	4.948
Ole O. Velden and Thomine O. Velden	SE¼ of SW¼	16	102	49	33.0	3.993
Mary P. Brende	NW¼ of SE¼	16	102	49	19.0	2.299
S. P. Brende	SW¼ of SE¼	16	102	49	25.0	3.025
F. I. Renner	E½ of NE¼	17	102	49	77.0	11.944
Gertie R. Peterson	NW¼ of NE¼	17	102	49	38.00	5.841
Gertie R. Peterson	N½ of SW¼ of NE¼	17	102	49	19.5	3.001
Iver R. Peterson	S½ of SW¼ of NE¼	17	102	49	19.5	3.001
Gertie R. Peterson	NE¼ of NW¼	17	102	49	39.0	5.733
Ingeberg Peterson	NW¼ of NW¼	17	102	49	18.0	2.376
Bernt Mekvold	SW¼ of SW¼	17	102	49	33.0	4.356
Bernt Mekvold	W 26 2/3 acres of SE¼ of NW¼	17	102	49	26.67	3.726
300						
Gertie R. Peterson	N½ of East 13 Acres of SE¼ of NW¼	17	102	49	6.5	0.105
Iver R. Peterson	S½ of East 13 acres of SE¼ of NW¼	17	102	49	6.5	0.105
C. C. Fleischer	E½ of SW¼	17	102	49	80.00	11.673

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. C. Fleischer	NW¼ of SW¼	17	102	49	37.0	4.884
T. P. Horton	E½ of SW¼ of SW¼	17	102	49	18.0	3.376
Nels I. Nelson	W½ of SW¼ of SW¼	17	102	49	20.0	2.64
Jonas Olsen	E½ of SE¼	17	102	49	78.00	12.092
C. J. Orstad	W½ of SE¼	17	102	49	78.00	12.732
W. O. Quincy	E½ of NE¼	19	102	49	3.00	0.396
Henry J. Schimmel	NE¼ of NE¼	20	102	49	39.00	6.318
Albert N. Allis	W½ of NE¼	20	102	49	78.00	12.049
O. S. Pendar	SE¼ of NE¼	20	102	49	39.00	6.318
Albert N. Allis	E½ of NW¼	20	102	49	76.00	11.207
W. O. Quincy	W½ of NW¼	20	102	49	74.00	9.768
R. J. Huston	N½ of SW¼	20	102	49	73.00	10.236
R. J. Huston	NW¼ of SE¼	20	102	49	39.00	6.025
Chas. E. Kaufman	S½ of SW¼	20	102	49	70.00	9.84
O. S. Pendar	E½ of SE¼	20	102	49	78.00	12.584

O. S. Pendar	SW¼ of SE¼	20	102	49	38.00	6.103
Ole O. Volden and Thomine O. Volden	NW¼ of NE¼	21	102	49	12.00	1.452
E. Larson	(Except right-of-way of C. M. & St. P. Ry. Co.) NW¼	21	102	49	151.85	19.473
Michael P. Brende	E½ of SW¼	21	102	49	39.5	4.785
Paul H. Brende and Martha O. Brende	(Except right-of-way of C. M. & St. P. Ry. Co.) NW¼ of SW¼	21	102	49	36.95	5.025

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O. S. Pendar	(Except right-of-way of C. M. & St. P. Ry. Co) SW¼ of SW¼	21	102	49	35.95	4.891
J. A. Erickson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼	28	102	49	142.25	18.890
Alfred Christensen	(Except right-of-way of C. M. & St. P. Ry Co.) SW¼	28	102	49	118.20	19.521
Chas. E. Kaufmann	NE¼	29	102	49	154.5	24.43
Chas. E. Kaufmann	NE¼ of NW¼	29	102	49	39.0	5.748

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Carrie Erickson and John A. Erickson	W½ of NW¼	29	102	49	57.0	7.524
M. P. Brende and S. P. Brende	(Except tract 1) SE¼ of NW¼	29	102	49	2.5	0.330
M. P. Brende and S. P. Brende	Tract 1 of SW¼	29	102	49	36.0	5.052
Erick O. Eggen	(Except Tracts 1 and 2) NE¼ of SW¼	29	102	49	10.2	1.658
M. P. Brende and S. P. Brende	Tract 1 of SW¼	29	102	49	7.8	1.270
Ole O. Eggen	Tract 2 of SW¼	29	102	49	21.5	3.486
Carrie Erickson and John A. Erickson	(Except right-of-way of S. D. Central Ry Co) W½ of SW¼	29	102	49	38.62	6.259
Ellen Berg and Mary Schodjt	(Except right-of-way of S. D. Central Ry Co.) SE¼ of SW¼	29	102	49	36.49	5.911
Chas. E. Kaufmann	NE¼ of SE¼	29	102	49	39.00	7.309
Mary Schodjt and Ole P. Schodjt	(Except ½ acre next below described) NW¼ of SE¼	29	102	49	36.5	6.681
School District No. 17	A tract in the Southeast corner (8 rods North and South by 10 rods East and West) NW¼ of SE¼	29	102	49	0.38	0.062

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Mary Schodjt and Ole P. Schodjt	SW¼ of SE¼	29	102	49	35.25	6.24
State of South Dakota	SE¼ of SE¼	29	102	49	35.5	6.786
G. E. Eggen, Guru E. Eggen, Ole E. Moen, Gurine E. Moen and Edward E. Moen	E½ of NE¼	31	102	49	5.0	0.584
K. O. Jellum	E½ of SE¼	31	102	49	43.0	5.106
State of South Dakota	E½ of NE¼	32	102	49	72.9	12.025
Mary Schojdt and Ole P. Schojdt	(Except right-of-way of S. D. Central Ry Co) NW¼ of NE¼	32	102	49	35.88	5.913
Joe H. Whitman	(Except Right-of-way of S. D. Central Ry Co.) SW¼ of NE¼	32	102	49	37.78	6.230
G. E. Eggen, Guru E. Eggen, Ole E. Moen Gurine E. Moen, and Edward E. Moen	(Except right-of-way of S. D. Central Ry Co) N½ of NW¼	32	102	49	66.25	10.929
G. E. Eggen, Guru E. Eggen, Ole E. Moen, Gurine E. Moen, and Edward E. Moen	SW¼ of NW¼	32	102	49	40.0	6.6
J. H. Whitman	That part West of River of N½ of SE¼ of NW¼	32	102	49	6.0	0.831
State of South Dakota	That part East of River of N½ of SE¼ of NW¼	32	102	49	13.0	2.151
Ezra M. Shotwell	North 3 acres of S½ of SE¼ of NW¼	32	102	49	3.0	0.488
W. H. Lyon	South 5 acres of North 8 Acres of S½ of SE¼ of NE¼	32	102	49	5.0	0.699
Thomas Paulson	South 2 acres of N½ of S½ of SE¼ of NW¼	32	102	49	2.0	0.330
N. E. W. Brakke	S½ of S½ of SE¼ of NW¼	32	102	49	10.0	1.650

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K. O. Jellum	SW¼	32	102	49	152.0	35.08
State of South Dakota	NE¼ of SE¼	32	102	49	37.50	6.190
J. E. Colton	(Except right-of-way of S. D. Central Ry Co) NW¼ of SE¼	32	102	49	37.98	6.270

Thomas S. Nolan	(Except right-of-way of S. D. Central Ry Co.) SW¼ of SE¼	32	102	49	38.01	6.270
State of South Dakota	(Except right-of-way of S. D. Central Ry. Co.) SE¼ of SE¼	32	102	49	36.89	6.096
Francis A. Miller	(Except right-of-way of C. M. & St. P. Ry Co.) N½	33	102	49	110.2	14.531
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry. Co) N½ of SW¼	33	102	49	76.0	10.285
O. Benson	(Except right-of-way of C. M. & St. P. Ry Co) S½ of SW¼	33	102	49	72.0	10.140
O. Benson	W½ of SE¼	33	102	49	60.0	7.26
Ole O. Langness Town of Baltic	(Except right-of-way of C. M. & St. P. Ry. Co.) NE¼ of NW¼	5	103	49	10.29	1.131

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Baltic Creamery Co.	A tract 10½ rods West and East by 15 rods North and South in NE corner of NW¼ of NW¼	5	103	49	0.85	0.93
Olaf N. Lyng	(Except the tract last above described) NW¼ of NW¼	5	103	49	33.93	3.732
J. O. Langness	That part South of River of SW¼ of SW¼	5	103	49	8.0	0.88
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co) SE¼ of NW¼	5	103	49	3.0	0.330
304						
Sena C. Langness	NE¼ of SW¼	5	103	49	36.75	4.315
John Langness	Tract 1 of SW¼	5	103	40	11.00	1.33
A. J. Floren	Tract 2 of SW¼	5	103	49	6.00	0.726
Gunerius Thompson	Tract 3 of SW¼	5	103	49	3.57	0.392
Gunerius Thompson	Tract 4 of SW¼	5	103	49	1.0	0.11
Gunerius Thompson	Tract 5 of SW¼	5	103	49	34.43	4.165
Gunerius Thompson	(As shown in Book 5 of Plate Page 51) Lot 1 of Tract 6 of SW¼	5	103	49	28.41	3.125
Gunerius Thompson	(Except the tract last above described) Tract 6 of SW¼	5	103	49	2.84	0.312
Gunerius Thompson	Tract 7 of SW¼	5	103	49	27.0	2.97

Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SE¼	5	103	49	1.50	0.182
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co.) North 3 acres of SW¼ of SE¼	5	103	49	1.0	0.121
J. O. Langness	(Except the North 3 acres and except the right-of-way of C. M. & St. P. Ry Co) SW¼ of SE¼	5	103	49	17.33	8.097
Mari Lee, Libbie Lang Carrie Lee, Etta M. Lee, Tilda Lee, Mabel O. Lee, and Thomas E. Lee	NE¼ of NE¼	6	103	49	38.81	4.827
	and S½ of NE¼	6	103	49	69.82	9.106
	and N½ of SE¼	6	103	49	75.82	9.876
John Williamson	NW¼ of NE¼	6	103	49	38.60	5.320
Even O. Fossum	NE¼ of NW¼	6	103	49	35.11	5.793

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Knud Larson	W¼ of NW¼	6	103	49	43.00	6.958
Lina Hanson	N½ of N½ of SE¼ of NW¼	6	103	49	9.05	1.484
K. P. Sorklime	(As described in Book 53 of Deeds, page 434) Lot 1 of SE¼ of NW¼	6	103	49	17.64	2.911
305						
Gunerius Thompson	That part South of Lot 1 as last above described of SE¼ of NW¼	6	103	49	9.50	1.568
Gunerius Thompson	N½ of NE¼ of SW¼	6	103	49	18.09	2.985
Gunerius Thompson	S½ of NE¼ of SW¼	6	103	49	18.09	2.985
A. L. Berg	S½ of SW¼	6	103	49	59.75	9.302
Gunerius Thompson	SE¼ of SW¼	6	103	49	35.18	5.805
Gunerius Thompson	S½ of SE¼	6	103	49	77.82	10.164
Gunerius Thompson	N½ of NE¼	7	103	49	77.0	10.074
Julia Johnson	S½ of NE¼	7	103	49	78.32	10.247
Ole J. Ustrud and H. O. Ustrud	NE¼ of NW¼	7	103	49	35.18	5.705
Knut O. Larson	W½ of NW¼	7	103	49	59.75	9.302
Ole O. Ustrud and O. O. Sando	SE¼ of NW¼	7	103	49	36.18	5.970
Magnild Floren	NE¼ of SW¼	7	103	49	36.18	5.970
Ole O. Floren	W½ of SW¼	7	103	49	34.40	5.594

Ole O. Floren	SE¼ of SW¼	7	103	49	35.18	5.855
Julia Johnson	N½ of SE¼	7	103	49	78.32	10.247
John Thompson	SW¼ of SE¼	7	103	49	38.82	5.338
John P. Risvold	Tract 1 of SE¼	7	103	49	3.21	0.397
Anders S. Aas	Tract 2 of SE¼	7	103	49	15.50	2.035
Ingeberg Risvold	Tract 3 of SE¼	7	103	49	12.00	1.320
Peder P. Risvold	Tract 4 of SE¼	7	103	49	4.87	0.536
Sivert E. Kringen	(Except right-of-way of C. M. & St. P. Ry Co) N½ of NE¼	8	103	49	38.67	4.679
John P. Risvold	(Except right-of-way of C. M. & St. P. Ry Co.) SW¼ of NE¼	8	103	49	36.00	4.356

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
John P. Risvold	North 25 acres of SE¼ of NE¼	8	103	49	21.00	2.541
Peder P. Risvold	South 15 acres of SE¼ of NE¼	8	103	49	15.00	1.815
306						
C. M. Christianson, Halvor Gunderson and Maria Langness	NE¼ of NW¼	8	103	49	35.50	3.905
Gunerius Thompson	As shown in Book 5 of Plats, page 51, Tract 1 of NW¼ of NW¼	8	103	49	6.70	0.737
Gunerius Thompson	(Except Tract 1 of last above described) NW¼ of NW¼	8	103	49	29.16	3.208
Annie M. Kringen	(As described in Book 26 of Deeds, page 507) SW 4½ acres of SW¼ of NW¼	8	103	49	4.5	0.495
John O. Langness	(Except the Tract last above described) SW¼ of NW¼	8	103	49	33.50	3.685
Jens Erickson	SE¼ of NW¼	8	103	49	39.00	4.290
Jens Erickson	NE¼ of SW¼	8	103	49	39.00	4.290
Sara Vollan	NW¼ of SW¼	8	103	49	37.50	4.125
Anders P. Risvold	North 30 acres of SW¼ of SW¼	8	103	49	29.50	3.245
Peder P. Risvold	South 10 acres of SW¼ of SW¼	8	103	49	9.00	0.99
Anders P. Risvold	N½ of SE¼ of SW¼	8	103	49	19.50	2.145
Peder P. Risvold	S½ of SE¼ of SW¼	8	103	49	18.80	2.035
Peder P. Risvold	NE¼ of SE¼	8	103	49	40.00	3.960

Peder P. Risvold	The North 11 acres of that part East of right-of-way of C. M. & St. P. Ry. Co. of NW¼ of SE¼	8	103	49	11.00	1.210
Anders P. Risvold	(Except right-of-way of C. M. & St. P. Ry. Co. and except the N. 11 acres East of such right-of-way) NW¼ of SE¼	8	103	49	25.00	2.750
307						
Anders P. Risvold	(Except right-of-way of C. M. St. P. Ry Co) SW¼ of SE¼	8	103	49	35.00	3.850
Lars Paulson, G. P. Wilson and G. T. Nyhus	SE¼ of SE¼	8	103	49	39.00	3.861

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Sara Vollan	SW¼ of NW¼	9	103	49	8.00	0.968
Sara Vollan	N½ of SW¼	9	103	49	47.90	4.421
Torger H. Nyhus	SW¼ of SW¼	9	103	49	39.00	3.861
Peder P. Risvold	SE¼ of SW¼	9	103	49	38.00	4.235
Ole Johnson	NW¼ of NE¼	16	103	49	37.10	4.040
Torger H. Nyhus	SW¼ of NE¼	16	103	49	38.00	3.762
Peder Risvold	NE¼ of NW¼	16	103	49	39.00	4.247
John Johnson	NW¼ of NW¼	16	103	49	39.00	3.470
Paul A. Risvold	S½ of NW¼	16	103	49	78.00	8.151
Gilbert G. Brende	N½ of SW¼	16	103	49	78.00	8.151
Gilbert G. Brende	SW¼ of SW¼	16	103	49	40.00	4.40
Gilbert G. Brende	SE¼ of SW¼	16	103	49	40.00	3.96
Ole G. Brende	W½ of SE¼	16	103	49	78.00	7.722
Ole G. Brende	SE¼ of SE¼	16	103	49	4.00	0.484
G. T. Nyhus	NE¼ of NE¼	17	103	49	39.00	4.290
Sara Vellan	(Except right-of-way of C. M. & St. P. Ry Co.) W½ of NE¼	17	103	49	70.00	7.700
Gilbert G. Brende and O. L. Brende	SE¼ of NE¼	17	103	49	39.00	4.290
Gilbert T. Gunderson	E.½ of N.W¼	17	103	49	77.00	8.470
Peter P. Risvold	N.W¼ of NW¼	17	103	49	37.00	4.070
Gilbert T. Gunderson	SW¼ of NW¼	17	103	49	40.00	4.400
G. T. Nyhus	Tract 1 of SW¼	17	103	49	7.40	1.018

Thomas O. Brende, Thorsten O. Brende, and Joseph O. Brende,	Tract 2 of SW¼	17	103	49	2.18	0.300
308						
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 3 of SW¼	17	103	49	4.70	0.647
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 4 of SW¼	17	103	49	1.00	0.138
Olaf B. Floren	Tract 5 of SW¼	17	103	49	4.80	0.66

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 6 of SW¼	17	103	49	2.04	0.281
Clara Schneider	Tract 7 of SW¼	17	103	49	1.34	0.185
Torger N. Nyhus	Tract 8 of SW¼	17	103	49	3.00	0.413
Sarah Vollan	Tract 9 of SW¼	17	103	49	2.96	0.407
E. G. Brende	Tract 10 of SW¼	17	103	49	3.00	0.413
Iver Paulson	Tract 11 of SW¼	17	103	49	1.03	0.142
E. G. Brende	Tract 12 of SW¼	17	103	49	2.00	0.275
G. T. Gunderson	Tract 13 of SW¼	17	103	49	21.56	2.965
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 14 of SW¼	17	103	49	18.00	2.477
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 15 of SW¼	17	103	49	28.80	3.960
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 16 of SW¼	17	103	49	35.72	3.929
Nidres Norwegian Evangelical Lutheran Congregation	Tract 17 of SW¼	17	103	49	8.60	0.946
Knud Thompson and Jacob Olson	Tract 18 of SW¼	17	103	49	1.83	0.252
Erick H. Oien	NE¼ of SE¼	17	103	49	39.00	4.290
Bortinus Pederson	(Except right-of-way of C. M. & St. P. Ry Co.) W½ of SE¼	17	103	49	70.65	7.772
Mali Johnson	SE¼ of SE¼	17	103	49	40.00	4.400
John O. Aasen	(Except Tracts 1 and 2) NE¼	18	103	49	126.79	17.709

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit
Peder P. Risvold	Tract 1 of NE¼	18	103	49	10.14	1.115
Ole J. Stordahl	Tract 2 of NE¼	18	103	49	1.40	0.154
Andrew Swenson, Aas	NW¼	18	103	49	51.65	8.523
Ole J. Ustrud	That part East of River of NE¼ of SE¼	18	103	49	11.67	1.805
Martha R. Roberts	NE¼ of NE¼	20	103	49	40.00	4.400
B. G. Flamoe	(Except right-of-way of C. M. & St. P. Ry Co.) NW¼ of NE¼	20	103	49	34.50	3.795
Haagen O. Skatvold	(Except right-of-way of C. M. & St. P. Ry Co.) S½ of NE¼	20	103	49	70.20	9.653
Frederick Johnson and Jens Johnson and Torbjorn Olson	Tract 1 of NW¼	20	103	49	4.28	0.589
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. H. Thompson, Fred R. Thompson, Rueben V. Thompson, Mabel J. Thompson and Carl M. Thompson	(Except Tract 1 and except the Tract next Hereinafter described) NE¼ of NW¼	20	103	49	10.00	1.375
James J. Flamoe	A tract as described in Book 67 of Deeds, page 106, in NE¼ of NW¼	20	103	49	10.00	1.375
John J. Almlie, Jr.	NW¼ of SW¼	20	103	49	3.33	0.456
Bernt J. Flamoe	SE¼ of NW¼	20	103	49	8.10	1.114
Peter Paulson	(Except right-of-way of C. M. & St. P. Ry Co.) E½ of SE¼	20	103	49	63.65	8.752
Haagen O. Skatvold	NW¼ of SE¼	20	103	49	15.00	2.063
Peter Paulson	(Except Tract 1) that part lying East of River of SW¼ of SE¼	20	103	49	13.00	1.788

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G. T. Nyhus	Tract 1 of SE¼	20	103	49	1.60	0.220
Mattha R. Roberta	North ½	21	103	49	251.75	26.687
Peter Paulson	W½ of SW¼	21	103	49	79.0	10.461
Erick G. Brende	E½ of SW¼	21	103	49	79.0	8.690
Erick G. Brende	SE¼	21	103	49	101.42	8.796

Martha Roberts, John H. Roberts and Thomas S. Roberts	E½ of SW¼ of SW¼	27	103	49	2.00	0.242
Erick O. Eggen and D. D. Russell	W½ of SW¼ of SW¼	27	103	49	17.75	1.764
G. T. Nyhus	(Except 5 acres next described) n½ of NE¼	28	103	49	29.75	6.911
E. G. Brende	5 acres being 10 rods N. and S. at East end, and no rods N. and S. at West end, extending across the North side of N½ of NE¼	28	103	49	3.00	0.363

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
G. T. Nyhus	S½ of NE¼	28	103	49	78.00	7.414
O. S. Thompson	(Except the East 19 acres) E½ of NW¼	28	103	49	60.24	7.449
G. T. Nyhus	East 19 acres of E½ of NW¼	28	103	49	18.76	2.089
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) W½ of NW¼	28	103	49	73.15	10.077
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) N½ of SW¼	28	103	49	70.90	9.405
O. S. Thompson	E.18½ acres of E½ of SW¼ of SW¼	28	103	49	17.80	2.452
Ole Peterson	W 1¾ acres of E½ of SW¼ of SW¼	28	103	49	1.70	2.343
Ole Peterson	(Except right-of-way of C. M. & St. P. Ry Co) W½ of of SW¼ of SW¼	28	103	49	12.95	1.837
Thomas S. Roberts	SE¼ of SW¼	28	103	49	39.00	5.225
311						
G. T. Nyhus	N. 3½ acres of N½ of SE¼	28	103	49	1.50	0.165
Erick O. Eggen	(Except the N 3½ acres) N½ of SE¼	28	103	49	76.50	7.153
Thomas S. Roberts	SW¼ of SE¼	28	103	49	39.00	4.29
Nils E. Eggen	SE¼ of SE¼	28	103	49	39.00	3.861
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. H. Thompson, Fred R. Thompson, Reuben V. Thompson, and Carl Thompson	Tract 1 of NE¼	29	103	49	30.00	4.188

Joseph G. Thompson	Tract 2 of NE¼	29	103	49	15.00	2.178
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) Tract 3 of NE¼	29	103	49	61.31	9.477
O. S. Thompson	N½ of SE¼	29	103	49	52.00	7.908
O. S. Thompson	N½ of SE¼	29	103	49	3.00	0.696
Ole Peterson	SE¼ of SE¼	29	103	49	29.00	4.374
Andrew J. Aasen	N½ of NE¼	32	103	49	67.20	9.399
Andrew J. Aasen	SW¼ of NE¼	32	103	49	37.00	4.477

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. Thompson, Fred R. Thompson, Mabel Thompson and Carl Thompson	N½ of SE¼ of NE¼	32	103	49	19.50	3.159
Joseph C. Thompson	S½ of SE¼ of NE¼	32	103	49	19.50	3.159
Andrew J. Aasen	E½ of NW¼	32	103	49	11.00	1.225
Thomas Hendrickson	E½ of SW¼	32	103	49	20.00	2.640
James L. Finnegan	N½ of SE¼	32	103	49	76.00	11.232
John Finnegan	SW¼ of SE¼	32	103	49	36.00	4.752
Margaret L. Finnegan	SE¼ of SE¼	32	103	49	37.20	5.534
312						
Martha R. Roberts, John H. Roberts and Thomas S. Roberts	NE¼ of NE¼	33	103	49	39.00	3.861
Thomas S. Roberts	NW¼ of NE¼	33	103	49	39.00	4.719
Gurine Peterson	S½ of NE¼	33	103	49	80.00	8.800
Thomas S. Roberts	NE¼ of NW¼	33	103	49	39.00	5.792
Andrew J. Aasen	(Except right-of-way of C. M. & St. P. Ry. Co) NW¼ of NW¼	33	103	49	33.10	4.831
Bertha Peterson, Alice C. Peterson, John O. Thompson, Wm. H. Thompson, Fred Thompson, Reuben V. Thompson, and Mabel Thompson and Carl Thompson	(Except right-of-way of C. M. & St. P. Ry Co) SW¼ of NW¼	33	103	49	33.00	4.967

Gurine Peterson	SE¼ of SW¼	33	103	49	40.00	5.94
Anne O. Haugen, Amanda E. Haugen and Jennie A. Haugen	E½ of SW¼	33	103	49	79.00	11.732
Joseph C. Thompson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SW¼	33	103	49	33.00	5.000
Thomas Hendrickson and B. B. Hendrickson	(Except right-of-way of C. M. & St. P. Ry Co.) SW¼ of SW¼	33	103	49	32.10	4.863
Gurine Peterson	N½ of SE¼	33	103	49	80.00	8.800
Gurine Peterson	SW¼ of SE¼	33	103	49	39.00	4.719

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Gurine Peterson	SE¼ of SE¼	33	103	49	39.00	3.861
Martha K. Roberts, John H. Roberts and Thomas S. Roberts	NW¼ of NW¼	34	103	49	20.75	2.061
Gurine Peterson	SW¼ of NW¼	34	103	49	21.00	2.079
313						
Gurine Peterson	W½ of SW¼	34	103	49	35.50	3.536
Lars Simonson	SW¼ of SW¼	29	104	49	6.87	0.781
C. R. Mattern	SE¼ of SW¼	29	104	49	12.67	1.394
John M. Bruaas	(Except right-of-way of C. M. & St. P. Ry Co) S½ of SE¼	29	104	49	14.00	1.540
Lars Simonson	E½ of NE¼	31	104	49	37.00	5.088
Hans Nelson	SW¼ of NE¼	31	104	49	20.00	2.888
Lars Simonson	SE¼ of NW¼	31	104	49	11.67	1.926
P. G. Thompson	NE¼ of SW¼	31	104	49	32.85	5.421
Ole L. Mule	S½ of SW¼	31	104	49	19.60	3.234
P. G. Thompson	SE¼ of SW¼	31	104	49	35.18	5.805
P. M. Thompson	NE¼ of SE¼	31	104	49	39.00	4.978
Julie L. Moe and Julie L. Hustoft	NW¼ of SE¼	31	104	49	39.82	5.476
Oluf N. Lyng	E½ of SW¼ of SE¼	31	104	49	19.50	2.682
P. G. Thompson	W½ of SW¼ of SE¼	31	104	49	19.32	2.657
Oluf N. Lyng	SE¼ of SE¼	31	104	49	38.00	4.717
John M. Bruaas	(Except the right-of-way of C. M. & St. P. Ry Co.) N½ of NE¼	32	104	49	49.00	3.300

Mali P. Langness	(Except right-of-way of C. M. & St. P. Ry Co) S½ of NE¼	32	104	49	50.00	5.500
Mali P. Langness	E½ of NW¼	32	104	49	53.00	5.968
Lars Simonson	W½ of NW¼	32	104	49	53.00	7.013
Mali P. Langness	N½ of SW¼	32	104	49	78.00	8.580
Randi A. Floren	SW¼ of SW¼	32	104	49	38.00	4.279
Columbia Creamery Co.	A tract as described in Book 59 of Deeds, Page 70, in SE¼ of SW¼	32	104	49	.11	0.012

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Mrs. M. O. Nyhus	(Except the Tract last above described) SE¼ of SW¼	32	104	49	36.00	3.960
Mali P. Langness	(Except right-of-way of C. M. & St. P. Ry Co) N.W¼ of SE¼	32	104	49	17.93	1.972
A. J. Pettingill	The West 500 ft. of Tract 9 of SE¼	32	104	49	1.73	0.190
A. J. Pettingill	(Except that part in St. Oluf Mill Tract as shown in Book 5 of Plats, page 63) Tract 3 of SE¼	32	104	49	7.29	0.802
Wm. J. Milne	That St. Oluf Mill Tract as described in Book 5 of Plats, page 63, being part of Tracts 2, 3, and 9 of SE¼	32	104	49	4.37	.4807

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. L. Ferguson	SW¼ of NE¼	24	101	50	32.32	3.555
C. L. Ferguson	SE¼ of NE¼	24	101	50	38.50	4.235
John Johnson	SE¼ of NW¼	24	101	50	12.64	1.390
Chas. L. Ferguson	SE¼ of NW¼	24	101	50	12.64	1.390
Ed Clark	NE¼ of SW¼	24	101	50	5.30	0.583
M. L. Fusselman	SE¼ of SW¼	24	101	50	3.31	0.364
Geo. Parsons	NE¼ of NE¼	25	101	50	40.00	4.400
Geo. Parsons	NW¼ of NE¼	25	101	50	40.00	4.400
Harry A. Chetham	SW¼ of NE¼	25	101	50	40.00	4.400
Harry A. Chetham	SE¼ of NE¼	25	101	50	40.00	4.400

Geo. A. Parsons	NE¼ of NW¼	25	101	50	12.64	1.390
Harry A. Chetham	SE¼ of NW¼	25	101	50	12.30	1.353
Harry A. Chetham	NE¼ of SE¼	25	101	50	40.00	4.400
315						
Harry A. Chetham	NW¼ of SE¼	25	101	50	40.00	4.400
Harry A. Chetham	W½ of SW¼ of SE¼	25	101	50	20.00	2.200
Harry A. Chetham	SE¼ of SE¼	25	101	50	40.00	4.400
Johnson Bros. Land Co.	E½ of SW¼ of SE¼	25	101	50	20.00	2.200
Harry A. Chetham	NE¼ of SW¼	25	101	50	16.78	1.845
G. A. Castle	SE¼ of SW¼	25	101	50	8.23	0.905
Ludwig Seubert	NE¼ of NE¼	36	101	50	40.00	4.400
Ludwig Seubert	NW¼ of NE¼	36	101	50	36.47	4.011
Dennis & Dennis	SE¼ of NE¼	36	101	50	27.54	3.029
Dennis & Dennis	SW¼ of NE¼	36	101	50	4.10	0.451
John DeBok	NW¼ of SW¼	31	101	49	30.05	3.305
Wm. H. Lyon	SW¼ of SW¼	31	101	49	4.86	0.534
John DeBok	SW¼ of NW¼	31	101	49	40.00	4.400
John DeBok	NW¼ of NW¼	31	101	49	38.23	4.205
Roger L. Dennis	Tract 1	31	101	49	6.63	0.729
Roger L. Dennis	Tract 2	31	101	49	2.03	0.223
Roger L. Dennis	Tract 3	31	101	49	13.31	1.467

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Roger L. Dennis	Tract 4	31	101	49	15.54	1.709
Roger L. Dennis	Tract 5	31	101	49	30.47	3.351
Roger L. Dennis	Tract 6	31	101	49	5.13	0.564
Roger L. Dennis	Tract 7	31	101	49	4.76	0.523
Roger L. Dennis	Tract 8	31	101	49	10.34	1.137
Roger L. Dennis	Tract 12	31	101	49	9.83	1.081
Roger L. Dennis	Tract 13	31	101	49	13.29	1.461
Roger L. Dennis	Tract 14	31	101	49	25.13	2.764
Roger L. Dennis	Tract 15	31	101	49	9.81	1.079
Roger L. Dennis	Tract 16	31	101	49	8.30	0.931
Roger L. Dennis	Tract 17	31	101	49	21.80	2.398

Roger L. Dennis	Tract 18	31	101	49	2.50	0.275
Roger L. Dennis	Tract 19	31	101	49	13.08	1.438
316						
Roger L. Dennis	Tract 20	31	101	49	17.03	1.873
Roger L. Dennis	Tract 21	31	101	49	12.03	1.323
Roger L. Dennis	Tract 22	31	101	49	10.02	1.102
Geo. Henderson	S½ of SW¼ of SW¼	32	101	49	16.80	1.848
Thos. Quigley	NW¼ of SW¼ and N½ of SW¼ of SW¼	32	101	49	36.76	2.573
Frank Corey and F. A. Ayers—	S½ of SE¼ of SW¼	32	101	49	12.40	1.364
Joe Seubert	N½ of SE¼ of SW¼ and NE¼ of SW¼	32	101	49	45.30	3.171
Pauline Zetlitz	Except Plat of Hazelville, SE¼	32	101	49	72.05	6.484
Norman O. Hamlin	Lot 2 of S½ of NE¼	32	101	49	28.00	2.520
Norman O. Hamlin	Lot 3 of S½ of NE¼	32	101	49	2.65	0.291
Arne Zetlitz	Lot 4 of S½ of NE¼	32	101	49	7.20	0.504
Wm. Jones	Lots 1, 2, 3 and 4 of Plat of Hazelville, SE¼	32	101	49	3.70	0.407
J. Walkins and C. S. McDonald	Lot 28 of Walkins & McDonald's Plat of W½ of NW¼	33	101	49	23.10	2.541

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
J. Walkins and C. S. McDonald	Lot 27 of Walkins & McDonald's Plat of W½ of NW¼	33	101	49	17.00	1.870
Chas. Eckert	E½ of NW¼	33	101	49	49.74	5.471
Oscar Harpel	NW¼ of SW¼	33	101	49	17.35	1.388
G. B. Tuthill	All lying South of River in NE¼	33	101	49	16.22	1.784
317						
Julius Kuh	All lying North of River in NE¼	33	101	49	70.50	7.755
A. W. Tuthill	N½ of NW¼	34	101	49	24.36	2.679
Chas. Eckert	SW¼ of SW¼	27	101	49	15.58	1.713
Chas. Eckert	SE¼ of SW¼	27	101	49	24.60	2.904
Clark Coats Estate	NE¼ of SW¼	27	101	49	30.30	3.333
Clark Coats Estate	NW¼ of SE¼	27	101	49	20.90	2.299

Clark Coats Estate	SE¼ of NW¼	27	101	49	10.55	1.160
Clark Coats Estate	SW¼ of NE¼	27	101	49	27.63	3.039
Clark Coats Estate	NW¼ of NE¼	27	101	49	14.17	1.558
Clark Coats Estate	SW¼ of SE¼	22	101	49	28.58	3.143
Clark Coats Estate	NW¼ of SE¼	22	101	49	8.50	0.935
Clark Coats Estate	NE¼ of SW¼	22	101	49	21.50	2.365

Name of Owner	Description	Lot	Block	Proportion of Benefit
Town of Renner				
Leonard Renner	Lots 1, 2, 3, 4, 5, 6, 7 and	8		0.094
Olson's Addition to Renner				
Jonas Olson		1		0.012
H. W. Ross Lumber Co.	Lots 2, 3, and	4		0.033
Jonas Olson	Lots 5 to 13, inclusive			0.101
H. W. Ross Lumber Co.	Lots 14, 15, 16, 17, 18 and	19		0.062
Jonas Olson	Lots 20, 21, 22, 23 and	24		0.051
Berwick Addition to Sioux Falls.				
Grant Lines	Lot 1 and	2	1	0.05
Grant Lines		3	1	0.025
Grant Lines		4	1	0.025
Grant Lines	Lots 5 and	6	1	0.05
Grant Lines	Lots 7, 8, 9, 10, 11 and	12	1	0.15
318				
Security Savings Bank	Lots 1, 2, 3 and	4	2	0.10
Security Savings Bank	Lots 5, 6, 7, 8, 9, 10, 11 and	12	2	0.20
Frank C. Frizzel	Lots 1 and	2	3	0.05
E. N. Frizzell	Lots 3, 4, 5 and	6	3	0.10
Grant Lines	Lots 7 and	8	3	0.05
E. N. Frizzell	Lots 9 and	10	3	0.05
F. C. Frizzell	Lots 11 and	12	3	0.05
A. D. Horton			4	0.20
Elwin N. Potter			5	0.225
Security Savings Bank			6	0.083
F. L. Blackman	Lots 1 and	2	7	0.05
F. L. Blackman	Lots 7 and	8	7	0.05
F. L. Blackman	Lots 11 and	12	7	0.05
F. C. Frizzell	Lots 1, 2, 3 and	4	8	0.10
J. N. Weston	Lots 7 and	8	8	0.05

Name of Owner	Description	Lot	Block	Proportion of Benefit.
F. C. Frizzell	Lots 9 and	10	8	0.05
F. E. Payne		11	8	0.025
Security Savings Bank	Lots 1, 2, 3, 4, 5 and	6	9	0.15
Mathias Blumer		7	9	0.025
Security Savings Bank		8	9	0.025
Security Savings Bank	Lots 9, 10, 11 and	12	9	0.10
J. N. Weston	Lots 1 and	2	10	0.10
J. N. Weston	Lots 10, 11 and	12	10	0.075
State of South Dakota	East Half of		11	0.041
State of South Dakota	Lots 1, 2, 3, 4, 5, 6, 7, 8 and	9	12	0.225
State of South Dakota	Lots 10, 11 and	12	12	0.075
State of South Dakota	Lots 1, 2, 3, 4, 5 and	6	13	0.113
Elwin N. Potter	Lots 7, 8, 9, 10, 11 and	12	13	0.15
State of South Dakota			14	0.175
Security Savings Bank			15	0.30
319				
Grant Lines	Lots 1 and	2	16	0.05
Grant Lines		3	16	0.025
Grant Lines		4	16	0.025
Grant Lines		5	16	0.025
Grant Lines		6	16	0.025
Grant Lines	Lots 7, 8, 9, 10, 11 and	12	16	0.15
W. C. Archer	Lots 1 and	2	17	0.05
Security Savings Bank	Lots 3 and	4	17	0.05
Dorothy Golden	Lots 5 and	6	17	0.025
Dorothy Golden	Lots 7, 8, 9 and	10	7	0.05
W. C. Archer	Lots 11 and	12	17	0.025
Sophia Krull	Lots 1, 2 and	3	18	0.037
Sophia Krull		4	18	0.12
Sophia Krull	Lots 5 and	6	18	0.12
Sophia Krull	Lots 10 and	11	18	0.024
C. L. Norton		12	18	0.12
Name of Owner	Description	Lot	Block	Proportion of Benefit.
State of South Dakota			19	0.20
State of South Dakota			20	0.31

State of South Dakota	Lots 1, 2 and 3	4	21	0.105
State of South Dakota	Lots 5 and 6	6	21	0.05
State of South Dakota	Lots 7, 8, 9, 10, 11 and	12	21	0.15
State of South Dakota			22	0.041
Security Savings Bank	Lots 1, 2 and	3	24	0.075
Security Savings Bank		4	24	0.025
J. C. Boynton		5	24	0.025
L. J. Modde		6	24	0.025
M. W. Potter	Lots 7 and	8	24	0.05
Elwin N. Potter		9	24	0.025
Elwin N. Potter	Lots 10, 11 and	12	24	0.075
E. B. Mallet			25	0.02
State of South Dakota			27	0.033
State of South Dakota	Lots 1, 2 and	3	28	0.075
320				
State of South Dakota	Lots 4, 5, 6, 7 and	8	28	0.125
State of South Dakota			29	0.02
State of South Dakota			30	0.02
Security Savings Bank		2	31	0.012
Jas. Kennedy		3	31	0.025
Security Savings Bank		4	31	0.025
Security Savings Bank	Lots 5 and	6	31	0.05
Security Savings Bank	Lots 7 and	8	31	0.05

Brookings' Addition to Sioux Falls.

Wigant Ludewig	Lots 4, 5, 6, 7, 8, 9, 10, 12 and	13	5	0.325
Hans C. Ruvald	Lots 1, 2 and	3	11	0.075
Hans Ruvald	Lots 1 and	2	12	0.065
H. Ruvald	Lots 3, 4 and	5	12	0.015
Hans C. Ruvald		6	12	0.032

Brooks' Addition to Sioux Falls.

Grant Lines	Lots 14, 15, 16 and	17	1	0.075
Name of Owner	Description	Lot	Block	Proportion of Benefit

Bunker's Addition to Sioux Falls.

Hans Ruvald	Lots 1, 2, 3, 4, 5, 6 and	7	1	0.162
N. S. Johnson		8	1	0.02
Geo. C. Hull		9	1	0.02
Hans Ruvald	Lots 10, 11, 12, 13 and	14	1	0.10

Hans Ruvald		15	1	0.02
Hans Ruvald	Lots 16 and	17	1	0.04
Hans Ruvald	Lots 18, 19 and	20	1	0.06
Hans Ruvald		1	2	0.02
Hans Ruvald	Lots 2, 3, 4, 5, 6 and	7	2	0.06
Joseph Elott	Lots 8 and	9	2	0.02
Hans Ruvald		10	2	0.02
Hans Ruvald		11	2	0.02
O. C. Cadwell		12	2	0.02
321				
Hans Ruvald	Lots 13, 14, 15, 16, 17, 18, 19 and 20		2	0.15

Central Park Addition to Sioux Falls.

Chas. Dailey	Lots 1 and	2	1	0.04
Hans Ruvald	Lots 3 and	4	1	0.04
J. H. Fernyhough		5	1	0.02
F. T. Williams		6	1	0.02
Bessie Haas	Lots 7 and	8	1	0.04
J. H. Fernyhough	Lots 9 and	10	1	0.04
Benjamin F. Barnes	Lots 11, 12 and	13	1	0.06
J. H. Fernyhough	Lots 14, 15 and	16	1	0.06
John P. Shoemaker			2	0.30
Frances G. Carpenter			3	0.30
Henry D. Norris			4	0.30
Diantha A. Hurd			5	0.30
Henrietta Levinger			8	0.30
Diantha A. Hurd			12	0.30
Mariette Blomiley			13	0.30

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Frances G. Carpenter			14	0.30
Clara L. Hambright	Lots 1, 2, 3 and	4	15	0.08
Abe Davison and Sippie Davison	Lots 5, 6, 7 and	8	15	0.08
Michael Marousek	Lots 9, 10, 11 and	12	15	0.08
Clara L. Hambright	Lots 13, 14, 15 and	16	15	0.08
Frances G. Carpenter			16	0.30
Frances G. Carpenter			17	0.30

Anne E. Ploog			18	0.30
Frances G. Carpenter			19	0.30
Frances G. Carpenter and G. T. Greeley	Lots 1, 2, 3 and	4	20	0.08
Nora Connell	Lots 5, 6, and 7 and	8	20	0.08
F. G. Carpenter and G. T. Greeley	Lots 9, 10, 11, 12, 13, 14, 15 and	16	20	0.16
322				
W. R. Timpe and H. L. Schroeder	Lots 1, 2 and	3	21	0.06
F. L. Blackman		4	21	0.02
Mattie M. Hanson	Lots 5, 6, 7 and	8	21	0.08
F. L. Blackman	Lots 9 and	10	21	0.04
F. L. Blackman		11	21	0.02
F. L. Blackman		12	21	0.02
D. J. Carpenter		13	21	0.02
W. R. Timpe and H. L. Schroeder	Lots 14, 15 and	16	21	0.06
Mary C. Brace			30	0.30
F. L. Blackman			31	0.30
Frances G. Carpenter	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and	14	32	0.28
May Sanders and May B. Sanders	Lots 15 and	16	32	0.04
Earl H. Roster			33	0.30
Frances G. Carpenter			40	0.30
Frances G. Carpenter			48	0.30
George H. Brace			49	0.30

Name of Owner	Description	Lot	Block	Proportion of Benefit.
A. Gale, C. A. Greeley, C. C. Carpenter, and G. H. Brace	Outlet "A"			0.075
Geo. H. Brace and James Jameson, Trustees,	Outlet "B"			0.075
Geo. H. Brace and James Jameson, Trustees	Outlet "C"			0.075

Englewood Addition to Sioux Falls.

Marcus Russell		1	0.225
William Fuller		2	0.225
Marcus Russell		3	0.225

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nnie A. W. Nock			4	0.225
mes B. Adams			12	0.225
larcus Russell			13	0.225
lark M. Powers			14	0.225
larcus Russell			15	0.225
larcus Russell			16	0.225
larcus Russell			17	0.225
ames B. Adams			18	0.225
. I. Russell		1	19	0.015
. I. Russell		2	19	0.015
I. T. Botsford	Lots 3 and	4	19	0.03
ddie B. Woodworth	Lots 5, 6, 7 and	8	19	0.06
Iarcus Russell	Lots 9, 10 and	11	19	0.045
arah Walker		12	19	0.015
lice M. Steinbach		13	19	0.015
illie M. Darrow	Lots 14, 15 and	16	19	0.045
. L. Blackman	Lots 1, 2, 3 and	4	20	0.06
. I. Russell		5	20	0.015
Iarcus Russell		6	20	0.015
. I. Russell	Lots 7 and	8	20	0.03
Iarcus Russell	Lots 9, 10, 11, 12, 13, 14, 15 and	16	20	0.12
. I. Russell		1	21	0.015

Name of Owner	Description	Lot	Block	Proportion of Benefit.
S. D. Kennedy	Lots 2, 3, 4 and	5	21	0.06
F. I. Russell		6	21	0.015
M. J. Tinkham	Lots 7 and	8	21	0.03
F. I. Russell	Lots 9, 10, 11, 12, 13 14, 15 and	16	21	0.12
Marcus Russell			22	0.225
Marcus Russell			27	0.225
Marcus Russell			28	0.225

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Marcus Russell			29	0.225
Edward A. Benson and Charles E. Anderton,			30	0.225
Marcus Russell			31	0.225

Marcus Russell	Lots 1, 2, 3 and	4	32	0.06
F. I. Russell	Lots 5 and	6	32	0.03
James Martin	Lots 7 and	8	32	0.03
E. T. Newhall	Lots 9, 10 and	11	32	0.045
Joe Kirby		12	32	0.015
Marcus Russell	Lots 13, 14, 15 and	16	32	0.06

Harrison Addition to Sioux Falls.

A. P. Burtch	Lots 5, 6 and	7	16	0.075
Porter P. Peck			17	0.225
Porter P. Peck			18	0.225
O. C. Potter	Lots 1, 2 and	3	19	0.06
Oscar C. Potter	Lots 4, 5, 6, 7, 8, 9, 10, 11 and	12	19	0.18
Lester D. Sharon			20	0.225
G. H. Grebel			21	0.225
G. H. Grebel	Lots, 2, 3, 4, 5, 6, 7 and	8	22	0.14
W. L. Oaks			25	0.225
G. H. Grebel			26	0.225
G. H. Grebel			27	0.225
G. H. Grebel			28	0.225
G. H. Grebel			29	0.225

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Oscar C. Potter			30	0.225
Porter P. Peck			31	0.225
Porter P. Peck			32	0.225

325 Lincoln Park Addition to Sioux Falls.

P. P. Peck	Lots 1 and	2	3	0.20
P. P. Peck	Lots 3 and	4	3	0.20
P. P. Peck	Lots 5 and	6	3	0.20

McClellan's Second Addition to West Sioux Falls.

John McClellan Estate	Lots 1, 2, 3, 4, 5, 6, 7, 8, and	9	29	0.27
G. T. Blackman, Administrator of John McClellan Estate	Lots 17 and	18	29	0.06
M. O. Thompson Estate	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and	14	30	0.275
M. O. Thompson Estate		15	30	0.006

Meredith's First Addition to Sioux Falls.

F. L. Blackman			1	0.225
Herbert C. Everson and Hattie A. Everson			4	0.225
Chas. A. Scott	Lots 1, 2 and	3	8	0.06
R. E. Bach and Fred Diver	Lots 4, 5 and	6	8	0.06
Sam Smith		7	8	0.02
J. H. Fernyhough	Lots 8 and	9	8	0.04
R. E. Bach and Fred Diver	Lots 10, 11 and	12	8	0.06
Melvin J. Brooks			9	0.225
S. J. Stoneall			16	0.225
Mariette Blomiley			17	0.225
Soren Monson			18	0.225
Soren Monson			23	0.225
Marion Chase			24	0.225
Thos. Scanlon			25	0.225
Thos. Scanlon			26	0.225
W. H. Lyon			31	0.225

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Name of Owner	Description	Lot	Block	Proportion of Benefit.
Thos. Scanlon	Lots 1, 2, 3, 4, 5 and	6	32	0.12
Thos. Scanlon	Lots 7, 8, 9, 10, 11 and	12	32	0.12

Meredith's Second Addition to Sioux Falls.

E. J. Sharon			33	0.225
E. J. Sharon			34	0.18
Horatio A. Burtch			37	0.14
A. G. Erskine			38	0.225
A. G. Erskine	Lots 1, 2 and	3	39	0.06
A. G. Erskine	Lots 4, 5, 6, 7, 8 and	9	39	0.12
A. G. Erskine	Lots 10, 11 and	12	39	0.065
John E. Batheal			40	0.225
A. G. Erskine			43	0.225
Horatio A. Burtch			44	0.225
F. L. Blackman and E. J. Sharon			45	0.14

F. L. Blackman and E. J. Sharon			46	0.1
F. L. Blackman and E. J. Sharon			47	0.225
Horatio A. Burtch			48	0.115
W. H. Lyon			56	0.075
F. L. Blackman and E. J. Sharon			57	0.20
F. L. Blackman and E. J. Sharon			58	0.16
I. E. Kosier			59	0.06
Carrie Lundell			60	0.115
I. E. Kosier			74	0.18
E. R. Loucks	Lots 1 and	2	75	0.035
I. E. Kosier	Lots 4, 5, 6, 7, 8, 9, 10, 11 and	12	75	0.165

327 Millard Park Addition to Sioux Falls.

Porter P. Peck			1	0.135
Porter P. Peck	Lots 10, 11 and	12	34	0.035

Name of Owner	Description	Lot	Block	Proportion of Benefit.

North Boulevard Addition to Sioux Falls.

Geo. H. Brace			4	0.225
Mary C. Brace			6	0.225
Mary C. Brace			9	0.225
Mary C. Brace			13	0.225
Mary C. Brace			29	0.225
Geo. H. Brace			34	0.225
Chas. Brigham, John C. Spofford and Geo. H. Brace			35	0.225
Mary C. Brace			49	0.225
Mary C. Brace			50	0.225
Mary C. Brace			61	0.225

North Park Addition to Sioux Falls.

Lilly E. Braley	Lots 1 and	2	1	0.04
James A. Guest	Lots 3, 4, 5 and	6	1	0.08
Hans Ruvald	Lots 7 and	8	1	0.04
Hans Ruvald	Lots 9 and	10	1	0.04
Hans Ruvald	Lots 1, 2, 3, 4, 5, 6 and	7	2	0.14
Hans Ruvald		8	2	0.02

John Kadinger	Lots 9, 10, 11 and	12	2	0.08
Hans Ruvald		13	2	0.02
Hans Ruvald	Lots 14, 15 and	16	2	0.06
Hans Ruvald		1	3	0.02
Hans Ruvald		2	3	0.02
328				
Hans Ruvald		3	3	0.02
Hans Ruvald	Lots 4, 5, and	6	3	0.06
H. Ruvald	Lots 7, 8 and	9	3	0.06
H. Ruvald		10	3	0.02
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	3	0.12
H. Ruvald			4	0.30
Emma J. Nelson	Lots 1 and	2	5	0.04
Name of Owner.	Description	Lot	Block	Proportion of Benefit.
Emma J. Nelson	Lots 3, 4, 5, 6, 7 and	8	5	0.12
Emma J. Nelson	Lots 9, 10, 11, 12, 13, 14, 15 and	16	5	0.16
Hans Ruvald	Lots 1, 2, 3, 4 and	5	6	0.10
John Frederickson, Peter Holland and Hans Ruvald		6	6	0.02
Hans Ruvald	Lots 7 and	8	6	0.04
Hans Ruvald	Lots 9 and	10	6	0.08
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	6	0.16
Henry Teimeier	Lots 1 and North Half of	2	7	0.03
F. W. Pieper	Lots 3 and South half of	2	7	0.03
F. W. Pieper	Lots 4 and	5	7	0.04
F. W. Pieper		6	7	0.02
F. W. Pieper	Lots 7 and	8	7	0.04
E. C. Lord		9	7	0.02
H. Ruvald	Lots 10 and	11	7	0.04
Hans Ruvald	Lots 12, 13, 14, 15 and	16	7	0.10
Hans Ruvald	Lots 1 and	2	8	0.04
Hans Ruvald	Lots 3, 4 and	5	8	0.06
H. Ruvald	Lots 6 and North Half of	7	8	0.03
329				
Hans Ruvald	Lots 8 and South Half of	7	8	0.03
Lena H. Bessler		1	10	0.02
F. H. Bessler		2	10	0.02

P. B. Hunt	Lots 3, 4 and	5	10	0.06
J. M. Warren	Lots 10, 11 and South Half of	12	10	0.05
Lena Bessler	Lots 13 and North Half of	12	10	0.03
Hans Ruvald	Lots 1 and	2	11	0.04
Louise Guest Estate	Lots 3 and	4	11	0.04
Hans Ruvald	Lots 5, 6 and	7	11	0.06
H. Ruvald		8	11	0.02
Peter P. Simson	Lots 1 and	2	12	0.04
Hans Ruvald		3	12	0.02
Name of Owner	Description	Lot	Block	Proportion of Benefit.
H. Ruvald		4	12	0.04
Hans Ruvald	Lots 5, 6, and	7	12	0.06
H. Ruvald		8	12	0.02

North Park Second Addition to Sioux Falls.

Julia W. Anderson			1	0.30
Hans Ruvald			2	0.30
Hans Ruvald			3	0.40
Ira Cox			4	0.30
Hans Ruvald			5	0.30
Hans Ruvald			6	0.30
Theron S. Swain and Henry E. Shaw			7	0.30
Hans Ruvald			8	0.30

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Hans Ruvald			9	0.30
Hans Ruvald			10	0.30
Ira Cox			11	0.30
Julia W. Anderson	Lots 1 to 16, inclusive		12	0.30
Hans Ruvald	Lots 17 and	18	12	0.05
Julia W. Anderson	Lots 19, 20, 21, 22, 23 and	24	12	0.15
Hans Ruvald			13	0.30
Dan Hamway	Lots 1, 2 and	3	14	0.063
Thomas E. Powers	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12 and	13	14	0.275
Dan Hamway	Lots 14, 15 and	16	14	0.063
Hans Ruvald			15	0.40
Geo. J. Fullerton	Lots 1 and	2	16	0.05

S. Olney		3	16	0.02
S. Olney		4	16	0.02
S. Olney		5	16	0.02
H. Ruvald		6	16	0.02
H. Ruvald	Lots 7 and	8	16	0.04
Edward H. Story		9	16	0.02
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Hans Ruvald		10	16	0.02
Hans Ruvald		11	16	0.02
Hans Ruvald		12	16	0.02
Hans Ruvald		13	16	0.02
W. W. Ormiston		14	16	0.02
Hans Ruvald		15	16	0.02
Hans Ruvald		16	16	0.02
Hans Ruvald	Lots 1 and	2	17	0.04
Hans Ruvald	Lots 3, 4, 5, 6, 7 and	8	17	0.12
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Hans Ruvald	Lots 9 and	10	17	0.04
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	17	0.12
H. Ruvald	Lots 1 and	2	18	0.04
Hans Ruvald		3	18	0.02
Hans Ruvald		4	18	0.02
Hans Ruvald	Lots 5 and	6	18	0.04
S. E. White		7	18	0.02
Hans Ruvald	Lots 8, 9, 10, 11, 12 and	13	18	0.12
Hans Ruvald	Lots 14, 15 and	16	18	0.06
Hans Ruvald			18	.03
Hans Ruvald			20	0.30
H. Ruvald	Lots 1, 2 and	3	21	0.06
H. Ruvald		4	21	0.02
H. Ruvald		5	21	0.02
H. Ruvald		6	21	0.02
H. Ruvald	Lots 7 and	8	21	0.04
Hans Ruvald	Lots 9, 10, 11, 12, 13, 14, 15 and	16	21	0.16
Hans Ruvald	Lots 1, 2, 3, 4, 5 and	6	22	0.12

H. Ruvald		7	22	0.02
Hans Ruvald		8	22	0.02
H. Ruvald	Lots 9 and	10	22	0.04
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	22	0.12
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Hans Ruvald			23	0.30
Wigant Ludewig			24	0.45

Sioux Falls Improvement Co's Addition to Sioux Falls.

S. E. Reinius			89	0.20
Soo Valley Granite Co.	Lots 1, 2, 3, and	4	91	0.046
Sarah Foster	Lots 12, 13 and	14	91	0.025
J. Reichard and J. W. Reichard	Lots 15 and	16	91	0.02

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Moses Hawkins		17	91	0.012
James W. Bowles		18	91	0.012

Summit Addition to Sioux Falls.

Harry J. Brown		1	17	0.025
Soo Valley Investment & Construction Co.		2	17	0.025
Anna Hillner	Lots 23, 24, 25 and	26	17	0.10
F. L. Blackman		1	18	0.025
Margaret M. Matthews and Hannah L. Matthews		2	18	0.025
Alex Matthews		3	18	0.025
Bertha M. Ferguson		4	18	0.025
F. L. Blackman	Lots 5, 6 and	7	18	0.025
J. B. Fearon		8	18	0.025
J. H. Fernyhough		9	18	0.025
F. L. Blackman	Lots 16, 17, 18 and	19	18	0.10
A. W. Ibach		20	18	0.025
F. L. Blackman	Lots 21, 22, 23, 24, 25 and	26	18	0.15

West Park Addition to Sioux Falls.

David R. Rector	Lots 1 and	2	1	0.05
Augusta C. Fowler	Lots 14 and	15	1	0.05

Sioux Falls Trust Co.		16	1	0.025
Sioux Falls Trust Co.	Lots 17, 18, 19 and	20	1	0.10
Sioux Falls Trust Co.	Lots 1, 2, 3, and	4	2	0.075
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Sioux Falls Trust Co.	Lots 5, 6 and	7	2	0.075
Sioux Falls Trust Co.		8	2	0.025
Sioux Falls Trust Co.	Lots 9, 10, 11, 12 and	13	2	0.125
Sioux Falls Trust Co.		14	2	0.025
333				
Board of Education of the City of Sioux Falls	Lots 15, 16, 17 and	18	2	0.075
Sioux Falls Trust Co.	Lots 19 and	20	2	0.025
Sioux Falls Trust Co.	Lots 13 and	14	3	0.05
Sioux Falls Trust Co.	Lots 15 and	16	3	0.05

J. L. Phillips Addition to Sioux Falls.

Manchester Biscuit Co.	Lots 1, 2, 3, and	4	25	0.833
Chicago, Milwaukee & St. Paul Ry Co.,	Lots 5, 6, 7, 8 and	9	25	2.291
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 10, 11, 12, 13, 14, 15, 16, 17 and	18	24	3.094
Geo. B. Cone	Lots 1 and	2	24	0.480
F. M. Mills		3	24	0.229
W. I. Thompson and J. W. Wadden		4	24	0.229
Madison Mill & Grain Co.		5	24	0.229
W. I. Thompson		6	24	0.229
Rock Island Plow Co.	Lot 7 and North Half of	8	24	0.343
Luella A. Jones	Lot 9 and South Half of	8	24	0.343
W. K. Van Brunt	Lots 1, 2 and North Half of	3	23	0.859
Van Brunt-Overland Co.	South Half of Lot 3 and North Half of	4	23	0.480
Geo. H. Brace	South Half of Lot 4, and Lots 5 and	6	23	1.145
J. N. Weston		7	23	0.572
German Savings Bank		8	23	0.687
Joe Tosini	North Half of	9	23	0.480
Carl Look	South Half of	9	23	0.572
G. Kiriakedes		1	22	1.145
Inez Van Eps		2	22	1.145

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Name of Owner	Description	Lot	Block	Proportion of Benefit.
Lacotah Building Co.	Lot 3 and north half of	4	22	1.719
Frank Angel	South half of	4	22	0.572
Inez C. Van Eps		5	22	1.145
Mary Zentel		6	22	1.145
E. B. Northrup		7	22	1.145
R. F. Pettigrew		8	22	1.145
M. C. Smith		9	22	1.145
H. A. Homan	Lot 17 and North Half of	16	21	6.874
E. L. Smith	Lot 15 and South half of	16	21	1.489
L. A. Kelley	Lots 13 and	14	21	1.375
J. W. Jones		12	21	0.480
W. Braley and Geo T. Blackman	West 100 ft. of Lots 10 and	11	21	0.480
J. W. Jones	East 50 feet of lots 10 and	11	21	0.229
J. P. Edmison	Undivided ½ lots 4, 5 and	6	26	3.437
E. L. Smith	Undivided ½ lots 4, 5, and	6	26	3.437
Chicago, Rock Island & Pacific Ry Co.	West 44 feet of Lots 7, 8 and	9	26	0.412
H. T. Parmley	East 42 feet of West 86 Feet of Lots 7, 8, and	9	26	0.412
Pete Ellingson and John Ellingson	East 42 Feet of West 128 Feet of Lots 7, 8 and	9	26	0.412
P. Ellingson	East 22 feet of lots 7, 8, and	9	26	0.229
Koenig Realty Co.	Lots 10, 11 and	12	15	0.685
G. T. Greeley	North Half of Lot	13	15	0.115
Josephine Levinger	South Half of Lot	13	15	0.115
E. J. Daniels		14	15	0.229

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C. C. Bratrud		15	15	0.229
G. T. Bratrud	North Half of	16	15	0.115
F. Hyde	South Half of	16	15	0.115
Inez C. Van Eps	Lots 17 and	18	15	0.480

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Chas. Look and W. H. Look	Lot 10 and South Half of	11	14	0.344
John Tossini	North Half of	11	14	0.115

Wm. Reynolds		12	14	0.229
John McKee	Lot 13 and South Half of	14	14	0.344
G. H. Perry Estate	North Half of Lot 14 and lot	15	14	0.344
Chas. S. Lund		16	14	0.229
Wm. Tate	South Half of	17	14	0.115
G. L. Nadel	North Half of	17	14	0.115
Beach Parshall Realty Co.		18	14	0.229
Robert R. Plane		10	13	0.229
L. Koplow	Lot 11 and South half of	12	13	0.344
W. I. Thompson	North Half of Lot 12 and South 117 Feet of	13	13	0.688
F. J. Solari and S. J. Solari	North 33 Feet of	13	13	0.688
F. J. Solari and S. J. Solari		14	13	0.229
Pat Shannon	South Half of	15	13	0.115
A. M. Whitman	North Half of	15	13	0.115
Geo. W. Eagon	South Half of	16	13	0.115
C. O. Bailey	North Half of	16	13	0.115
Albert Anderson		17	13	0.229
Victor Anderson and Albert Anderson		18	13	0.229

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F. S. Emmerson Estate		1	21	0.344
Chas. Kaufmann	North Half of	2	21	0.172
G. T. Greeley	South Half of	2	21	0.172
E. L. Smith	North Half of	3	21	0.172
E. L. Smith	South Half of Lots 3 and Lot	4	21	0.515
E. B. Northrup		5	21	0.229
Will A. Beach	North Half of	6	21	0.114
A. K. Pay	South Half of	6	21	0.114

Name of Owner	Description	Lot	Block	Proportion of Benefit.
G. T. Greeley		6	21	0.229
S. K. Grigsby	South Half of	9	21	0.114
Wm. Carswell	North Half of	9	21	0.114

Burlington's Sub-Division of Lots 10 to 13. Block 26 of J. L. Phillips' Addition.

A. H. Stites	Lots 1, 2 and	3	26	2.750
Farley & Denton Co.		4	26	0.916
Brown Drug Co.	Lots 5, 6 and	7	26	2.750

Morningside Addition to Sioux Falls.

Howard Holden		1	3	0.022
Wm. Weslund	Lots 2 and	3	3	0.048
Caroline Langager		4	3	0.022
Laura A. Brown		5	3	0.022
David Vesper	Lots 8 and	9	3	0.048
F. I. Hardimon	Lots 10, 11, 12, 13 and	14	3	0.114

Gale's Addition to Sioux Falls.

Frank C. Hardimon	Lots 1, 2 and	3	25	0.343
Chicago, Rock Island & Pacific Ry. Co.	Lots 1, 2, 3, 4, 5 and	6	24	0.550
Anna Bakken	West 50 Feet of Lots 1 and	2	26	0.091
337				
Ludwig Seubert	East 100 feet of Lots 1 and	2	26	0.137

Morse's Addition to Sioux Falls.

Stephen Donahoe, Den Donahoe, Dan Donahoe, and Wm M. Donahoe	East Half of		1	0.480
Anna Barrett		7	1	0.069
Stephen Donahoe, Den Donahoe, Dan Donahoe and Wm. M. Donahoe	Lots 8, 9, 10 and	11	1	0.400

Millspaugh's Addition to Sioux Falls.

Chicago, Rock Island and Pacific Ry Co.	Lots 1 and	2	13	0.137
Girton-Adams Ice Co.	Lots 1, 2, 3, 4 and	5	14	0.412
P. O. Stiver	Lots 6, 7, 8, 9, 10, 11 and	12	14	0.641
Girton-Adams Ice Co.	Lots 13, 14, 15 and	16	14	0.321
Name of Owner	Description	Lot	Block	Proportion of Benefit.
P. O. Stiver	Lots 1 and	2	15	0.137
Girton-Adams Ice Co.	Lots 3, 4, 5 and	6	15	0.114
P. O. Stiver	Lots 8, 9, 10 and	11	15	0.366

Girton-Adams Ice Co.	Lots 12, 13, 14 and	15	15	0.344
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 16 and	17	15	0.183
Girton-Adams Ice Co.	Lots 10, 11 and	12	28	0.114
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 13, 14 and	15	28	0.275
P. O. Stiver	Lots 16, 17 and	18	28	0.175
P. O. Stiver	Lots 1, 2, 3, and	4	16	0.275
J. L. Brookings	Lots 13 and	14	16	0.137
P. O. Stiver	Lots 8, 9, 10, 11, 12, 13 and	14	27	0.412

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Daniels' Addition to Sioux Falls.

Susan Burke			4	0.480
Chicago, Milwaukee & St. Paul Ry. Co.			5	0.343
Girton-Adams Ice Co.	Blocks 12 and		13	0.916
Kittery Realty Co.	Blocks 10 and		11	1.031

Van Eps' Addition to Sioux Falls.

Joe Tosini	Lots 6, 7, 8, 9, 10, 11 and	12	2	0.229
Jos. Tosini	Lots 1, 2 and	3	1	0.137
Jos. Tosini	Lots 1, 2, 3, 4, and	5	2	0.229
Jos. Tosini	Lots 1, 2 and	3	3	0.069
Inez C. Van Eps	Lots 1, 2, 3, 4, 5, and	6	8	0.275
Inez C. Van Eps	Lots 10, 11 and	12	8	0.137
Inez C. Van Eps	Lots 1, 2, 3, 4, and	5	24	0.114
William Lackay		6	24	0.011
Inez C. Van Eps	Lots 1, 2, 3, 4, 5, 6, and	10	18	0.229
Inez C. Van Eps			19	0.069

Brookings & Edmunds' Addition to Sioux Falls.

Wm. H. Thomas	Lots 10, 11 and	12	31	0.685
Parlin & Orendorf Plow Co.	Lot 13 and South Half of	14	31	0.344
O. S. Jones Seed Co.	North Half of Lot 14 and South Half of	15	31	0.229
R. A. Wyman	North Half of	15	31	0.115
Jewett Bros. & Jewett	Lots 16, 17 and	18	31	0.685

Name of Owner	Description	Lot	Block	Proportion of Benefit.

Braley's Addition to Sioux Falls.

W. Braley		1	1	0.025
W. Braley	Lots 9, 10, 11, 12 and . .	13	1	0.125
W. Braley			2	0.425
W. Braley			3	0.475

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W. Braley	Lots 1, 2, 3, 4, 5, 6, and	7	4	0.175
C. R. Lewis	Lots 8, 9 and	10	4	0.075
W. Braley	Lots 11, 12, 13, 14, 15, 16, 17, 18, 19 and	20	4	0.25
W. Braley	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and	10	5	0.25
W. Braley	Lots 11, 12, 13 and	14	5	0.175
W. Braley	Lots 1, 2 and	3	6	0.125
Geo. F. Boyle	South 88 Feet of	4	6	0.050
W. Braley	North 44 Feet of	4	6	0.025
W. Braley	Lots 5, 6, 7 and	8	6	0.175
W. Braley			7	0.35
W. Braley			8	0.375
Lois W. Jellies		1	9	0.075
W. Braley	Lots 2, 3, 4, 5 and	6	9	0.375
W. Braley			10	0.50
W. Braley			11	0.50
W. Braley			12	0.625
W. Braley	Lots 1, 2, 3 and	4	13	0.10
Anna Vaghn		5	13	0.025
W. Braley	Lots 6, 7, 8, 9, 10, 11 and	12	13	0.175
H. W. Bullard		13	13	0.025

Name of Owner	Description	Lot	Block	Proportion of Benefit.
W. Braley	Lots 14 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and	30	13	0.425
W. Braley	Lots 1 and	2	14	0.05
W. Braley	Lots 3 and	4	14	0.05
W. Braley	Lots 25, 26, 27, 28, 29 and	30	14	0.15
W. Braley	Lots 1 and	2	15	0.025
W. Braley	Lots 26, 27, 28, 29 and	30	15	0.125

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Silver Park Addition to Sioux Falls.

Great Western Investment Co.	Blocks 1, 2, 3, 4 and	5	1.375
Charles N. Hare		7	0.165
F. R. Webber		8	0.275
F. O. Lyford	Blocks 10 and	24	0.357
Great Western Investment Co.	Blocks 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and	23	3.575
N. B. Turner		25	0.275
E. A. Flanders	Blocks 26 and	27	0.550
Great Western Investment Co.	Blocks 28, 29, 30, 31, 32, 33, 34, 35 and	36	2.475
Annie E. Skinner	Blocks 37 and	42	0.550
A. G. Holmes		38	0.275
David B. Stewart	Blocks 39, 40, 41 and	42	1.10
Great Western Investment Co.		43	0.247
Great Western Investment Co.	Blocks 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63 and	64	5.500

Unplatted Lands Situated in Sections 16, 21, and 22, Township 101, Range 49, Within the City of Sioux Falls.

Equitable Realty Company's Sub-division of Tract 1 of the Northwest Quarter of Section 16.

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Dakota Iron Store	Lot 2			1.145
Dakota Iron Store	Lot 3			1.145
Dakota Iron Store	Lot 4			0.480
International Harvester Co.	Lot 1			0.916
Dakota Iron Store	Lots 8 and 9			0.480
Equitable Realty Co.	Lot 5			1.375

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Chicago, Milwaukee & St. Paul Ry. Co.	Lot 6		1.833
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 7		1.833
Equitable Realty Co.	Lot 10		2.290

Equitable Realty Company's Sub-Division of Northeast Quarter of Northwest Quarter of Section 16.

Equitable Realty Co.	Lot 1	0.480
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 2	0.685
W. F. Hesse	Lot 3	1.375
Chicago, Milwaukee & St. Paul Ry. Co.	Depot Grounds on Southwest Quarter of Northwest Quarter, Section 16	2.062
Chicago, Milwaukee & St. Paul Ry. Co.	Tract 3 of Northwest Quarter, Section 16	0.685
Chicago, Milwaukee & St. Paul Ry. Co.	Tract 4 of Northwest Quarter Section 16	0.916
Edward Ellis	Tract 5 of Northwest Quarter, Section 16	0.229
Larabee Mills Co.	Lot 5 of Sioux Falls Light & Power Co.'s Sub-Division of the Northeast Quarter of Northwest Quarter, Section 16	2.00
Northern States Power Co.	Lot 4 of Sioux Falls Light & Power Co's Sub-Division of the Northeast Quarter of Northwest Quarter, Section 16,	2.00
Larabee Mills Co.,	Lot A, Tract 12 of Northwest Quarter, Section 16,	0.29
Northern States Power Co.,	Tracts 6 and 7 of Northeast Quarter, Section 16,	2.583
Name of Owner	Description	Proportion of Benefit.
Watertown & Sioux Falls Ry. Co.	Benefit to Bridge and Trackage across Sioux River on Northwest Quarter, Section 16	4.583
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Guy Strahon	Tract 21 of Southwest Quarter Section 16 (Except W. 30 ft.)	0.687
A. S. Held and John Schetzel	West 30 Feet of Tract 21 of Southwest Quarter, Section 16,	0.480
F. H. Hollister	Tract 22 of Southwest Quarter, Section 16,	0.687
Emerson-Brantingham Implement Co.	Tract 23 of Southwest Quarter, Section 16	0.480
Mary C. Brace	Tract 24 of Southwest Quarter, Section 16	0.720
Etta Esta Boyce and A. B. Fairbanks	Tract 25 of SW¼ of Sec. 16	2.062
J. M. Freese	Tract 4 of Southwest Quarter, Section 16	2.750

Sioux Falls Gas Co.	Tract 3 of Southwest Quarter, Section 16	4.478
Chicago, Rock Island & Pacific Ry. Co.	Tract 29 of Southwest Quarter, Section 16	3.437
Chicago, Rock Island & Pacific Ry Co.	Tracts 1 and 2, Southwest Quarter, Section 16	3.437
J. H. Donahoe	Tracts 13 and 15, Southeast Quarter, Section 16.	5.155
Northern States Power Co.	Tracts 15, 16, and 20, Southwest Quarter, Section 16	5.840
Illinois Central Ry. Co.	Depot Grounds on Southwest Quarter, Section 16,	3.895
Chicago, Rock Island & Pacific Ry. Co.	Lots A and B. Sub-Division Tract 17, Southwest Quarter, Section 16	0.480
S. H. Hurst and T. McKinnon	Lot C, Sub-Division Tract 17, Southwest Quarter, Section 16.	0.480
T. McKinnon	Lot D, Sub-Division Tract 17, Southwest Quarter, Section 16	0.343
S. H. Hurst	Lot E, Sub-Division Tract 17, Southwest Quarter, Section 16	0.229
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Depot Grounds on Southwest Quarter, Section 16.	4.583
Great Northern Ry. Co.	Depot Grounds on Southwest Quarter, Section 16.	3.437
Farley-Loetscher Co.	Lots D and C of Franklin Investment Co's Sub-Division of Part of Tract 3 of Southwest Quarter, Section 16.	1.145

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Name of Owner	Description	Proportion of Benefit.
Franklin Investment Co.	Lots A and B of Franklin Investment Co's Sub-division of Part of Tract 3 of Southwest Quarter, Section 16.	1.145
H. R. Dennis	East 132 Feet of Tract 14 of Southwest Quarter, Section 16.	1.145
Albert Larson and Geo. E. Larson	Except East 132 Feet, Tract 14 of Southwest Quarter, Section 16.	6.874
A. C. Schoeneman	Tract 8 of Southwest Quarter, Section 16	8.593
J. W. Tuthill	North 50 Feet of Tract 9 of Southwest Quarter, Section 16.	0.572
John C. Felger	Except North 50 Feet, Tract 9 of Southwest Quarter, Section 16.	1.145

John W. Tuthill Lumber Co.	Tract 12, Southwest Quarter, Section 16.	0.343
John W. Tuthill Lumber Co.	Tract 13, Southwest Quarter, Section 16.	2.750
John W. Tuthill Lumber Co.	Tract 7, Southwest Quarter, Section 16.	2.062
B. W. Harding	Tract 6, Southwest Quarter, Section 16.	0.687
A. J. Jordan	Tract 5, Southwest Quarter, Section 16.	2.062
John W. Tuthill Lumber Co.	Tract 7, Southeast Quarter, Section 16.	0.916
M. Margulies	Tract 8, Southeast Quarter, Section 16.	0.229
M. Margulies	Tract 10, Southeast Quarter, Section 16.	2.290
W. H. Lyon	All that part of Tract 2 of Southeast Quarter of Section 16 lying West of Franklin Avenue	1.375
Board of Education of the City of Sioux Falls.	All of Franklin Investment Co's Sub-Division of No. 1 of Part of Tract 2 of Southeast Quarter, Section 16.	1.833

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J. H. Drake	Tract 1, Southeast Quarter, Section 16.	2.062
Girton-Adams Ice Co.	Tract 12, Southeast Quarter, Section 16.	2.290
Sioux Falls Gas Co.	Tract 3 of Northeast Quarter, Section 21.	1.375
E. H. Hyde	Tract 12 of Northeast Quarter, Section 21	0.916
Girton-Adams Ice Co.	Tract 4 of Northwest Quarter, Section 22.	0.572
Joe Tosini	Tract 2, of Northwest Quarter, Section 22.	1.375
Inez C. Van Eps.	Tract 1 of Northwest Quarter, Section 22.	2.062
Ed Bell.	Tract 1 of Northeast Quarter Section 22.	0.229

Name of Owner	Description	Proportion of Benefit.
City of Sioux Falls	Parks, Water System, Highways and dedicated streets within the drainage area.	111.11
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area.	0.384

Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.	0.072
Mapleton Township	Twelve miles and fifty-two rods of laid out and established highways within the drainage area.	10.468
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area.	21.252
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area.	2.323
Minnehaha County	Benefits arising from and to the safety and preservation of bridges within the drainage area.	55.555
345		
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50 West of the 5th P. M., within the drainage area (1.5 miles)	15,263
Watertown & Sioux Falls Ry. Co.	Right-of-way as laid out and located across Sections 4, 5, and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49, West of the 5th P. M., within the drainage area (2.60 miles),	28.86
Chicago, Milwaukee & St. Paul Ry. Co.	Right-of-way as laid and located across Sections 4 and 9, Township 101, Range 49, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29, and 33, Township 103, Range 49, and Section 32, Township 104, Range 49, West of the 5th P. M., within the drainage area, (the above being the Sioux Falls and Egan line), also across Sections 5, 8 and 9, Township 103, Range 49, West of the 5th P. M., within the drainage area, (being the Renner and Madison line), total 14.5 miles	147.533

All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed, as stated, and the said determination of said Board made final.

Dated March 8, 1919.

A. G. RISTY
Chairman of the Board of County Commissioners of Minnehaha County, South Dakota.

Attest:
E. H. Shenkle
County Auditor
(Seal)

Filed in the office of the Auditor of Minnehaha County, S. D. this 8 day of March, 1919.

E. H. SKENKLE
346 County Auditor.

It is stipulated that attached to the bill of complaint herein is a true copy of the drainage ditch notice of hearing upon the question of equalization of apportionment of benefits of Drainage Ditch No. 1 and 2 on the 1st day of August, 1921, caused to be published by the Board of County Commissioners of Minnehaha County, South Dakota, said Drainage Ditch Notice being Marked "Exhibit C".

Exhibit "C" attached to the bill of complaint is offered in evidence by plaintiff and received in evidence.

(Exhibit "C" being printed herein as an exhibit to the bill of complaint, is not at this place reprinted.)

(Cross-Examination of witness F. E. Ward)

The proportion of benefits of Drainage Ditch No. 1 and 2 was not equalized upon the notice returnable April 25th, 1919, upon that date or at any other time. The proceeding was abandoned on account of errors in the published notice.

A. G. RISTY called and sworn as a witness for the plaintiff testified as follows:

(Direct Examination)

My name is A. G. Risty; I am one of the defendants in this action and am and for nine years have been a member

of the Board of County Commissioners of Minnehaha County, South Dakota; for about seven years I have been Chairman of the Board; in the spring of 1919 the County Commissioners passed a resolution apportioning the benefits for Drainage Ditch No. 1 and 2; notice of hearing upon the proposed equalization of such benefits was published; the plaintiff's Exhibit "A" is the notice I refer to; I was a member of the Board at the time of making that apportionment of benefits.

347 Q. Please state to the Court, Mr. Risty, in what manner and upon what basis you determined, in the resolution referred to, the proportion of benefits to the Chicago, Minneapolis, St. Paul & Omaha Railway?

Objected to by defendants as incompetent, irrelevant and immaterial, the record now showing that the exhibit referred to by counsel in his question, that the proceedings therein were abandoned and are not the proceedings upon which the present actions were instituted, or the present controversy before the court.

Counsel for plaintiff: I state to the Court this is offered solely for the purpose of showing to the court the attempted application by the County Commissioners of the law which we are questioning.

The evidence received subject to objection.

A. Well, in all those cases we tried to take into consideration the right of way, the value of the line as compared with adjacent lands and the benefits that might be derived from this drainage proposition as to the maintenance of the track and the bridges and so on.

In determining the apportionment of benefits as stated in Exhibit "A" to the Chicago, St. Paul, Minneapolis & Omaha Railway, 1.5 miles; to the Watertown & Sioux Falls Railway Company, 2.60 miles; and to the Chicago, Milwaukee & St. Paul Railway Company 14.5 miles; I don't think we computed on a mileage basis; we may have had that number of miles in mind, but we tried all the while to base it on a certain unit, as I remember it.

Q. Just how, Mr. Risty, did you compare the alleged benefits to the three railway companies mentioned, with the
348 unit of agricultural lands to which you have just referred?

A. How we determined the units for the railroads?

Q. No. How you compared the alleged benefit to the railroads with the unit you have referred to.

A. Well, we arrived at—I don't remember what value we passed on that unit at that time (referring to the agricultural unit). We had the value fixed of the agricultural unit and the proportion of benefit that this drainage would be to that unit; when we came to the railroad question and other properties we took into consideration the benefits that they would derive and I might say we capitalized that—how much the average annual benefit would be to those properties, we might say to a certain piece of railroad, and having that amount fixed, we took the benefit that this unit of farm land was supposed to have and divided the benefits of the railroads—for instance we will say the unit of the farm land was $100; we would make the proportion of the benefit 25% or $20; then when we came to place a unit on other property after having exercised our judgment and made our investigation as to what those benefits might be, we arrived at a certain amount; we divided that by 25, the benefit of the farm unit and that gave us the number of units that we would assess up to that property or railroad, you might say if you wish; I am now testifying with reference to the procedure in 1919; we employed about the same procedure all the time.

Q. Mr. Risty, I call your attention to the fact that the units tentatively assessed to each railroad company in the drainage notice Exhibit "A" bears the same proportion to the mileage of said railway company in each case; with that in mind will you state to the court whether or not that attempted assessment was made by you upon a mileage basis?

A. The mileage basis—if it is the same number of
349 miles or if it is the same per mile for each company, then we must have estimated that the benefit was about the same and that [give] the same number of units per mile.

In our attempted fixing of proportion of benefits which is in question in this lawsuit I don't think we used the mileage basis but I don't remember positively.

With reference to drainage Ditch No. 1 or reference to Ditch No. 1 and 2 no warrants to any great amount have been issued since the time of fixing this proportion of benefits in the spring of 1919; it might possibly be that the cleaning of the ditch was not paid at that time; I don't remember that would be the kind of work that has been paid for since if it wasn't paid for before that; we have done some work around the foot of the spillway and so on since the publication of this notice in April, 1919, but I don't remember what it cost.

Q. In what manner, Mr. Risty, did you determine the benefit to the unit of agricultural land in 1919?

A. We made an estimate of what that land was worth according to our judgment and how much more it would be worth after it had the benefit of this drainage ditch, fair value, I don't remember we had any other basis to go on other than our own judgment as to the value of the land before the drainage and after the drainage.

We arrived at our determination with reference to the benefit of 111.11 units to the parks, water system, highways, and dedicated streets of the City of Sioux Falls without the drainage area in April, 1919, in just the same way as I stated to you that we arrived at the benefit to the railroads
350 and so on; what in our judgment we thought was the benefits; we fixed the amount that in our judgment we thought was the benefit. We fixed an amount that in our judgment we thought was right and proper and divided by the benefit to the agricultural unit to get the number of units in regard to this other property; we based that judgment upon the fact that some of us, most of us, are farmers or were farmers and we all know the price of land—was selling it at that time; with reference to parks, water system, highways, and streets of the City of Sioux Falls we based our determination upon the same facts as we used in regard to all other property; we estimated according to our judgment and our investigation what these properties had cost and what benefit they were to the public, what loss they would be at in case they were annually overflowed; to some extent we used the cost of the parks of the City of Sioux Falls; the cost of the water system of the City of Sioux Falls was talked of; we made our determination on the estimate of the cost and the benefit that those properties would derive; we never had a hearing; it might be more and it might be less we didn't get far enough to hear the other side; we made an estimate of the damages that might accrue in case the highways and streets of Sioux Falls were overflowed; we based that estimate on our best judgment; suppose you have a building down along the Sioux here and have it overflow; the basement filled with water; your own estimate on what damage it would be to you and it would vary probably a great deal from mine; neither one mighe be right. It is doubtful whether you and I would agree. I have stated the manner in which we compared the benefits to the parks and water system, streets and highways of the City of Sioux Falls with the agricultural

unit; we took the public highway that would be annual-
351 ly overflowed; we had in mind as road builders what damages that would be to that road; in our judgment we fixed the damages to be what we thought were right and the number of units on that piece of property; then we proceeded as in all other cases, divided by the benefit to our original unit; to get the number of units we first attempted to determine what the benefit was and then divided it to get the proportion; it is possibly a fact that the unit as used by us in the measurements in the spring of 1919 represented approximately $80.00 or $85.00 in cost; we used at 10A. unit; I am not certain whether the unit was supposed to have been benefitted $80.00 to $85.00 or $7.00 to $8.00 per acre, that might be it, I don't remember.

Q. I now call your attention, Mr. Risty, to the drainage notice providing for hearing on the 1st day of August, 1921, upon the equalization of benefits of drainage ditch No. 1 and 2 and call your attention to the benefits to roads, railroads, etc. and ask you to state to the court in what manner and upon what basis you arrived at your determination with reference to the proportion of benefits to the Chicago, Rock Island & Pacific [Rr]., the Chicago St. Paul, Minneapolis & Omaha Ry., the Great Northern Ry., the Chicago, Milwaukee & St. Paul Ry., the City of Sioux Falls, and the Northern States Power Co., referring particularly to the benefits to the Hydro-Electric plant and water rights of the Northern States Power Co.

Mr. Bartlett: "That is objected to as incompetent, irrelevant and immaterial, not within the issues that can be tried by this Court in this collateral action, the same being a legislative matter and not subject to inquiry in this Court, it not having been alleged in plaintiff's bill of complaint herein that the Commissioners acted fraudulently or arbitrarily."

352 The Court: "Received, subject to objection."

A. As to the railroads and other property mentioned in this question we arrived in the manner stated before; we took into consideration the value of the right-of-way compared the right-of-way with adjacent lands and what protection from this water would benefit them and the savings it would be in upkeep of the railroad track, bridges, etc; in regard to the Hydro-Electric Co. plant we took into consideration the overflow and high water that would clog up their turbines and put them out of working order for some time, and we had in mind the great overflow of 1881 when it swept out the lumber yards down there and took out the mill at

the foot of the falls, and in our estimation after having taken all those things into consideration which I wouldn't mention all now, we arrived at the conclusion that this water, the drainage proposition was of immense value to the Water Power Co. and we figured on that with a good deal of care and then I think we arrived at the amount of $50,000.00; I would not say positively that was the amount; we compared the benefits which we arrived at to the Northern States Power Co. with the benefit to our 1A tract of agricultural land as I have stated before; the benefit to that unit we had said was $25.00; when we had estimated the benefits to the water power company was $50,000.00 we wanted to find out how many units that it represented and we divided it by 25 and that gave us the number of units that would be assessable to the water power company; I suppose there was no material increase in value of the railroad companies' rights-of-way and other property I have mentioned by the making of these two apportionments of benefit unless it might be increase in value with the value of other property increased at
353 that time, but the expenses to be paid were more; there were probably in the neighborhood of $250,000.00 of ditch warrants outstanding at the time we made this apportionment of benefits in 1919; I know there has been some issued since but I don't know how much; in estimating the benefits to various railroad companies in our last apportionment of benefits, we had about the same ideas as we did in 1919; we did not use the mileage basis or farm basis or street basis anywhere; we used the units.

Q. Just how did you use the units, that is what I am trying to find out?

A. When we find out what amount we have to raise—when we come to levy the assessment, the proportional benefits will be assessed to each unit—one unit may be 100%, another is 150% and some only 10%, others 25%; they won't all be alike, of course they are not benefitted alike; in arriving at our determination in 1921 of the last apportionment of benefits and the number of units of the benefit to the Chicago, Rock Island & Pacific [Rr.] Co. we took into consideration the damages that might be done to the railroad tracks with high water to the grades; and in regard to the bridges, bridges could be built smaller; wooden bridges generally have a duration of about ten years and if they could get along with smaller bridges or make grades instead of [tressel] works which would be a benefit to the company; we inquired minutely into those things but as I say haven't heard the other side; we

might be away off; the hearing was not allowed and we didn't get any basis from you folks on that question; we determined that the benefit to the track of the Rock Island Ry. from the ditch was a certain specified amount in dollars and cents; I wouldn't say that we put those amounts on record; that is the way we arrived at our units; we took into consideration in determining this benefit the fact that the Rock Island
354 might build a shorter bridge somewhere and that was part of the basis of our assessment of benefits; after arriving at the amount of dollars and cents benefit we proportioned it by dividing by the value of the unit; in determining the proportion of benefits to the Chicago, St. Paul, Minneapolis, & Omaha, the Great Northern, the Chicago, Milwaukee & St. Paul Railroad Companies we followed the same procedure; the basis for our determination of the benefits with reference to the highways, streets, water supply, water plant, Sherman Park and Phillips Park in the City of Sioux Falls was as I have stated to you before; it may seem [arbitrarily] but in regard to county highways for instance, we knew pretty well what it would take to keep them in good passable condition in seasons when there was any overflow and in seasons when there was no overflow; in regard to the streets and basements that have been flooded each year I made an estimate as to how much it would damage a basement if filled with water; same way to the streets, same way to the parks; If you had ever had a hearing those things would all have been adjusted. I wouldn't say absolutely that we did in 1921 the same as we did in 1919 with reference to the city; we had the same idea in mind when we gave it reconsiderations and wherever we saw we could improve, we did it to make a more equitable proportion; in my judgment and in the judgment of the commissioners the last proposition is better than the first one; I don't want to say we absolutely followed the methods of the first instance or we followed any particular practice in the last instance; it may be we did and possibly we didn't; in arriving at the determination that the benefit to the Hydro-Electric Co. plant of the Northern States Power Co. was about $50,000.00, we based our determination upon the following facts; in the first place we have a stream that tends to give a steady flow of water around the bend so that it will not go over the spillway; in one certain place about 3 miles northwest from
355 town outside of the ditch proper, the river broke through and would eventually have cut across the bottom and into the spillway and we dammed that up; then we took into consideration the high water backing up and filling up the gorge below their plant so that at certain times the

water power would not be serviceable and that it would cost them fuel and other items to a great extent and then primarily, any water which overflowed would be apt to sweep out everything around that electric plant if they should have an overflow like 1881.

Q. You say there was danger of some ditch cutting through and diverting the water out of the river?

A. Yes sir.

Q. State whether or not that was the Ditch No. 1 or ditches Nos. 1 and 2 which were constructed by the Board of County Commissioners, the records of which have been placed in evidence here.

A. Those ditches were established and built before my time on the Board and that might possibly have been that it was cutting into Ditch No. 1 and making that immense excavation, but I would not say. But it was necessary to have it dammed up according to the orders of the hydro-electric engineer; the ditch I refer to must have been probably the terminus of ditch No. 1; the engineer gave orders it had to be dammed up absolutely.

Q. In just what manner did you arrive at the fact that this alleged benefit to the Northern States Power Company amounted in dollars and cents to approximately $50,000.00?

A. After taking those things into consideration, that was our best judgment. We might have itemized it and added it up; I don't remember that; but according to our best judgment that would be reasonable assessment upon the water power company.

356 We based that judgment upon these benefits I have stated to you; giving them a uniform flow of water in dry seasons and protecting them from overflow when we had an overflow season; I have stated practically everything that was taken into consideration in determining that the Northern States Power Co. was benefitted $50,000.00. if I remember right.

Q. I call your attention, Mr. Risty, to the alleged benefit in your apportionment of 1921 to the Chicago, Milwaukee & St. Paul Railway; benefits to right-of-way, tracks, embankments, bridges and grades across sections 4, 9, 16, 21, 22, Township 101 Range 49, and across sections 4, 9, 16, 21, 28, 33 Township 102 Range 49, and across sections 5, 8, 17, 20, 28, 29, 33 in Township 103, Range 49, and ask you to tell the court what you took into consideration in determining that the Chicago, Milwaukee & St. Paul Ry. Co. was benefitted 1678.9 units.

A. We took into consideration what it would damage the tracks—what the damage would be if those tracks washed out and the expense to rebuild them, and with the assistance of a competent railroad engineer we arrived at those figures that we have given there.

We assumed that except for this spillway these tracks of the Chicago, Milwaukee & St. Paul Railway would wash out and be under water for a certain period; I have seen the Milwaukee road under water 8 or 10 days at a time when they had to run their trains around to Pipestone on other railroads; I don't remember what proportion of its tracks we assumed would wash out; the distance used is about equal to the lands that overflow; those lands that overflowed and had the tracks on; of course it would overflow the tracks; I don't remember how many miles we estimated that to be; we tried to figure it out and our engineer worked it out and that was the number of miles; the tracks were on land subject to overflow, that is what determined the distance; with reference to the bridges of the Chicago, Milwaukee & St. Paul Railway in arriving at this benefit—I don't remember whether there is any more bridges on the Milwaukee; yes, there are two; we took
357 into consideration that by diverting the great volume of water from the river into these ditches, their bridges would be less subject to destruction by the ice gorges and by high water and that they could be made smaller when they come to build new ones because they would not have such high waters; the water would be divided between the river and the ditches; in arriving at that feature of the benefit in dollars and cents, we figured out with our engineer what it would cost to build and maintain bridges of the size they have now and what it might cost to build them smaller and their relief when they were subject to overflow and ice gorges; these were the elements we had in mind.

After the filing of the Blackman petition in 1916 when it was decided that the spillway was to be repaired we employed engineers to go ahead and investigate that and it took about a year and a half before all of the preliminaries were taken care of so that we went to actual excavation on the structure; we employed a competent engineer and he laid the plans and we let the contract to a contracting company here, they were to have a percentage for their work; they proceeded to sink that shaft and make the channel of the spilling basin; to put it all in shape that it is at the present time; on the river we straightened a number of bends, made cuts across bends and straightened out the river to facilitate the flow of the water;

I think Ditch No. 2 was cleaned about as far as Renner; then the time arrived that the ditch warrants did not sell any longer and we had no means to complete the work; there always were control gates at the head of Ditch No. 2; we made no change at the head of Ditch No. 2 after the filing of the Blackman petition if you call the end of it up there near Baltic where the ditch begins; it crosses the river at one certain place up there and if you have reference to where this lower
358 part is started, there we built a small dam of willows and earth to keep the water from coming out of the ditch entirely and doing damage that way; the route of the ditch was left the same as the route of Ditch No. 1 and Ditch No. 2, the old ditches; no changes was made in the initial point or terminal points of either ditch.

(Cross-Examination).

Prior to the attempt to fix the proportion of benefits in 1919, no topographical survey was made or thorough investigation upon which to base the assessments or fix the benefit. In order to save money we thought the old survey would answer; in making the proportional benefits we took the old figures and old survey to avoid expense; we didn't get far enough to make any assessment on any particular tract of land; the Board abandoned that attempt to fix the proportion of benefits because of an error in adopting three units instead of one; after that time the Board caused a full topographical survey to be made by Chenoweth & Rettinghouse of this city and a thorough investigation of the benefits that would accrue to the various properties within the drainage area; Mr. Rettinghouse reported and explained to us the conditions which he found generally throughout the drainage area and the property that was benefitted; in making that report he stated to us the various elements that he considered as benefits and submitted to us the facts upon which he based his conclusions; Mr. Rettinghouse as our engineer made the computation with reference to this apportionment of benefits and the plans and we talked it over and he was practically the one that planned how it should be done; he did all the figuring and the computations; before we adopted the resolution of June 10, 1921, we had been fully advised as to the topographical situation and the elements that went into the fixing the proportion of benefits against each of the various pieces of property that we deemed to be benefitted; the board made a personal investi-
359 gation of all the property within the drainage area and determined the benefits before we adopted this resolution; we selected as a unit an acre of land about three miles north of town in the district between the river and the

ditch and visited that unit in company with Mr. Rettinghouse; we determined that in our judgment that unit was benefitted by the improvement 25%; in reaching that conclusion it seems to me we valued the unit without the drainage at $100 and with the drainage at $125.00; it being our judgment that the real benefit to that unit was the sum of $25.00; after determining the value of this unit we proceeded to equalize and fix the proportion of benefits among the other property; the engineer accompanied us and had with him various figures and maps he had made showing these tracts, we referred to the map right along as we traveled; the Board proceeded to investigate the whole territory proposed to be assessed on this basis investigating first upon the east side of the river and then on the west side and then around the bend clear in through town; we looked over the railroad situation and other properties including the power plant, city streets, parks, and water system that in our judgment were affected; my judgment and the judgment of the board coincided almost entirely with the report of the engineer, Mr. Rettinghouse, with reference to these various proportions of benefit; after having made our investigation and having had the elements of benefit explained to us by the engineer, the board exercised its judgment and concluded that these properties were actually benefitted relatively or approximately as the engineer had reported them, we considered as a basis for making assessments on these various properties the acreage of the right-of-way within the drainage area; with reference to the Great Northern Railroad property, Mr. Rettinghouse gave us the facts as to the area within the various territories; he pointed out to us that certain bridges would be benefitted by reason of it, that certain bridges might be shortened
360 by reason of having the water by-passed through the ditch; all of these facts together with the betterment or saving in maintenance on the roadbed were considered by the Board in determining and fixing the proportion of benefit as against the Great Northern Railroad; in like manner the engineer explained the amount of acreage of right of way of the Chicago, Rock Island & Pacific within the drainage area would be protected and benefitted the same as the adjacent farm lands; he pointed out that there was a certain length of its track that would be affected in having its maintenance cheapened by the drainage and that certain of its bridges might be shortened and were protected by reason of this drainage ditch by-passing the portion of the water that would come down the river; those amounts were all taken into consideration and passed upon by the Board in determining the amount of benefit our judgment indicated the Chicago, Rock

Island & Pacific received; the Chicago, Milwaukee & St. Paul Railway extends almost the full length of this ditch and adjacent to it; in some places the track is right along the ditch and in other places it runs pretty close to the ditch all the way; it might possibly be 80 rods away where the ditch crosses the river at Renner; he explained the amount that this railroad benefitted upon the same proportion that the farm lands adjacent thereto; that the embankments, tracks and roadbeds were benefitted in the same manner by being made more substantial and requiring less upkeep; that there was a certain number of bridges that could be shortened and a certain bridge might be abandoned by reason of by-passing this water; these matters were all taken into consideration by the Board in determining the amount of benefit that we fixed against the railroad for its proportion and the amount of benefit was figured out by Mr. Rettinghouse for us in the manner in which I have testified on the basis of maintenance
361 and upkeep; the Chicago, Minneapolis & Omaha Railway extends directly across the project in two places and Mr. Rettinghouse explained to us that its right of way would benefit the same as adjacent land and that its roadbed was benefitted by being more easily maintained; that there were a certain number of bridges over the Sioux River and adjacent thereto that were protected by the drainage; that a certain number of trestles might be shortened or abandoned and that by reason of these benefits the railroad company was actually benefitted a certain amount and it was in our judgment; we took all these matters into consideration and exercised our judgment in determining the amount to be fixed as against these various properties.

Mr. Rettinghouse, as our adviser, explained to us the number of miles or blocks of streets in the city of Sioux Falls that were within the drainage area and would be benefitted by being protected and drained by this drainage; also the benefits that would accrue to the two city parks and to the Sioux Falls water system and the elements of such benefit; the Board took all these elements into consideration in exercising its judgment and determining the amount of proportional benefits which it fixed against the city of Sioux Falls.

At the same time, Mr. Rettinghouse explained to the Board and the Board considered the elements of benefit which would accrue to the Northern States Power Co. by reason of the drainage; we went through that very thoroughly; the facts that the dam was put in adjacent to the river near Schotz, about three miles north of the city of Sioux Falls and that the controlling works in the nature of wiers were put in at

Thompson's about ten miles north of the city were considered as elements of benefit to the Northern States Power Co. by reason of holding the water in the river and permitting it to flow down and over its power plant; to by-pass the flood water or a portion thereof through the ditch and save the
362 retarding effect of permitting that flood water to pass over the dams of the power company and pile upon and retard the whole power produced at the power plant also was considered an element of benefit; all of these matters were taken into consideration by the Board in determining the amount of benefit that should be fixed against the Northern States Power Co. The construction of this drainage project, several river cut-off channels, were put in up the river north of Sioux Falls, and in determining the Northern States Power Co. benefit the Board took into consideration the effect and influence of these cut-offs in hastening the flow of the flood water down the stream and shortening the time of floodage upon the power plant. All of these matters were taken into consideration by the board in exercising its judgment of the amount that should be fixed, in the first instance against the Northern States Power Company.

The work that the Board did upon this drainage project consisted of constructing the spillway, cleaning and widening and deepening the ditch between here and Renner, diking the ditch and putting in the dam at Schotz and controlling works at the Thompson Bridge, and putting in these numerous river cut-offs.

The Court: Where is the Thompson Bridge?

A. Up where the ditch ends and turns into the river, and crosses the river and goes up on the other side.

The Court: How far is the Thompson Bridge from Sioux Falls?

A. About 12 or 14 miles.

The Court: How far is Renner from Sioux Falls?

A. 8 miles.

Q. Do you know the approximate present width of the ditch as it extends from Sioux Falls to Renner, or
363 thereabouts?

A. No, I don't. That would be a mere guess.

Q. Isn't it in the neighborhood of 80 to 100 feet?

A. It probably is as far North as Renner.

Where we diked the ditch had taken the channel of the creek; there hadn't been dirt enough taken out to make a

dike and when the floods came it backed up on the farm lands to the west of it; we diked there probably five or six feet high; and protecting those farm lands from overflow from the ditch after that; the dam at Schotz covered the break in the bank of the river about 150 feet wide and had the effect of keeping the water from the river from flowing in the bayou that is tapped by the ditch.

After the attempted assessment made in 1919, some work was still to be done in cleaning a portion of the ditch from Renner to the railroad tracks; settlement for this work had not been fully made.

Q. And this dam at Schjodt's that has finally been made to stand was not in at that time?

A. No, it was not.

Q. And some repair work has been done on the spillway since that time, has it not?

A. Yes, the control work at the bridge at Thompson's was put in since that time, but at the initial point of the ditch we haven't made any change.

Exhibit "1" is a copy of a map of the territory affected by drainage ditch No. 1 and 2 submitted by Mr. Rettinghouse to the Board as a part of his report.

We had a map similar to this upon which the percentages were marked before us when we made the inspection of the drainage [—] before making the apportionment of benefits, on June 10th last.

Exhibit "I" offered in evidence by defendants and received in evidence.

364 Q. Mr. Risty, in applying and using this unit as explained by Mr. Rettinghouse to you, and as followed by the Board in fixing these apportionments of benefits of the various properties affected, you stated that you determined what the actual benefit to the unit selected was, and that its value was twenty-five dollars? A. Yes sir.

Q. Did you use that value of twenty-five dollars as the actual benefit to the unit in determining the apportionment of benefits which each of the various classes of lands aside from farm land should be assessed in this drainage proceedings?

A. We did. This was in regard to farm lands.

Q. And your engineer figured out the total benefit to each of these various pieces of property and divided that benefit by twenty-five, the value of the unit, to determine the number of units to be fixed against these various pieces of property?

A. Yes, that is the way we determined the number of units.

Q. That applies generally to all of the plaintiffs in these actions? A. Yes sir.

Q. Your understanding is that in determining the amount of the assessment upon this basis, that the total number of units are added together to determine the number of units, and the total cost of the ditch is computed and the total cost is divided by the number of units to get the actual assessed valuation of a unit? A. Yes sir.

F. E. WARD recalled on behalf of plaintiffs testified as follows:

The plaintiff's Exhibits "B" and "C" are part of the files and records of my office.

Exhibit "B" was offered in evidence by plaintiff and received in evidence. It is the resolution of the County
365 Commissioners of Minnehaha County fixing the proportion of benefits on drainage ditch No. 1 and 2, dated June 10th, 1921; it is not printed here because it describes the same property, names the same persons, and fixes the same units as are described, named and fixed in Exhibit "C" printed as a part of the bill of complaint herein.

Exhibit "C" was offered in evidence by plaintiff and received in evidence. It is the same as Exhibit "C" printed herein as a part of the bill of complaint and for that reason is not reprinted here.

H. E. BARLOW, called and sworn on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am civil engineer of the Chicago, St. Paul, Minneapolis & Omaha Railway; the Sioux Falls-Mitchell branch of the Omaha enters the City of Sioux Falls from the west, crossing the big Sioux River and the bottoms approximately three miles west of the city. The line then swings somewhat to the south and enters the city on the southeastern corner again crossing the Big Sioux River and through the station grounds runs approximately north and south; the spillway is a couple of miles north of the line of the Omaha; in the west portion of the City of Sioux Falls there is a spur track known as the west side spur, which branches off from the main line a short distance west of the westerly course of the Big Sioux

River, and runs approximately north and south for a distance of about a mile; the Omaha railroad has no agricultural lands in the City of Sioux Falls other than its right of way and depot grounds or in the drainage district involved in this controversy; all of its property consists of its railroad right-of-way, station grounds and appurtenances and is used exclusively for railroad purposes.

I know Mr. Rettinghouse, the engineer of the County
366 Commissioners in this drainage ditch matter; I called upon him at his office in Sioux Falls and had an extended conversation with him during which he very kindly outlined the method by which he had arrived at the amount of benefits; this conversation was in February or March last; the information was given me by Mr. Rettinghouse but not in confidence; the method he used in arriving at the total benefits deals primarily with the question of bridges; at the point where the Omaha crosses the bottoms west of town, we have in addition to a hundred foot steel span over the main channel, an approach bridge approximately 233 feet long, and two other bridges east of the main river bridge, one 126 ft. and one somewhat shorter; in addition to these bridges we have a small one span pile bridge considerably west of these bridges which takes care of local drainage only and is not concerned in this question; Mr. Rettinghouse has figured that by reason of the diversion of a certain amount of flood waters of the Big Sioux River by means of the spillway constructed by the County authorities, the Omaha Railway would be justified in filling in certain of these approaches, particularly our bridges known as 129 and 130, aggregating 239 feet in length; these are the bridges a mile east of the main bridge over the river west of town about three miles out; he has figured that it would cost to rebuild these bridges about $25 a foot or $5975; he has assumed that it will be necessary to rebuild these wooden structures about once in ten years; he has therefore figured that the average annual expenditure would be one-tenth of $5975; he has capitalized this amount at 7% arriving at $8536; then he has deducted the cost of filling these bridges and the riprap necessary to protect the dam; he has used this at $2000, which deducted from the $8536 makes a net of $6536 benefit on account of filling bridges
367 129 and 130; in a similar manner he has figured that we could fill the approaches to the two steel spans we have here in town, where the amount of pile bridging is 166 ft. going through the same proposition and capitalizing the annual expenditures and deducting the cost of filling he has arrived at $2930; these bridges which we have here in town

are what are known as through bridges; the supports are above the track, and Mr. Rettinghouse has figured that if the Omaha Company thought it desirable it might rebuild those bridges and substitute the deck built character construction which is a cheaper type construction, and by using shorter girders and necessitating two additional piers, this type of construction could be used, and he has planned that to reproduce these bridges as through structures would cost $45,500 and with the deck plate girder type would cost $25,500, making a difference of $20,000; then there is one other item which relates to the maintenance of the roadbed of the mile and ¾ length of track we have west of town in the district; this track has an embankment varying from 3 to 4 ft. to 10 or 12 ft; he has figured that on account of the diversion of a part of the flood waters, the embankment would be less, consequently the amount of labor that would have to be expended in keeping up the track would be less by an amount equal to $100 per year; he has capitalized this $100 at 7% arriving at $1400; in summarizing all of these items he arrived at the total benefit of $30,866; now the assessment of the Omaha is fixed at 839.45 units; if 1 unit is approximately $9.50, the total assessment would be $7975; the total amount of benefit divided by the total number of units would make an average value of about $36 for the unit; he has assessed us at approximately 25.8% of the total benefits; figuring the one unit as $9.50.

The situation at the west crossing is that we cross the valley approximately at right angles; the valley is quite wide at this point; the track is on an embankment and has
368 these 4 openings; three of them are at a distance of about ¼ of a mile; the land north of the track on the upstream side is cultivated to a considerable extent, not in the immediate vicinity of the bridges, but a short distance each way from the river the land is cultivated; in a time of normal high water this land is flooded and on account of the likelihood of holding this water an unnecessary length of time on this bottom land if we don't have considerable opening there through our embankment and taking into consideration the danger to the roadbed that might result if we closed the opening, it is my opinion that we would be unjustified in reducing the size of our openings or the length of them; in my opinion there are absolutely no benefits resulting to those bridges west of the city or to the railroad west of this city by virtue of this drainage ditch construction.

Referring to the bridge west of the depot in the City of Sioux Falls and taking up the question of the substitution of

the belt girders for the trestles; the fact of the matter was that the Omaha Company has no intention of making any changes in these bridges; the bridges are amply strong for the locomotives we are now running or which we anticipate we will run in the future; there is absolutely no reason for disturbing the bridges at all; furthermore, if we should decide ever to substitute the plate girders we could do so and still have the light iron at about the high water of 1881.

There is one other point that has not been covered and that is in regard to filling the pile approaches; there are short approaches at each end; the west approach is 62 or 63 feet; and the east approach is 103 ft; we have felt that we could fill both of these approaches whenever we got around to it and could at any time; as a matter of fact it would involve considerable expense and we have felt it would
369 be better economy to maintain that type of approach; as to the filling of those approaches the drainage ditch construction has no effect one way or the other.

I have figured up the acreage the right-of-way of the Omaha Railroad in the drainage district amounts to; we have 22 acres on the main line, 21.2 of which is on the west bottom and 5.89 acres on the west side spur previously described; these figures, include .8 of an acre in the vicinity of the bridge out here in the city and includes all the right-of-way within the drainage district sought to be assessed.

(Cross-Examination)

I have been in the business of civil engineering something over 22 years and have occupied my present position since the first of March 1920; it is a fact that water in flood seasons permitted to stand along side of the embankment which supports the tracks of the railway has a tendency to weaken that embankment and it necessarily requires a greater outlay of money to keep the bank in solid form; as a general proposition the more water standing there the more effect it has.

Q. Do you know when these bridges were built west of town?

A. I think our records disclose that they were built about 1880 or 1879, along in there.

Q. Then these extra full bridges were built at a time when all water was coming down the river?

A. Yes sir; the engineer building the bridges would naturally have in view that they would take care of all the water that came down the river; if the evidence should disclose in this case that from 1/3 to ½ of the water that comes down the

river was diverted and does not pass under this bridge, it would not be the reasonable conclusion that at least part of the bridge could be done away with; I don't know how much water stood out there last year north of those bridges on the uphill side of those embankments; I don't know how much water there was the year before or the year before that.

Q. You do not know any of the data, but you are willing to swear you got no benefit, notwithstanding the fact
370 that you do not know how much water stood there?
A. Yes, I am willing to say that.

I think it had no effect whatever; if only ½ of the water came down the river last year that previously went under the bridges there would have been no benefit to our embankment in the solidity of the same and in the cost of the maintenance of it; it would make no difference how much water comes down the river unless it should go over the track and begin to wash the bottom out; I stated as a general proposition that when the embankment stood in water it had a tendency to weaken it and make a higher cost of maintenance; this fact is not true at this place and our embankment would stand all amounts of water; there is a peculiar reason why it should.

It is not a fact that we cannot run over that bridge the same class or weight of engines that bring our trains from St. Paul and Minneapolis to Sioux Falls; that bridge would not have to be changed if we wanted to run the same class or weight of engines to Mitchell; my company has not put in any different trestles since this spillway has been constructed; I have been in Sioux Falls several times; I think I was here in 1919; I think I was here in 1917 or 1918, and went over the ditch matter at that time; our former chief engineer had at one time under consideration the question of the shortening of the bridge just east of here; my understanding is that the spillway is designed for 2000 second feet and could take an overload of 500 more, making a total of 2500.

371 (Redirect Examination)

The special reasons why water standing by this railroad embankment did not affect it is that this particular embankment is very wide and deep and very heavily overgrown with vegetation and sod; in the vicinity of the river course where any washing has ever taken place are thoroughly protected by rip-rap; for this reason I believe that water standing along this particular embankment would have no effect on it in so far as the labor that would have to be expended in maintaining the track is concerned; that is the answer that I would

make to the claim of benefits made by Mr. Rettinghouse in regard to saving $100 a year maintenance; my understanding is there has been no decrease in the force employed on the section since the construction of the spillway in 1918 and that would be the determining factor as to saving in maintenance account.

The reason why trains the same as come from St. Paul to Sioux Falls cannot be run to Mitchell is that we have other bridges between here and Mitchell which would not permit of the running of heavier locomotives; the bridge in Sioux Falls is restricted in our time card; we do not permit our heavier engines to go over it at the present time; as a matter of fact there is no reason why the heavy engines that operate down here cannot go over this particular bridge although it is restricted in our time card; there is no reason why the heavier engines should run any further than Sioux Falls if they cannot go clear through to Mitchell; Mr. Rettinghouse the engineer of the drainage district, was the former chief engineer of the Omaha road who had under consideration the question of changing the bridge at Sioux Falls.

C. GEELAN, called and sworn on behalf of the plaintiffs, testified as follows:

372 (Direct Examination)

I am road master of the Chicago, St. Paul, Minneapolis & Omaha Railway from Worthington to Mitchell and from Luverne to Doone, and I have been since August 15, 1905; prior to becoming roadmaster, I was section foreman and extra gang foreman; I was section foreman at Montrose; I started working for the Omaha in April, '80, and was employed by that road during 1881; I remember the flood waters of 1881; I was in Sioux Falls when the water was the highest; I am familiar with that portion of the Omaha Railroad in the City of Sioux Falls and west of the City comprised in the area sought to be assessed for the construction of drainage in this drainage district No. 1 and 2, and have been familiar with it since 1908; there is very little noticeable difference in the water conditions along that line of the Omaha railroad subsequent to the construction of the new spillway in 1918; I realize that more water has come down and stood on the bottoms, but it spread out such a wide territory across the bottoms that it didn't raise it very much; I wouldn't say that

there has been more water on the bottoms west of the city and north of the Omaha Railway track since the construction of the spillway than there was before, but to my knowledge there is fully as much; I have seen the water conditions each year beginning with 1918 and have visited that part of the line and know how much water there was; the water that has collected in the field north of the track does not seem to have had any bad effect, that is, it doesn't seem to make any more particular work across that bottom; I can't say it has a bad effect one way or the other either before or after the construction of the spillway; the construction of the spillway and other works in Drainage Ditch No. 1 and 2 has made no apparent difference one way or the other as to the flood waters of the river
373 and as to the line of railroad of the Omaha west of the city and east of the river; I can't say that there is any particular noticeable difference in regard to the water conditions at the bridge in the city of Sioux Falls before and after the construction of the new spillway; I am familiar with the course of the river through the City of Sioux Falls and have seen it each year since I have been roadmaster; so far as effects the maintenance and operation of the railroad, the difference is very little; in fact as far as the operation of the railroad is concerned, it doesn't affect the river being a little high or low west of the depot; it never has had any effect before or after the construction of the spillway with the exception of one year, that was 1881; that was the year there was an ice gorge formed in the southeastern part of the city; that gorge held the water back and when the ice gorge broke there was a flood which flooded the track about the location of the present station; the Omaha has never been troubled with water at its station or at its bridge west of the station since 1881.

(Cross-Examination)

I have been familiar with this particular part of the river between here and Montrose since 1880; in my travels back and forth over this road from year to year I have never set any permanent structure to indicate the course of the water at any particular year; when I say that the water is the same now as 5 or 10 years ago, that is the best of my judgment; in 1881 it washed out the whole line; in 1907 the waves had cut down into the bank and there was some riprap put there for fear it might wash; the water caused us additional expense and maintenance that year; if the water should pile up in the same way as it did in 1907, it would not be necessary to put riprap in again.

374 Q. You say the [heighth] of this water has been practically the same every spring? Were you advised of the fact that from one-third to one-half of the water coming down the valley had been diverted from your railroad?

A. Yes sir.

Q. Still the [heighth] of the water remains about the same each spring as to your railroad track?

A. Not the same every spring.

The [heighth] of the water as to the railroad track varies with each season but is relatively the same; if there should be an increase of 30% to 50% of the amount of water coming down the Sioux River the effect upon the track would be very little, if any; it would not require any more riprap and would stand up just as well as it does now; we would not need any greater flood bridges than we have now; we did need them in 1881 but it was then fixed out there to take care of the flood water we have kept the same amount of lineal feet of flood bridges since 1881 to take care of the flood waters even since the spillway has been put in.

(Redirect Examination)

The riprap which was put in in 1907 was put in on the west spur which is possibly 400 ft. west of the main channel; it was on that branch or spur which runs north of the main line and the water has never since made any trouble; no other riprap has been put in.

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375 B. A. WAITE, called as a witness on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am B. A. Waite of Des Moines, Iowa; am assistant Engineer of the Chicago, Rock Island and Pacific Railway. I have been Assistant Engineer of the Dakota division coming into Sioux Falls frequently. I became connected with the line that runs into Sioux Falls in 1907; from then down to the present time I have been on this division, five or six years, and while I was working in Chicago and in Davenport I worked on this territory part of the time. Am a Civil Engineer, practicing that profession since 1892. Am familiar with the right of way and the bridges and railroad tracks of the Rock Island Railroad within this drainage district. I have here a map showing the property owned by the Chicago, Rock Island & Pacific Railway within the City limits of Sioux Falls, marked Rock Island Exhibit "1". That is a correct blue

print representing the right of way, the property owned by the Rock Island Railroad within the City limits of the City of Sioux Falls. The red pencil mark outlines the property owned by the Rock Island Railway.

Rock Island Exhibit "1" is offered in evidence by the plaintiffs and received.

I have computed the number of acres of property owned by the Rock Island Railroad within Drainage Districts No. 1 and 2, and as far as I can tell it is about thirty acres (30) or a little less. There are two bridges on the Rock Island across the Big Sioux River, one two miles east of town and one just north of the depot. The Rock Island comes into Sioux Falls from the southeast, crossing the river the first time two miles southeast of the City. It then comes up the west side of the river into Sioux Falls. It then crosses the river again within the City limits at the foot of 9th Street; that is a spur
376 known as the Bismark spur. The trains do not cross this bridge. The Rock Island station is on the west side of the river on 10th Street. The Rock Island Railway Company has no property within this Drainage District that is used for agriculture and none of it has ever been so used. All of its property is used for railroad purposes, location of side tracks, industrial tracks, station grounds, roundhouse grounds and right of way of the main line. The Rock Island has no more property within the City of Sioux Falls or within this drainage area than is necessary for railroad purposes. The first half mile of the track from the east bridge toward the City is about eight feet above the average water of the Big Sioux River and is practically level with the adjoining ground near all the rest of the distance, and inside of the City limits it is above the level of the river about fifteen to twenty feet. That is true throughout the course of the line, except at the east end over the bottom where it is about eight feet above the river. Neither the track nor the embankment of the Rock Island has ever been reached by high water within my knowledge, and neither the track nor the right of way has ever been affected by high water from the Big Sioux River since I have known it. I have here a blue print of a cross section of the bridge about two miles southeast of town marked Rock Island Exhibit "2". I have checked the measurements over at this time and it is correct. There is in the center of this bridge a true span made of steel and then it has piled approaches. The approach on the east end is ninety-seven feet (97) and on the west end one hundred ninety feet (190), making a total bridge, including approaches, of four hundred

nineteen feet (419). From the top of the tie to the bottom of the river is twenty feet.

Rock Island Exhibit "2" is offered in evidence and received.

377 I also have a cross section of the Bridge at 9th Street inside the City of Sioux Falls marked Rock Island Exhibit "3". This shows the construction of the bridge, with the exception of the pile portion, which has been re-built since that plat was made. The plat was made in 1913 and part of the piling on the east end has been filled in since then. It was filled in gradually, took several years from 1913 to 1915 and the land on either side of the bridge was filled in as we filled in the approach. The shore line has been filled out on either side of the approach so the approach was of no use there.

The exhibit is offered and received in evidence.

In regard to the bridge southeast of town, we have never had any trouble with that bridge from high water to my knowledge, either before or after the building of the spillway. As an engineer I would not dare to fill in any of the bridge or any of the approaches at the present time, because at the present the waterway is no more than would be required according to our way of figuring the waterway required. We figure the drainage area on Dunn's tables and a certain proportion of that is the waterway required according to the area drained, and under such computation we have no more waterway under this bridge than is required for the area drained. The approaches to this bridge have not been in any way affected by the building of the spillway and the spillway has had no effect upon the bridge that I know of.

In regard to the bridge in the city at 9th Street, I understand it is proposed by Mr. Rittenhouse to eliminate one section of that bridge, that is the south or east one hundred ten feet (110) steel span truss. The bridge now is three hundred seven (307) feet long. If that span was taken out the bridge would be one hundred ninety-seven (197) feet long. I
378 would not dare to cut that bridge down to one hundred ninety-seven feet. The bridge as it is now is about the same length as the other railroad bridges on this stream. I believe that they have two one hundred feet (100) spans, and if we eliminate one hundred ten (110) feet this bridge would be shorter than the other bridges. This bridge on 9th Street was raised by the Rock Island before I came here. This span that is contemplated to be eliminated by the drainage engineer

is filled in about half way. There is no water under it at the present time, the current is under the other end of the bridge. This was caused by the building out of approaches and driveways, pushing out the shore line. The spillway has nothing to do with the filling of this river on either side. It has been caused by the buildings being extended towards the river. There is at the present time a garage known as the Homan Garage directly west of this span in the bridge and extending out at least half of the length of the approach, so that a line from the warehouse on the east side of the bridge to the corner of the garage would strike the middle of this span. I would not consider that it was reasonable engineering to eliminate any of this bridge. Since I have known this property the water of the Big Sioux River has never been over any of the track in any place, and I have known it since 1907.

(Cross-Examination).

It is twenty feet (20) from the rails on the bridge two miles south of town to the bottom of the river. This bridge was built in 1886. Either this bridge or replacements of it. Since 1907 it has been in the same condition. I have never compared this with the Great Northern Bridge down the river. I have never observed this bridge at extreme high water. From the area of the waterway required I would say that none of the approaches to this bridge could be filled in. I asked Mr. Rittenhouse in regard to the watershed in this drain-
379 age area, and I think he said it was 4500 square miles. This was the whole watershed. I do not know the slope of the land from north to south per mile. I do not know the velocity of the water, but from our rules we could not reduce the length of the bridge. The steel span in the center is 127 feet with pile approaches. These piles are treated and should last 20 to 30 years. We do not know just how long creosote piling will last.

I said that one of the approaches to the bridge within the City had been filled in gradually along about 1914. It has not caused us any trouble since then. Where the filling is there was formerly a trestlework. Under the present condition of the river since 1914 it has not been necessary to have as much approach to the bridge as when it was constructed. The shore line that I spoke about from the Homan Garage to the warehouse, that is in a bend in the river. I do not know the difference in elevation of the two bridges and I do not know the velocity of the water at either one of them.

Q. And still upon this information that you don't seem to possess as to the fundamentals as to how much water this river carries, the slope of the land, or the difference in the [heighth] of the land, you still wish to be understood that it would not be safe, in your judgment, to shorten these bridges?

A. Yes sir.

I do not know what would be the effect on the bridge here in town if the amount of water flowing down the river should be increased thirty to fifty per cent. I think the one east of town would be all right, but I am not sure about the one here in town. The high water has never reached our embankment that I know of. I do not believe that the water has ever crossed our right of way. I do not remember of it. I have not been here very often for the last year, once be-
380 fore in the last six months, but have been here before. My headquarters are at Des Moines. I have been here at high water periods. I could not tell you just what year, but I have been connected with this end of the railroad intermittently. I could not remember the year that they had high water when I was here.

(Redirect Examination.)

In regard to the filling in of the piling on the bridge in the City known as the Bismark Spur, the land adjacent had been built out to the end of the piling so there was nothing but dead water that stood under it. The water could not flow under the piling on account of the land having been filled in on each side.

C. E. Dean Called as Witness on Behalf of the Plaintiffs Testified as Follows:

(Direct Examination.)

I live in St. Paul and am a bridge foreman on the Chicago, Rock Island & Pacific. I am a bridge foreman upon the division running into Sioux Falls. I began work here in the fall of 1893 and left this division in 1913, so that from 1893 down to 1913 I have known this railroad running into the City of Sioux Falls, with the exception of the years 1905, and 1906, when I was with another railway. From 1893 to 1897 I was a bridgeman. From 1897 to 1905 I was bridge foreman, and from 1907 to 1912 I was master carpenter on this division. I was familiar with the two bridges on the Rock Island within this drainage district at the time I was here and down to 1913. I remember when the bridge across the Big Sioux at the foot of 9th Street in the City of Sioux Falls was raised. It was

raised about four feet on the two spans, but the old approaches were left alone. That was just before or about the time of the breakup of the ice in the spring. We contemplated a flood. The report came that there was an ice gorge
381 up the river, we expected it to break loose and have heavy water. It had been a hard winter and the ice was heavy, but it did not materialize. We had no trouble from it. The bridge was lowered a little after that, but not put back where it was originally. I think the permanent raise was about two and one-half feet and the ends dropped down to their original position. During the time that I was on the division we never had any trouble with the bridge southeast of town. I was here in 1907 when the spillway was put in, was master carpenter. I never have noticed any perceptible change in the condition of the water flowing under these two bridges before or after the building of the spillway. I have no record of high water marks myself. The building of the drainage ditch and the spillway has never benefitted these bridges in any way that I know of. From an engineering standpoint I cannot say but from a practical standpoint I would not fill in either of these bridges at the present time. I base my opinion upon the fact that the engineers as a rule do not give enough waterway. I have taken many an opening —for instance—four foot opening I put in once on the engineer's orders and afterwards had to be a seventy foot opening. During the time that I have known the Rock Island property within the City of Sioux Falls the railroad track has never been under water. The water has never been up on the embankments at any place to my knowledge.

(Cross-Examination.)

I was here in the high water of 1911. There was no damage that I know of. I have not been here at any other time of high water except in 1897. I have never made any definite measurements of the water in the river. I do not know the amount of watershed that the river and the ditch drain, I do not know the elevation of the land from our right of way north and I do not know how fast the water flows. I do not know the amount of water that comes down the river, or that comes down the drainage ditch. If the water was in-
382 creased fifty per cent I do not believe the bridges would stand it. The present bridges represent the same length of span that was here in 1893. Only the spans have all been renewed. There have been piers put in. The piles we are using now are creosoted piles. Piles not creosoted last about ten or twelve years, and this is true of hard wood culverts.

S. P. PERKINS, Called as a Witness on Behalf of the Plaintiffs Testified as Follows:

(Direct Examination.)

I am an inspector on the Rock Island Railroad. I have been connected with the bridge and building department as bridge foreman and master carpenter. I was master carpenter on the division running into Sioux Falls from January 1, 1913, to June 1, 1920. During that time I was familiar with the two bridges on the Rock Island in the City of Sioux Falls. During that time there never was any high water that damaged or threatened to damage these two bridges in any way. The water has never been upon the embankment of the right of way of the Rock Island at any time to my knowledge. I have worked upon these bridges more or less. As a bridge man I would not think it safe or advisable as a railroading proposition to fill in any part of these two bridges. From my experience I have been obliged to put in several larger openings at different points where we have had similar opening. We have had to increase the length of the openings on account of high water, and I would not think it safe to close up any of these openings.

(Cross-Examination)

I do not know the number of acres of watershed drained by this ditch or by the Big Sioux River or the elevation of the land or the excessive or average rainfall for a year in this drainage district, and I do not know the capacity of the spillway to take care of the water from the ditch, but I want the court to understand that these spans could not be safely shortened. That is based upon the fact that several times I have had to make openings larger and that is the foundation of my testimony.

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383 A. F. PILCHER Called as a Witness on Behalf of the Plaintiffs testified as follows:

(Direct Examination).

I am general agent of the Rock Island Railroad at Sioux Falls. Have been here since June, 1890. I was the agent of the Rock Island until 1914 and since then the general agent. I have been familiar with the property of the Rock Island within this drainage district for thirty-one years. The Rock Island has no property within this drainage district that has ever been used for agriculture and none of it is used for agri-

culture at the present time. It is all used for railroad purposes, roundhouses, stations and railway tracks. It has no land that is not necessary for railroad purposes at the present time. The right of way and the rails upon the track in the city are about 20 feet above the water in the Big Sioux River at ordinary times. Two miles south of town, at what is known as the Cherry Creek bridge, they are about eight feet above the water. The right of way has never had any water standing on it in the Big Sioux River since I have known it, that is since 1890. None of the roadbed of the railway has ever been washed by the Sioux River. There has never been any difficulty with the bridge southeast of town in handling floods. In regard to the bridge at the foot of 9th Street in the City, in 1897 there were rumors that an ice gorge had formed and as a precautionary measure we raised this bridge at the foot of 9th Street but we found out it was not necessary. The high water did not develop. The Big Sioux River has never been out of its banks here in the City of Sioux Falls since 1890.

(Cross-Examination).

I live in Sioux Falls and worked for the Rock Island Railroad Company in 1916, 1917 and 1918 and at that time knew about this new ditch going in. I saw the publications in the newspapers. I knew it was being constructed. I went over to the spillway and saw it in the course of construction. I know of no reason why the land of the Chicago, Rock
384 Island & Pacific Railway Company could not be used for agricultural purposes if not covered with the railroad tracks. It has agricultural land as a basis.

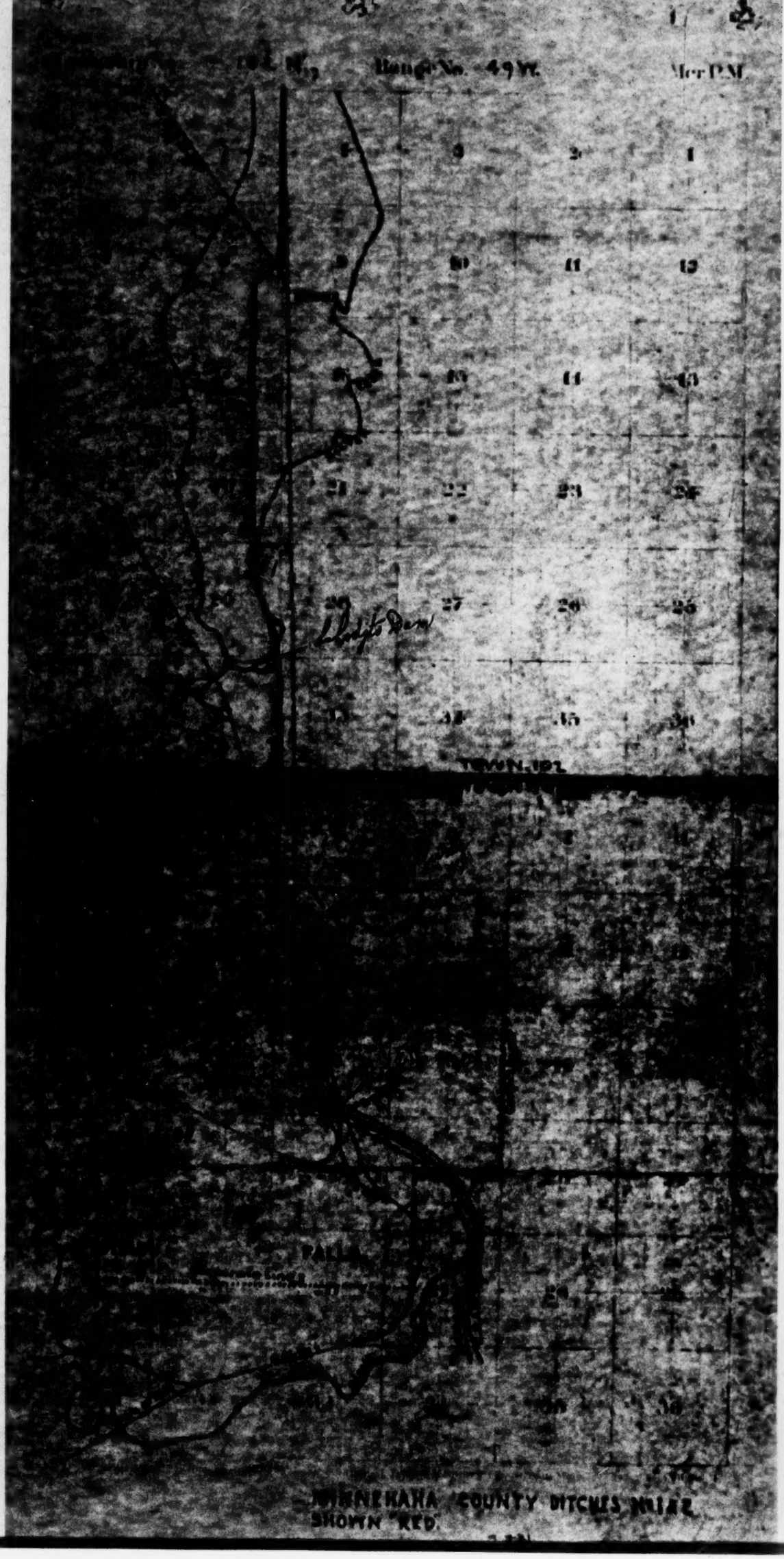
C. M. BASSETT called and sworn on behalf of the plaintiff testified as follows:

(Direct Examination)

My name is C. M. Bassett; I live in Sioux City; I have been a civil engineer 24 years; I am assistant engineer of the Great Northern Railway Company; I have been in its engineering department 9 years; at the present time I have jurisdiction of the entire Sioux City Division, including all of Minnehaha County, South Dakota; I have been in charge of that Division since the spring of 1916; during that period of time I have made frequent trips to Sioux Falls, and over the lines throughout Minnehaha County; for two years 1916-17 I was in Sioux Falls practically all the time; since then I have been here practically every week. I am familiar with what is known as drainage ditch Number 1 and 2, and the

spillway; I am also assistant engineer of the Watertown and Sioux Falls Railroad Company; its line is located along the ditch for about 3½ miles; every spring I have been to the spillway; then I have been over the entire line of the ditch and looked at the various head-works and retaining dams; the line of the Great Northern enters the city of Sioux Falls from a northeasterly direction at a point about a mile and a half from the mouth of the spillway; that is the nearest point on the line of the Great Northern to the mouth of the spillway; the course of the line of the Great Northern as it goes through the city of Sioux Falls and around south of the City and down through Section 31 is as follows: We enter in a northeasterly direction and then through town we go practically north and south and then we swing southeasterly towards Yankton; Exhibit 1 is a plat I prepared or caused to be prepared, showing the location of the line of the Great Northern over the area referred to and the general location of a portion of drainage ditch Number 1 and 2 and the location of the bridges along the line of the Great Northern within the area referred to; the plan is drawn to scale, 1 mile to the inch.

285 Plaintiff offered in evidence, Great Northern Exhibit 1 which was received in evidence and is as follows:


Range No. 49 W.
Mer P.M.
TOWN. 102
MINNEHAHA COUNTY DITCHES NOW
SHOWN "RED."

The acreage of the right of way and station grounds of the Great Northern Railway within the area in question, Sections, 16, 27 and 31, Township 101, Range 49, is 27.14; the acreage of the station grounds included in that is 6.09; tract 11 consisting of approximately one and one half acres is not included within the 27 and a fraction acres; tract 11 lies at the north end of our bridge 146 and on the west side of the main line; it is between the Omaha and Great Northern rights of way and the Milwaukee is on the north; it is just south of Tenth Street; it would be on the Eleventh Street if it were extended out; it is an irregular tract; it was originally purchased for station grounds and is part of the station grounds of the Great Northern; it is bounded on the east by our grade; on the north, the Great Northern and Milwaukee connection; on the west the Omaha grade and on the south the river; the tracts of the various railway companies bounding it I would say are about ten feet above the natural surface of the ground; tract 11 has never been used for agricultural purposes; I would not consider it agricultural land; it is not accessible; it is bounded by the river and three railroad rights of way on there is no road into it; no one could get into it to farm it; it is not feasible for that purpose. I am familiar in a general way with the channel and banks of the Big Sioux River from a point near our bridge in the city of Sioux Falls; the North bridge down to and through Section 31; to the south of town the banks of the river are well defined; there is a deep channel there and the river is confined to that channel, through town there is a greater chance; the channel is wider and the banks are
386 not so steep; as you go further north the channel again deepens and it is confined, the valley is narrowed considerably south of town; I am acquainted with Mr. Rettinghouse; I had a conversation with him in reference to the manner or basis upon which he based his opinion and report to the Board of County Commissioners with reference to the alleged benefit to the right of way, bridges, tracks and embankments of the Great Northern Railway from Drainage ditch No. 1 and 2 and the spillway in question; the first conversation with him was in early spring of this year; the last one was about ten days ago, I think it was last week; during the first conversation Mr. Rettinghouse stated that he had figured we could shorten our bridge and had figured out the cost of renewing those and the cost of filling and made deductions and based his figure on that amount capitalized at seven per cent, and divided by twenty-five per cent, was what our assessment came to—the number of units.

"Q. In your conversation approximately ten days ago, did he go more into detail with reference to the subject?

A. Yes sir.

Q. State the substance of that conversation.

Objected to as not binding upon the defendant commissioners.

Overruled.

A. We have two bridges within the area, and he stated bridge 150-7 that that bridge was about the right size, and bridge 146-0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures, and figured on the amount saved by the shortening of the bridge.

387 Counsel.

At this time, if the Court please, the defendants object and ask that the question be stricken, and objects to the testimony of this witness on behalf of the plaintiff empany, and to the proposition of whether or not the plaintiffs are benefitted or not, or the extent thereof, by the drainage project, for the reason the same is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction in the said matter in these proceedings, and proceeded with the construction and repair of the ditch in question. For the further reason that this Court has no original jurisdiction of a bill in equity to reject or control proceedings of the Board of County Commissioners of Minnehaha County in the construction or reconstruction and repair of this ditch. And that the plaintiffs have a plain adequate and complete remedy at law, by appeal from the equalization arising from the proceedings taken by the Board of County Commissioners. For the further reason, it calls for evidence of a fact, the determination of which is in the exclusive jurisdiction of the Board of County Commissioners, and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action, and with no allegation or proof of fraud or arbitrary action on the part of that tribunal. Is not within the issues of the case and not a proper subject of inquiry in these collateral proceedings, and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these pro-

ceedings attacking the question of whether or not they are or are not benefitted by the ditch proceedings?

388 The Court: Yes, the motion is denied. The testimony is received subject to objection.

Mr. Rettinghouse made no statement to me with reference to any other element of benefit to the Great Northern Railroad than the shortening of the north bridge within the city limits; basing my answer upon my knowledge of drainage ditch No. 1 and 2, the spillway, the location and construction of the tracks, bridges and embankments of the Great Northern Railroad Company, and my knowledge of the waters in the Big Sioux River; in my opinion no benefit results to such right of way tracks, bridges, embankments or station grounds from drainage ditch No. 1 and [—] including the spillway; no part of the right of way, tracks or bridges within the area in question to my knowledge have ever been flooded by the waters of the Big Sioux River; we have a plan drawn up for a new steel bridge at bridge 146 which provides for shortening of fifty feet of that bridge and putting in deck girders which are much lower and nearer the water; we considered that owing to the fact that we are lowering the steel we would have to provide practically the same opening we have there now; in planning to shorten the bridge fifty feet we did not take into consideration the existence of the drainage ditch; the present height of the track on this bridge above what I understand to be the high water mark of the Big Sioux River, according to our best record is eleven feet; if I were planning to construct new the bridges in question on the Great Northern, or to rebuild them, in determining the sizes of the openings from an engineering standpoint, I would not take into consideration the existence of drainage ditch No. 1 and 2, because by observation has been that before the spillway went out in 1916, and the water conditions have been just the same; I consider there is great danger as the spillway is constructed now of its going out, and there is danger that they will have to close the ditch and turn the water back into the original channel; I would not take it into consideration even if the ditch and spillway were working at capacity; I don't think it takes enough water out of the river to make any
389 material difference; I would plan new openings without considering the ditch and considering the highest possible water in the river; I would consider it bad engineering to plan otherwise.

I observed the flood waters that entered the ditch coming out of the ditch north of Sioux Falls and re-entering the Big

Sioux River; on the Watertown and Sioux Falls we are flooded every year just south of the city pumping plant at the top of the hill; the water comes out of the ditch and goes over our track; it has every year I have been here; we have probably over six inches over the top of our track; the water stands in there, sometimes for probably ten days on the Watertown and Sioux Falls line.

The length of the north bridge is 615 feet; I do not think it would be good engineering or safe for us to shorten that bridge more than fifty feet under any conditions; as I have stated, for some period of time we have contemplated the construction of a new bridge and of a different type, and shortening it fifty feet; as constructed at present the bridges are supported by a truss above, and in contemplating the new construction we had in mind what we called a deck girder, and that support is below the rail which makes a difference; our plan will be to lower it five or six feet due to the use of deck type girders instead of the truss now used; in planning this new bridge we did not take into consideration the possible effect of the drainage ditch.

(Cross-Examination)

When we lower five or six feet, the girders I have mentioned which are in the nature of I beams probably five feet thick, will still be underneath the track; the elevation of the track would remain the same as the bridge work is all underneath the track; from my observation I say that during the last five years the water from the south bridge and north to the termination of our line in the city has remained
390 about the same; during this same time the water has been high enough up around the penitentiary where the Watertown track goes to flood its tracks some inches of water every year; the water that came over the Watertown & Sioux Falls came out of the ditch; I have been told and know approximately the amount of watershed in this drainage project; I couldn't say off hand how much it is; I haven't the figures with me; I do not know how much water really falls in the watershed when we have high water here; I know generally the topography of the country north of Sioux Falls through which this water is collected and conveyed by the river and ditch south; I have been pretty well all over it; I do not know the number of cubic feet of water the river carries per second when it is banked full at flood time, nor the whole capacity of the ditch and spillway; I was up there

when they were building the spillway in 1917 and have been watching it; I didn't like the construction; I saw them repairing the ditch on north and throwing up embankments on either side; I am still of the opinion that the spillway isn't what it should be; I have seen it every year since then; I know of no reason why if the tracks were not upon the right of way and station grounds, those premises could not be used for agricultural purposes, except our station grounds which are right on top of rock; Section 31 and 27 could be used; Tract 11 I don't think has any soil to amount to anything on it; the bridge south of town is 304 feet long and takes care of the water; the bridge in town is 615; since I have been on the division there has been no new bridge put in; these bridges have been constructed for some years and before the spillway project was put in; I judge that they were put in to take care of the water that came down the Sioux River at the time; the water has come out of the ditch every year since the spillway was put in; north of the city at level siding
391 the water has come out of the ditch over the tracks of the Watertown & Sioux Falls Company right at the city pumping plant; it comes through the dikes in the ditch.

(Redirect Examination).

Along the right of way south of town we have an embankment about 1800 feet long; bridge 150-7; it is about 16 feet deep; side slopes approximately one and one half to one, approximately fifteen feet high; the toe is protected in some places with rip rap, and it is now overgrown with grass and weeds; that embankment is so constructed as to withstand any possible flood condition in this neighborhood.

THOMAS SIMPSON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination)

My name is Thomas Simpson; I have lived in Sioux Falls twenty-seven years; I am general agent of the Great Northern Railway Company at Sioux Falls, and have been its agent for twenty-seven years; I am familiar with the line of the Great Northern included within the area in question here in Section 16, 27 and 31; during such twenty-seven year period no part of the tracks, bridges or right of way of the Great Northern Railway within that area has been flooded; we have had no trouble during that period of time from high water; the station of the Great Northern is east of the river; I have lived on the west side of the river twenty-seven years; the depot

has been located where it is now approximately fifteen years; during that time I have crossed the Big Sioux River several times a day and I have not observed any appreciable difference in the flow of the Big Sioux River before and after the construction of the spillway.

(Cross-Examination).

During the time referred to in my testimony the height of the river has fluctuated, but there has been no floods; the height during flood periods has been at about the same level; I do not know how much water the spillway takes care of or how much the river banks carry; I heard about it when they put in the spillway.

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392 ANDREW NELSON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination).

I am section foreman for the Chicago, Milwaukee & St. Paul Railway between Baltic and Renner. Renner is six miles and Baltic fourteen miles north of Sioux Falls. I have been section foreman there twenty-seven years and was foreman in 1916. There is a place on my section where the drainage ditch is just outside of the right of way. I think they diked it there four feet just outside of the right of way. From a point about four miles south of Baltic the ditch is on the west side of the railway, and from that point down to Renner it runs close to the track. The Ditch runs between the railroad and the river and the ditch and the river are both on the west side of the track. In 1916 at a point four miles south of Baltic the dam went out of the river and the river let the water in the ditch. The ditch couldn't carry the water and it went over the bank and washed the dike out, and a few miles further south it washed the track and let all the water out over the farms around. It flooded the farms around there and washed back on the track. This water came from the ditch. The ditch is constructed with a dike and the water broke through that dike. Before the water came out of the ditch there was no water east of the track. The water came into the ditch and went out of the ditch and washed all the track out and flooded the ground. The water in the ditch came from the river. I did not have any trouble with the water in 1919 and 1920. It came out of the ditch at several places, but not enough in those two years to hurt the track. In 1919 and 1920

the water came out and went up to the track and the
393 ditch was full of water. It came to the bottom of the railroad track but didn't cut in much or wash. At the time the water came through and flowed up to the top of the bridge there was no water east of the railroad track. There was no flood water between the ditch and the river until the water ran out of the ditch. It ran out of the ditch and filled up between the river and the ditch too. It went over the dike on the west side of the ditch. The origin of that water was the river. In 1916 the water remained on the lands that were overflowed about ten days or two weeks. In 1919 and 1920 it stayed over two weeks. It stayed a little longer in 1920 than in 1916. The point at which the ditch protects the track is about a half mile south of the Thompson bridge. The ditch comes to the right of way at the Thompson bridge and runs nearly four miles down the track. The water comes in the ditch where that bridge is built. There has always been a bridge there. They built a cement bridge there a year ago. It is a highway bridge. At the point where I said it washed out we had to put in [riff raff]. We had to build a bridge there temporarily and afterwards we filled it with [riff raff] and it is [riff raff] now.

(Cross-Examination).

The water [wall] wash the track out the way the bridge is put in there. The water in 1916 washed out part of the track but not at the place where the bridge is. That was the year the old spillway went out and there was high water that year. I have no idea of the amount of rain or water that was carried by the river or the ditch in 1916, 1919 or 1920. In 1897 the track was washed out south of Renner. In 1916 the water did not cover the abutting lands before it went through the track, but it did not cover half as much ground as it did in 1897. Then it covered all over the East side after it got through the track. If the dikes were raised a foot or two they would keep more water in than they do now; our track was not injured in 1920.

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394 NELS OLESON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am section foreman for the Chicago, Milwaukee & St. Paul Railway Company. I started in 1887 as a laborer. The most of the time I have been employed as section foreman I worked in the yard five miles south of Sioux Falls. I have been continuously living here and working for the railroad

company since 1887 I have not noticed any injury to railroad property or to railroad property covered by waters from the Sioux River south of here during that time, and none in Sioux Falls. I do not know of any water doing any damage on J. L. Phillips' Addition and on the Millspaugh's Addition near the roundhouse, or east of the roundhouse, or north of the ice house. I do not know of any flood waters doing any damage to railroad property since I have been here. There are five tracks in the new yard in what they call Daniel's Addition and Millspaugh's Addition in the vicinity of the ice house east of the depot. I do not know of any damage being done there. There has been no interference with any of these tracks by the waters of the Sioux River since I have been here. There has never been any difficulty or damage on account of the flood waters at the roundhouse property.

(Cross-Examination).

The ice generally comes down in the spring and goes over on the east side and over the rocks there. There is a current through the east side of the channel of the river and it lifts the ice right around the roundhouse. The water comes close to the roundhouse but never does any harm. It does not come out to the banks by the ice house very much. I never saw water standing in the ditch alongside the track on the ice house side.

"Q. You don't know, Mr. Oleson, whether or not the amount of water that has been gathered into the Sioux
395 River and the ditch above Sioux Falls in the past five or ten years has increased or not, do you?

A. I couldn't tell you about that.

Q. And so if there is twice as much water coming down this valley as previously came down, you couldn't say that was true or not?

A. If the water raised five or ten feet I could tell.

Q. You don't know the actual amount of water?

A. No, I don't know nothing about that."

WILLIAM SHEA Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am general road master of the Chicago, Milwaukee & St. Paul Railway Company, and have been such about four years. Prior to that time I was district general road master and division road master. I have been in these divisions for the

railroad since 1890. Prior to that time I was track laborer and section foreman and construction foreman. We have many miles of railroad built across river bottoms and creek bottoms where we have to maintain grades that will guaranty us that we can operate our railroad during high water. The Chicago, Milwaukee & St. Paul have many lines upon which heavy traffic is carried upon which they have tracks to maintain under such a situation. I have been over the line between here and Baltic and have noticed the material of which the grade is constructed. From what has been my experience and observation I would state that adjacent water standing alongside of and extending against the grades has no effect upon the maintenance of the grades or the stability of the track upon it, for the reason that we used our track embankment in many cases as the bulkhead to our reservoirs of water for engine supply. We do not hesitate to use our track bank for that purpose. We have many of them on our railroad and we do not notice that we have any bad results from it.
396 No additional expense of up-keep is occasioned by that situation on embankments twenty years old or over. We prepare our property for the purpose we are going to use it for by building up a track bank. In this particular instance, it would cost from $800 to $1,000 an acre for us to build up the track bank and make the line serviceable for our purpose, which in this case is about what that cost up there. I do not believe the farmers ever went to any expense worth mentioning in that community to prepare their properties that way. I didn't notice anything of the kind. The overflow upon this embankment or alongside the embankment would have no effect whatever upon the railroad bridge. If the flood remained two or three, or five days, upon the adjoining agricultural land I think it would ruin their crops.

(Cross-Examination)

It would cost $800 to $1,000 per acre to prepare our right of way for railroad purposes, and if the embankments would wash out it would cost something like that to replace it. It has not been our experience in washouts that the damage to the right of way of the railroad would be greater than it would be to the farm land. When the water goes over it generally breaks through the embankment and cuts out a short piece, or whatever is necessary to carry the overflow of water from one side of the track to the other. After the water would get over our track it would not take our entire roadbed out, just break through and make openings similar to the kind we have in other places known as arches. It would not nec-

essarily take out our entire embankment. Yes, when this em bankment is taken and is washed away it does hold up our traffic and cuts off our income during that time just the same as the farmers. It costs about twenty-five dollars a cubic yard to put the dirt back in a washout.

I am familiar with this branch of the railroad running north and going through the drainage district. I pass over it and inspect it in different ways three or four times a year. We have had no washouts for the last four years, other than that the water got up on the track in 1919 and 1920. This year it didn't come over the track but it got very close to it. We possibly delayed our traffic. I came over on this line in 1918.

WILLIAM E. WOODS Called and Sworn on Behalf of the Plaintiff Testified as Follows:

397 (Direct Examination)

I am assistant district engineer of the Chicago, Milwaukee & St. Paul Railway and have been in the employ of that company about thirty years in the engineering department. I am familiar with the lines of the Chicago, Milwaukee & St. Paul Railway described in the notice of assessment published in the Daily Argus Leader dated August 13, 1921. None of the land of the railway company is used for agricultural purposes. The width of the right of way is usually one hundred feet, being 50 feet on each side of the center line of the main track. We have a little piece of right of way in Sioux Falls 50 feet wide, being 25 feet on each side of center line. There is approximately 198 acres of right of way in the drainage district, none of which is agricultural land. I am acquainted with the lands described as Lots 13, 14 and 15, of Block 28 of Millspaugh's Addition to Sioux Falls. That property is near the ice house property south and east of the town. It is used for new yard tracks. The main line lies between the trackage of this yard and the river. These tracks are lower than the main tracks. The main track was built in 1879. It has never been disturbed by high water. It remains in the same position as when originally constructed. Block 9 of Daniel's Addition to Sioux Falls is just east of Millspaugh's Addition and is used in the same manner. Lots 5, 6, 7, 8 and 9 in Block 25 of J. L. Phillips' Addition to Sioux Falls is used for roundhouse and ice tracks and turning table. This property is situated on the west bank of the Sioux River about 18 or 20 feet above the surface of the water.

398 (Cross-Examination)

The Chicago, Milwaukee & St. Paul Railway Company have 198 acres altogether in the drainage district. That includes what is known as the right of way of the north branch and also includes same going south. A very small portion of that 198 acres is taken up by the roundhouse grounds and the yard out near the ice house. The most of it is right of way. If there were no railroad through the most of it it could I presume be used for agricultural purposes.

A. G. Holt, called and sworn on behalf of the plaintiff testified as follows:

(Direct Examination)

I am assistant chief engineer of the Chicago, Milwaukee & St. Paul Railway Company and have held that position about eight years. I am a civil engineer by profession and have been connected with the railroad company in a professional capacity about thirty years. I am familiar with and have made a study of the matter of locating lines of road. In turning the line of road from one point to another the character of the country generally determines or controls the location of the line. In locating a line of road through the Sioux Valley an engineer would necessarily have in mind as one of the elements the cost of construction. He would have in mind the height of embankment to be constructed and maintained on account of flood waters. That would be an important feature. In making a location it is a part of the duty of the locating engineer to find out the height of the flood waters of the various streams he crosses. The grade line is usually established with reference to the high water. The engineer gets as much information as he can in regard to the elevation that the high water reaches in the valley. He gets the information partially from the people who live there and partly from his observation of high water marks as they are shown on trees and washes in the sides of the valley. He then deter-
399 mines largely the height of the grade from past experience as indicated by the information he has received. In determining the openings and bridges the engineer makes what is called a ravine section. That is a chart showing the elevation of the valley. Then on this chart he shows the elevation of the high water and from that he computes the size of the bridges and the openings, that will be required to carry that water. There are certain rules adopted by railway companies upon which these computations are made, and they

are made as an engineering proposition. I have recently examined the territory put into the drainage district. In locating a new line of railroad through the Sioux Valley occupying the place where the Milwaukee railroad now has its track you would have to take into consideration the fact that the drainage ditch was there. You would have to provide a bridge to span it. In providing the openings in bridges and other provisions in the line for overflow of water I would not make any deductions on account of that ditch, because I would figure that at the time of the flood the entire valley would be covered with water and this ditch would be simply a wrinkle in the valley. When the flood waters were the highest they would cover the ditch up.

(Cross-Examination)

I do not know the amount of cubic feet of water the river carries per second. I do not know the cubic feet of water per second the ditch carries, yet I think the ditch is a wrinkle. In computing the spaces I have testified about which I would make for a bridge, I do not think the speed of the water in passing a given point would make any difference if you had a high water mark that was dependable. If subsequent to the time I had that high water mark something was done to increase the speed of the water in passing a certain point I would have to take that into consideration.

It is stipulated that the mileage of the Great Northern within the drainage district in question, to-wit: Sec-
400 tions 27, 16 and 31, is 3.04 miles.

It is stipulated that the mileage of the Rock Island Railroad within Minnehaha County is 4.3 miles and within the district sought to be assessed 3.5 miles.

THOMAS HARDIMON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination)

I have lived in the City of Sioux Falls since April, 1879. I am a member of the City Commission and am in charge of the roads, streets and highways of the City. I have been a City Commissioner of the City of Sioux Falls for nine years last October. Since 1879 my occupation has been constructing and road work a great deal of the time. Some of the time I have done bridge work on railroads. I was in Sioux Falls in 1881 at the time of the big flood. There was an ice gorge out on the south side right over where the bridge runs on the Coats

farm. When it came through the City it took all the bridges but one and swept up the mills and lumber yard on the east side. The only thing left on the east side was the Omaha railroad bridge. With the exception of that flood which was caused by the ice gorge there has never been any high water since I have been here that has done any damage to the property of the City. The Coats farm is about two miles southeast of here. I think the west line of the farm is in the neighborhood of Eleventh or Twelfth Avenue. It is probably eighteen miles from the spillway following the course of the river around. I am familiar with the [photograph] of the channel of the river from Sherman Park down through the City. As you leave Sherman Park the most of the shore line is fairly level on one side. On the other side it is higher and goes up further from the river. For several miles there is a high plain on the right hand side as you go down the river. The banks on the left side are fairly high too in places.

401 From the time you leave Sherman Park until you get down below where the ice gorge formed in 1881 you have a very decided embankment on each side of the river. The river through the territory I have mentioned is much narrower than it is up above Sherman Park. The ice gorge at the Coats farm held all of the water that collected there, except what ran in the channel until the ice gave way. It gorged different places there. It kept creeping along there for probably two or three days before it came down here. The waters did not spread out on either bank of the river. There was no gorge close to the neighborhood where the Milwaukee roundhouse is now in 1881.

I was here when the Great Northern bridge was built that crosses the river about Seventh Avenue and worked on that bridge. During the past nine years my duties in regard to city property have been overseeing it and attending to it, and also attending to the bridges across the river through the City and matters of that kind. From the experience which I have had during a residence of over forty years here I should say the results would be very unsafe of narrowing the bridges and lowering them in case of extra high water. This would be on account of the volume of water, and in case of ice gorges would leave it too narrow underneath. If a flood took one it would probably take all of them and form a gorge.

The east side of Sioux Falls is thickly built up with business places, wholesale places and residences, lumber yards, and institutions of that kind. The City pumping station and the City electric light station are situated half or three quar-

ters of a mile north of First Street. The pumping station is south and west of the spillway. The electric light and water plant is south and west of the pumping station. The spillway runs to the north and east of our property. The water
402 plant and the electric light plant are a little north and west of the Penitentiary. I observed conditions of the water around the electric light and water stations during the years 1919 and 1920. I was up there on different occasions when there was any danger or any prospect of water. My official duties required me to be there and investigate those things from time to time. The water around the City electric light plant and pumping station was greater in 1920 than it was any year prior to that excepting 1881. I do not remember so much about it in 1919. We were up there quite a number of times in 1920. When we went in there the water was over the tracks of the two railroads there and there was also a flood down almost to Russell Street and from there down to Covell's Lake. The high water subsequent to 1881 has done no damage to speak of that I know to the City property in the City of Sioux Falls. The water went over Minnesota Avenue in 1920 but not enough to amount to anything. It took a few loads of cinders to patch it up. I never saw the water on the West Sioux Falls road, with the exception of 1881, any higher than it was in 1920. Each street there is two and one-half or three feet above natural ground. In 1920 it went up to just about where it could go over. Then the bridge there carried it down to Covell's Street bridge and it flowed away. Phillip's Park runs along the east bank of Covell's Lake and goes up very abruptly to the east, all except a little piece down at the First Street bridge. There is a little corner there that is a little low, but the balance of it runs up to the east and slopes quite sharply. It has some fruit trees and some other trees on it and has been terraced up in the shape of a park. It is quite broken and is not agricultural land and is not used for agricultural purposes.

403 Sherman Park is very low and all timber and is in where the river bends around considerable. The west side runs quite flat but the east side goes up very abruptly. No part of Sherman Park is agricultural land. Sherman Park overflows pretty nearly every year. The bed of the stream forms a circle in the Park for probably three quarters of a mile. I do not know that the spillway and those ditches have ever been of any benefit to city property. It is pretty hard to state whether or not the spillway materially [effects] the flow of the water through the City, because when the water is

high it overflows a lot which comes down in the spillway and almost directly east of the pumping station. Then it comes out through a little ravine and into Covell's Lake and finally into the river.

The City has a park known as Lien's Park near where the spillway empties into the river. It has practically put the park out of commission. The water practically keeps it covered and washed out considerable. There has been an attempt to rip rap or dam it up, but it has been of no avail. That condition did not exist prior to the establishing of the spillway.

In the City pumping station and electric light plant there are five wells, four of them are 25 to 50 feet in diameter. The last one is U shaped and is 16 feet. The furtherest one west is close to a mile west of the station. The City has a piece of ground that surrounds the well directly north of the pumping station. As I remember, there are about twelve acres in it. It is planted to young willow trees. Well No. 1 is located on this tract and well No. 2 is right close to it and directly west Then follow each well after that up to No. 5. It is probably 30 or 40 rods running east and west at right angles west of the road. The tract is enough as the population of the City increases from year to year for the establishment of
404 additional wells as the needs of the people require.

All of the property other than I have described, that is the three parks, the City pumping station and the electric light station, that is included in the assessment is the streets.

(Cross Examination)

There was high water in 1920.

"Q. Did you not testify in the case of Gilseth vs. County Commissioners, that if this ditch had not been reconstructed and the river had been permitted to take its then course over the bluff it would have destroyed the waterworks of the City?
A. It might."

The water was high twice that year; in the first place when the spring rains came and the snow went off, and then along about the first of June there was a heavy rain in the neighborhood of Flandreau that reached us a few days afterwards.

"Q. And the water was so high that year that it contaminated the city wells and it was necessary for your department to place certain notices in the city papers, in which you informed the patrons of the water company that they should boil all water before using it?

A. The commissioner of water might have done that. Never anything of that kind came before the Board that I know anything about.

Q. As a matter of fact the water did come into the wells in 1920, surface water?

A. I don't know. I would not want to say one way or the other." The city owns a plat of land known as Sherman Park within the drainage area, it is owned and kept by the city for park purposes; it is practically overflowed every spring; I do not recall whether it was overflowed in the spring of 1921; I was not there that spring; the water does not need to get up but a little ways because the land is very low; the river forms the letter S just around it. Pos-
405 sibly anything that tends to divert a portion of the water that comes down the Sioux Valley and keeps it out of the river as it goes through Sherman Park would be a benefit to that park; there is none of the Covell's Lake Park, excepting a little piece of ground just by First Street Bridge, that would be overflowed; I do not think the water would cover one whole lot; we have 125 miles of street, and some of them cost more for up-keep and some of them cost less; I think the up-keep would be somewhere in the neighborhood of $100 per mile; in 1920 during the high water, the water came up on the [wides] of the West Sioux Falls road, but didn't cross it; the roadway is much higher than the surrounding ground;

"Q. That is true when Sherman Park floods, isn't it. The refuse from the river [funs] up on the banks and is left there, and a very healthy crop of mosquitos is produced?

A. There is a very good reason for that. Sherman Park is filled with little ravines and is very much shaded. It is much better now than it was because many of the trees have been cut out.

Q. Directing your attention to the Park again, those conditions are true every time that it floods, that it causes an unsanitary condition there?

A. I presume it does to a certain extent."

We have abandoned Lien's Park on account of the water, which has practically cut out the park; it has been kept open, and there are some picnics held there, but it is practically abandoned; it is a little north and east of the Penitentiary, and just a little west of the spillway.

406 In my judgment it would be unsafe to change the lengths of the railroad bridges and other bridges across the Sioux River in town. The Omaha bridge is some wider

than the Eighth Street bridge, I think. They have filled some of the trestles of the Omaha. It is not so wide as it was before. As the Eighth Street bridge now stands, I think it has always served its purpose of letting all of the water of the river pass underneath it. I do not know the amount of water that comes down the Sioux Valley. I know that the elevation of the land north of the spillway is about two and one-half to three feet to the mile from Thompson's bridge down to where it enters the present spillway. The amount of water shed varies very much. It would be pretty hard to tell the amount thereof.

(Redirect Examination)

The channel of the Big Sioux River that passes through the city has been infringed on very much in the past twenty-five years; Since I came here in 1879—the river covered much more territory then than it does now and was very flat. When we got a heavy rain the stream flowed out and later would narrow down to a smaller stream again. During the years 1919 and 1920 the water in the river has been the highest that I can recall, and especially up around the city water plant and electric light plant, than at any time prior to that, since 1881; there has been no damage by high water to the city property since 1881; the Cascade Mill dam was built I think in, 1878; they were finishing it in the spring I came here.

F. E. SPELLERBERG, called and sworn as a witness testified as follows:

(Direct Examination.)

I am and have been since March 1916, superintendent of parks of the city of Sioux Falls; only a very small part of one end of Covell or Phillips park and about half of Sherman Park and about half of Lien Park are affected by
407 high water; Lien Park is situated a little east of the spillway; since the spillway was put in, the Board has taken out practically all the improvements at Lien Park that could be used at other parks and merely cut the grass and keep it available for use at such times as people can go in there when it is dry enough; we took out the improvements because we could use them at other places and they were practically of no use at Lien Park on account of flooded conditions from the river overflow from the spillway; the city has practically abandoned Lien Park as a park since the spillway was built; prior to the building of the spillway the city had started in to improve it; the spillway empties into the river above Lien Park and then flows down past it.

The high water does not affect Phillips Park to amount to anything; it overflows a small area at one end where the ditch overflows and comes down to Covell Lake; Phillips Park is practically all high ground bordering on Covell Lake with the exception of a small flat area at one end; it is rough land and cannot be used for agricultural purposes.

The lands of Sherman Park cannot be used for agricultural purposes; that park has overflowed every year except one since I have been here; it did not overflow in 1921; with the exception of that year it has overflowed every year for five years; in 1919 the overflowed condition started in the latter part of May and continued for two weeks into June and then dried up for a short time; the park was [useable] on the 20th of June and then overflowed once more in the middle of July; in 1920, we had practically no use of the lower part practically all season, the lower part of the park is on
408 the west side of the river; in the years 1919 and 1920 the river came up the highest it has been to my knowledge and the overflowed conditions continued longer those years than in any prior year.

(Cross-Examination).

"Q. The length of those periods would indicate to your mind that there was more water came down the Sioux Valley those years, would it not?

A. I am not sure I am competent to judge.

Q. You would naturally arrive at that conclusion?

A. I might.

Q. Anything that would tend to divert that water would be to the advantage—If a certain amount of water came down the Sioux Valley and you could keep part of it or divert it from Sherman Park, it would shorten the period that Sherman Park would be covered with water would it not?

A. I would sooner not answer that. I don't know that I am competent.

Q. Say yes or no.

The Court: I don't think he can."

There are 52 or 53 acres in Sherman Park; only about 20 or 25 acres are on the lower level; if the land was not occupied for park purposes, it would not make a good pasture as there is not enough grass there; the land around there is used for pasture, but it is higher; the land north of the park is used somewhat for cultivated crops and they are taking their

chances on it; the acre and a half or two acres at Phillips Park could be tilled or turned into pasture or produce hay after a fashion; they would have to wait until after the
409 flood had come down; it makes a late crop proposition.

O. S. THOMPSON, called and sworn as witness testified as follows:

(Direct Examination)

I reside in Sverdrup Township and was born there in 1875 and have resided there ever since; about 10 miles north of Sioux Falls; I own 503 acres in the Big Sioux River Valley where I live; within the drainage district there is close to 300 acres; I have farmed my land, myself since 1897 and was residing there when ditch No. 2 and also ditch No. 1 was constructed; I think ditch No. 1 was constructed in 1909 and ditch No. 2 was constructed the following year; ditch No. 2 starts about 1 mile northwest of Baltic; it starts right in the river at a point about 15 miles north of the spillway near the penitentiary; from the point where ditch No. 2 starts to where it joins ditch No. 1 is about 11 1/2 miles; the length of ditch No. 1 is 3 1/2 miles; the width of ditch No. 1 at the top is about 90 feet; the top width of ditch No. 2 is 45 to 50 feet; it is possible that at the very north end it is down to forty feet; the average depth of ditch No. 2 is about 6 feet and of ditch No. 1 about 6 feet; the present spillway was finished in 1918; the old spillway was washed out in 1916; the present spillway is a little less than 12 feet in diameter; the intake of the spillway is the lower end of ditch No. 1 and is rip rapped, then there are two gates leading into a hole that goes down through the ground about 40 feet; the shaft is perpendicular for about 40 feet; at the lower end of it a channel is run out towards the river towards the east sloping downwards so that it comes out just above the river level on the lower end; there was nothing that prevented all of the water that was gathered by these ditches No. 1 and No. 2 at the outlet or spillway to prevent all of the water going over the hill; since the new spillway was put in, I have lost more crops than I did before it was put in and after the
410 construction of ditches No. 1 and No. 2 my losses have been considerably more since the new spillway was put in than they were before it was put in and after the ditches were constructed.

Defendants were thereupon given permission by the Court to make the witness their witness for the purpose of identify-

ing certain exhibits and he thereupon testified in behalf of defendants as follows:

Defendants' Exhibit 2 is a petition to the County Board asking for the establishment of what is known as Covell Lake cut-off. The first signature attached thereto is mine. I signed that, and I had that presented to the County Board for the purposes set forth in the petition. I own land in the vicinity of Drainage Ditch No. 1 & 2 that is affected by that ditch. I evidently furnished the bond designated as Defendant's Exhibit 3.

Defendants' Exhibits 2 and 3 were offered and received in evidence as part of defendants' case.

FRED H. REED, Called on Behalf of the Plaintiffs and Sworn Testified as follows:

(Direct Examination.)

(It is stipulated that Northern States Power Company is the successor in interest of the Sioux Falls Light & Power Company in and to the property involved in this action.)

411 My name is Fred H. Reed; I have lived in Sioux Falls since 1899; my occupation before coming to Sioux Falls was farming; since coming to Sioux Falls I have been looking after farms, real estate and other properties; I was the Secretary of the Sioux Falls Light & Power Co., and of the Sioux Falls Improvement and Development Co's interest in certain properties in the vicinity of the Queen Bee Mill at one time; I had charge for Mr. E. W. Coughran and various of his associates of properties in the vicinity of the present hydro-electric plant of the Northern States Power Co. for a long period of years and since about 1900; my office is in the Lacotah Building between 8th and 9th streets and between Phillips Avenue and the Big Sioux River on the east side of Phillips Avenue and the west bank of the river in Sioux Falls; it is in the rear of the building facing the river; at the time I came to Sioux Falls there were three dams across the river in the vicinity of the present power plant; the Cascade or upper dam, the Queen Bee dam, and what was known as the Bennett dam; the Cascade dam is the dam below 8th Street and is still in existence; the Sioux Falls Light and Power Co. was organized in 1907 and constructed the present hydro-electric plant of the Northern

States Power Co., completing it in 1908; prior to the construction of that plant the Sioux Falls Light & Power Co., acquired in the spring of 1907 and operated the Cascade mill property; I first became associated with the property which is now the property of the Northern States Power Co. and the Queen Bee Mill property and the other ground in that immediate vicinity in 1900; I am familiar with the nature and character of the present real property interests of the
412 Northern States Power Co. including tracts 6 and 7 of the County Auditors subdivision of the Northeast of Section 16, township 101, Range 49, Lots B and C of Sioux Falls Light & Power Co's subdivision, tract 2 of the County Auditor's subdivision of the Northwest Quarter of said section 16, and also the property upon which the hydro-electric plant is now located; I don't know that there is any soil on that real property; it is rock, granite, come to the surface; that is true with reference to all of that tract of land in there; in my opinion it would not be possible for any part of that land to be used for agricultural purposes; the hydro-electric plant of the Sioux Falls Light & Power Co. now the Northern States Power Co., was operated partially under my supervision as one of its officers; I was familiar with its construction at that time; at the time of its construction the question of constructing it in such manner as to withstand all flood conditions of the Big Sioux River and prevent any damage to the property or its water power from flood conditions was discussed and taken into consideration; the hydro-electric plant was so designed under the instruction of our company as to guard against such flood conditions and was so constructed; at that time our engineers had data with reference to the flood waters of the Big Sioux River; no part of that property down there now owned by the Northern States Power Co. has been flooded since 1900; I have observed it every year since then; the largest flood that I recall, I think, was prior to the year of 1907, the time the ditch was first constructed; at the time no part of this property was
413 flooded; the hydro-electric plant of the Northern States Power Co., is east and some south of the spillway of ditch No. 1 and 2 and north of the Cascade dam and the city of Dell Rapids is north of the spillway; I think the hydro-electric plant is about ½ mile from the mouth of the spillway; the foundation or lower part of the hyro-electric plant is made right in the solid rock; the rock was blasted out for a distance of something over 30 feet deep; that part would be solid ground and the part from the granite on up with cement, concrete; for the first story it is in granite; the

dam was so constructed as to take care of the flood waters; I have observed from my office window the condition of the river at various times during all these years; I have not observed any appreciable difference in the volume of water flowing down the Big Sioux River since the construction of the spillway; the Lacotah building property is never flooded and the water never got into the basement.

(Cross Examination)

At the time I was connected with the company I was familiar with all the Northern States Power Co. equipment and machinery and with the three dams; the dam which the Northern States Power Co. now has is the same dam the original company put in; that was Queen Bee property at one time; the Bennett dam was below the Queen Bee property; it is not there now; it was about 16 feet in height and I think has all been blasted out; when the dam was taken out I think the tail race of the Northern States Power Co. was lowered; I suppose on a level with the river below the dam, probably 16 feet; that would help the water get away
414 from the wheels of the plant and produce more power; I think the Sioux Falls Light & Power Co. had a seven foot flume; I don't know whether the Northern States Power Co. has changed the flume or not; the property north from the dam to the present hydro-electric plant of the Northern States Power Co. is mostly granite.

O. A. ROFELTY Called on Behalf of the Plaintiff and Sworn testified as follows:

(Direct Examination)

My name is O. A. Rofelty; I live in Sioux Falls, South Dakota; I am Manager of the Northern States Power Co. and have general charge of its business and the operation of its property including this district; I have been in that position since November 27, 1918; the plant consists of Hydro and steam plants for the generation of electric power; that is essential; it is quite necessary for us to have the steam plant to supply the demands for electricity in the city of Sioux Falls; the water plant has not sufficient capacity; in the past, during the year 1921, there has never been a day but when we kept the steam plant going all the time, not even an hour, day or night; it was necessary to do that in order to serve our customers; we operate the two plants together as one unit for generating and selling electricity when we have any

water; it does not make a particle of difference in the operating expense of this plant such as labor and help whether the steam plant is required to produce a larger or smaller part of the load; I am familiar with all the ground or land owned by the Northern States Power Co. down there; I would describe it as a large pile of stone; it is not level; it is
415 piles of stone here and there, topsy turvy condition; the stone is what they call a red granite; there is not any soil on any of the Power Company's property there sufficient to be used for cultivation of crops of any kind.

(Cross Examination)

The capacity of our steam plant is about 5000 kilowatts; the rated capacity of our water plant, I believe, is 1400 to 1500 kilowatts; if the water is low or for any other reason we can't put the water over our turbines and have to produce this current with steam, it costs more money; what current we make by steam costs more than what we would make by water; there are times in the year when the water is not sufficient to produce any current; I have been manager down there since November 27, 1918; the company has not lowered the tail race since I have been there; we only cleaned it out; we never intend to lower it; I understand that our company succeeded to all the rights of the Sioux Falls Light & Power Co; Defendant's Exhibit "6" looks to me like a fair representation of the river and the location of our plant upon the river; I am unable to say positively whether the drop of our water from the top of our flash boards at our dam down the tail race was substantially as represented by this map or about 55 to 60 feet, but I think so; I think the size of our flume is about 7 feet; Exhibit "7" looks like a fairly good picture of our hydro-electric plant where the water enters the same by our flume, going through the turbines and discharging it into the tail race; I do not know of the lowering of the bottom of the driving tube or the tube carrying the water from the turbines into the tail race; the only thing we did was to clean out the loose dirt and stone that had fallen into it; we concreted that block of stone on the east side of the river in 1920; we did that for the purpose
416 of keeping the flood waters from carrying down the loose rocks that had gathered up there; the gorge you have mentioned north of our power house was full of water in 1919 and 1920; at the time of high water our tail race was up more than when the water is low; that is natural; the water outside was not as high as our lower power room; the water to the north of our building was not higher than the open-

ings into our tail race; the water at that time did not get high enough to cover the solid granite wall on top of which our company has thrown its loose stone; it was still out of the water; I do not know how deep the water was in the tail race, that is pretty hard to say because it is just a matter of guess; I imagine we have about 25 feet of cement in there; that runs down to almost the level of the falls between those two walls; I do not think the tail race extends over fourteen feet below the concrete; in 1919 the water went about 3 or 4 feet on the rocks which are now covered by cement; during that time our hydro-electric plant could and did run at full blast.

"Q. Do you know the height of the gorge of your tail race?

A. No, I could not answer that.

Q. About forty feet?

A. That is a pretty good guess I should say.

(Redirect Examination)

I should say the difference in cost per kilowatt an hour between generating electric current by steam and water power is possibly 2 mills per kilowatt.

J. WILLIAM LINK, called as a witness on behalf of plaintiff and sworn testified as follows:

417 (Direct Examination)

My name is J. William Link; I reside in Chicago; I am a hydro-electric engineer employed at the present time by the Byllsby Engineering & Managing Corporation; next February I will have been in its employ 12 years; my first experience in hydro-electric work was with the Missouri River Commission; I was with them for five years on the Missouri River Work; subsequent to that I was for five years on the Metropolitan Water Works in Boston; following that I was with the Niagara Falls Power Company for 4 years; I think it was; and then with the former resident engineer of that company, who opened an office for himself and I took charge of his office for him for a year or 18 months; I then was
418 with the City of Columbus, Ohio, for two years; following that I was with the Long Soo Development Company of the St. Lawrence River for two years, and with the Passaic Valley Sewage Disposal Commission for three months; I then came with Byllsby & Co., and I have been with them ever since; I should say the experience I have out-

lined covers pretty well the field of hydro-electric engineering; I have had a good deal of experience in the designing and construction or superintendence of construction of hydro-electric plants and water plants, particularly plants for the generation of electric current; I have had experience in the installation and inspection of water wheels and water machinery; I have not had experience in the designing of water wheels; that is a specialty; I have installed that kind of work and written specifications for them and designed what kind of wheels should be installed, etc; since I have been with Byllsby interests I have had complete charge of their hydro-electric plants in the different parts of the country; these plants are scattered pretty well over the country; we have 5 plants in Minnesota in the vicinity of the twin cities and southwest of there; we have two plants in Wisconsin; we have two plants in California; a plant in Oregon and a plant in Montana, and the plant here in Sioux Falls; I think that covers the water power plants pretty well; I have made a study of the hydro-electric plant in this city operated by the Northern States Power Co.; that was constructed before my connection with the Byllsby interests; the Byllsby interests constructed that plant before they acquired it, for other parties, the plant referred to being the hydro-electric plant in question here; I would call the construction of the plant very massive; I have investigated the stability of the dam, its capacity to withstand flood waters, and after examining
419 the whole plant, I should say that it is particularly well designed and constructed to withstand floods or anything of that nature; the massive walls I speak of are of concrete material; I have made a study of the flood conditions in the valley of the Big Sioux River; my sources of information have been government reports and the information I have gleaned from newspaper accounts and talks with various parties who have been on the ground and know the floods; the nearest I can judge, according to the information I have obtained, the greatest flood that there is any record of in that valley was the flood of 1881; I think the design and construction of the plant down here would be sufficient to withstand the flood stages of 1881; I think it would do that if there were no spillway or drainage ditch because the plant was constructed before the spillway was, and so far as I can find out no account was taken of the spillway at all; independently of that, the nearest estimate that I could make of the probable volume of the flood of 1881, the dam would discharge that without even raising the water any higher than we carry it ordinarily; in my judgment, the company operating this plant would absolutely not be justified

in the expenditure of any money for the construction of the drainage ditch, and spillway that has been talked about here on the basis of benefits to the plant in any way; it is my opinion that there is no appreciable benefit to the plant of the construction of the improvement out there.

(Cross Examination)

"Q. Mr. Link, you made for the County Commissioners of this county a hydro survey at one time, of this territory, did you not?

A. I don't think I made a survey.

Q. You made a report to the Board? A. Yes.

Q. And the data you testified about? Your attorney asked you on what data you based your opinion and you said upon government reports.

A. And some survey data taken by the Board's engineer.

Q. And you made a report as to the feasibility of this drainage project did you not?

A. The feasibility? In what way do you mean? I don't quite get your idea.

Q. That it was feasible from an engineering as well as a financial standpoint?

420 A. It was feasible to build it, yes."

In that report I stated that the maximum flood liable to occur in the reaches of the Big Sioux River under consideration which has this ditch construction, will probably not exceed ten thousand second feet. This condition was probably approximately as it existed in 1881; and that the floods which occurred in the spring of the year 1916—the amount of water that came down the river and the ditch at that time did not exceed six thousand or six thousand five hundred cubic feet per second; It seems to me the amount of water that went through the old spillway in 1916 was 1400 cubic feet per second; I am not sure; I recommended to the Board that the spillway be constructed to take care of approximately 2500 cubic feet per second; in my judgment the amount of water that was carried down the Sioux Valley during the freshet of 1916 was approximately 6000 feet per second; that was the spring that the spillway washed out; I do not know that you call the 1916 flood an ordinary flood; I have not been able to find any record of flood stages in the river and I am not sufficiently familiar with the floods from year to year to know whether that flood would be considered an

421 ordinary flood or not; I would rather say that it was larger than the ordinary flood; that is if by the ordinary flood you mean the intensity of flood that occurs most fre-

quently; the amount of water that came down the Sioux Valley in the year of 1881 is probably the maximum; I do not remember whether in that report I recommended to the Board that the opening which had occurred at what we have been calling Schotz, about 3 miles north of town, a dam be placed in there to keep the river in its old channel and to keep it from coming down through the ditch; I would recommend it; at the time I made this report I was employed by the Byllsby Co., Byllsby & Co. manage the Northern States Power Co., but it isn't the same company by any means, we do the managing for the Northern States Power Co.; I am familiar with the plant of the Northern States Power Co. and the improvements made since 1910; I was familiar with the construction of the old plant through the drawings and inspecting of the plant, etc.; defendant's Exhibit "7" was prepared before my time; in a general way I should say it substantially represents the plant here; it looks to me more like a picture plan than it does like a working plan; it was signed by the chief engineer, so I presume probably it was one of the construction plans; I do not remember the distance between the bottom of our turbine and the outlet in our draft tube; but I would say in the vicinity of 18 or 20 feet; the Northern States Power Co. had to lower their tail race to take advantage of the head at the Bennett dam; we destroyed the Bennett dam and lowered our tail race to take in that head; that lowering gave us more head; the lowering of the tail race does not give us more power; the head we had before was sufficient to run the generators full capacity with the wheels flooded; the lowering of the tail race enables us to pull a larger load with less water; we got no more power out of the units than we got before; they have a certain fixed output; the increasing of that head only conserved water; it didn't increase the output of the plant at all; the higher the head the less water you use, but if you have a machine in there with a fixed output, it
422 doesn't make any difference how much head you put on it, you can't get any more power out of it; it will burn up if you do; what I mean is that the lowering of our tail race, we could only turn out 6000 kilowatts from each unit, but we could get that 6000 from a smaller supply of water and consequently when the river is low we are able to get current longer than we could before; the capacity of the plant is fixed by the units in there; they could be run approximately 6000 kilowatts each; there are three units; the result of piled up water on our tail race is to lower the head but with those units not to produce less power; the head is the total fall; I don't think I have any positive information as to the length of time that the floods last here, but the general impression I have

gotten from the data is that the maximum conditions only last for two or three days; the flood itself, the river in flood stage I imagine for a considerable longer period of time; I think I am familiar in a general way with the general topography near our plant; Exhibit "5" fairly represents the condition from the northwest corner of the plant toward the old falls for a short distance; Exhibit "4" I am unable to identify; defendants' Exhibits "8" and "9" fairly represent the condition at our tail race; if a dam were put in at Schotz up here which was outside of the drainage ditch project, which kept the river in its banks, permitting the water to flow around the city to our water plant instead of going through and coming into the spillway, it would benefit the Northern States Power Co. to the extent that it would not deprive them of what they had a right to; I would not call it a benefit because we
423 have a right to that water; the benefit would be to give us the water that we have a right to here and which was taken away by the ditch; if there were controlling works placed in this ditch at Thompson's bridge some 12 miles up the river which maintained the level of the water in the river and will not permit the river water to go into the ditch until it reaches a certain height, which is flood condition, that would benefit the Northern States Power Co. in just the same way.

(Redirect Examination)

Q. From your examination of that region up there at the time you made the report as representative of H. M. Byllsby, I wish you would tell the court what that ditch and improvement is with regard to lands down here in the city and particularly in regard to the region down about the Northern States Power Co. property; what is the proper term for it?

A. It acts as a flood water bypass; there is no drainage; by flood water bypass I mean that it takes flood waters out of the river and passes them around and back in again; it relieves flood water conditions a certain small extent in certain stages of the river; I would say that that ditch is not a drainage at all in this section down here; in my judgment the power plant of the Northern States Power Co. as now constructed would be sufficient to withstand a flood equal to the flood of 1881; as I stated before I would think it would pass such a flood without raising the water higher in the dam than we ordinarily carry by means of flash boards; those flash boards should be removed at times of floods; the Bennett dam was destroyed under my supervision; it was de-
424 stroyed to get advantage of more head water or unite that head with ours in one plant.

Q. Something was said here by another witness about the cleaning out of that tail race or some part of the same. I wish you would tell just what was done in that regard and why.

A. The construction superintendent without asking permission or without my knowledge, built the spoil right on top of the excavation, which was contrary to my intentions, and built it with practically a vertical face, and without very much arrangements of the stones; consequently the first flood that came down washed out some of the stone at the bottom of the piles and started the disintegration of the spoil, and subsequent floods I presume did more, and the elements helped it along, frost action, and a great deal of this spoil had fallen back into the tail race until it raised the level about 4 feet; this work that was done in 1920 was simply to clean that out, and in order to put it so it would not fall back again we moved it back on the west side about 10 feet from the edge of the ledge; on the east side we put a concrete facing on it because there we had used the top of the spoil bank which had been leveled off for an outdoor sub-station, and this was so close to the edge of the spoil bank that we had to make it sloping to hold the substation and some transmission line poles there, and we felt that without a concrete face it might slip in again so we put a concrete face on that side in order to prevent it; that was the reason for that work; the proposition was to restore the tail race.

425 (Recross Examination)

This bypassing of the water I have mentioned would tend to relieve the Sioux River from the point where it took the water from the river to where it deposited it back in the river; it would relieve the river of the amount it carried.

Q. Doesn't that ditch up through there also drain agricultural lands?

A. As I saw it when I inspected it, I should say to very small extent as I understand drainage; there were only 3 or 4 inlets I could see where the farmers could take advantage of the drainage.

(Redirect Examination)

If I were designing a hydro-electric plant on the present site of the plant here today, knowing that the ditch and spillway had been constructed and are there as they are, as I know the ditch and its history, I would not take the ditch and spillway into consideration at all in the designing that plant, particularly with a view to resistance to floods or possible floods.

Q. Mr. Link, I would ask you to state whether or not the fact of this by pass upon the tail race of the Northern States Power Co. plant at a time of maximum flood would have any appreciable effect upon the output of that plant from its hydro-electric apparatus? A. Absolutely none.

Q. It can be maintained constant. A. Yes sir.

Q. I will ask you to state whether or not the effect of the straightening of the river in what I will term the upper reaches of the ditch, would have any effect on the constancy of the flow of the river at the Northern States Power Co. plant in different normal stages of the river.

426 A. As to whether the straightening would have any effect?

Q. Yes. A. I can't see how it would.

Q. I will ask you, Mr. Link, that if it is assumed you had a maximum flow of 10,000 second feet or more down this river, whether or not under those conditions the results in the river would be appreciably affected by the presence of this bypass ditch? A. I do not think so.

Rebuttal:

Q. I wish you would explain to the Court, Mr. Link, the character of the design and construction of the plant of the Northern States Power Company under consideration here with reference to the matter of obtaining a maximum efficiency of the turbines, or maximum output from the turbines, in relation to the amount of [ware] required.

A. The plant as originally constructed had a head of approximately 60 feet; there was another dam just below the present plant which backed the water up from the reservoir to our tail race, and controlled to a large extent the head; the machines that were installed in there were installed for a certain capacity at that head; the generators cannot pull any more load regardless of what the wheels may or may not do; the generators have a fixed capacity which we cannot exceed without burning them up; with the original head we could pull the full load out of the generators; since then the head has been increased by about 12 feet, by wrecking the dam below, excavating the tail race, by building draft tubes and extending draft tubes to the wheels; the result of that is not to increase the capacity of the plant because the generator capacity is fixed for the lower head, but it enables us in low water time to pull the full capacity out of the units with a smaller

427 quantity of water than we were able to do before; on account of the enlarging of the tail race and the wrecking of the dam below, flood waters will not rise as high at the

plant as they did previously, and it is my opinion that even a maximum flood of the river, even without the drainage ditch would not raise the level about the original normal level, consequently even with a maximum flood we would probably get the original load of the plant.

The Court: Which is full capacity?

A. Full capacity; now any diversion of the water which would lower the flood level in the tail race under present conditions would not increase the capacity of the plant nor the amount of power we could get out of it; at flood times there is any abundance of water that we can put through the wheels, any amount of water they will take, sufficient water to produce the full output of the generators; so there is absolutely no benefit can accrue in diverting flood waters from the plant.

Q. Was this plant designed and constructed in your judgment so as to take care of flood conditions in the river?

A. The plant was designed to take care of maximum flood conditions. It was designed and constructed before the drainage ditch was constructed and was built to take care of any conditions regardless of any drainage.

A. G. RISTY, recalled and examined by the Court, testified as follows:

The northern end of this ditch No. 1 and 2 was one mile north of Baltic; the end of the ditch opens into the Sioux River; there are no artificial laterals; if there are heavy rains on the lands adjoining this ditch which runs north and south in a general direction that flood the lands on either side of it, it is the intent and purpose that the ditch shall take care of such flood waters.

428 Q. How will it get into the ditch?

A. It slightly slopes into the ditch?

Q. How could it get over the embankment without laterals?

A. There are pipes at certain places to let the water in through the embankment into the ditch, and that you can adjust running out into the farm lands; there are pipes here and there along the ditch to let waters in when the bottom lands overflow, and it has also been proven that these ditches drain the bottom lands, because there are farms all along and it has lowered the water in their wells to a very considerable extent since the ditch was dug, so it shows it drains the lands; they propose to have gates in the embankment so that when the pressure was from the inside it would close the

gates and if the pressure came from the outside it would open them within this service pipe.

Q. Then the real purpose of this ditch as I understand it is to take the water from the Sioux River in flood times and conduct it down to the spillway and into the river at the mouth of the spillway.

A. And preventing the overflow to a great degree from spreading over the farm lands.

Q. And the purposes of the ditch, the effects that
429 the ditch is to perform, the thing that you intended when you were constructing was that it should be an [auxillary] to the river and relieve it of the surplus flood waters?

A. If the Court please, I was not on the Board when the ditch was constructed; only when we repaired the spillway, it has been my understanding always that it was to help carry off the flood waters.

Q. It is rather to take the water from the river at its maximum capacity and thus relieve the river of that water rather than to drain the lands along the sides; in other words, it is to keep them from being overflowed with this water?

A. That has always been my understanding.

Plaintiff rests.

Motion to Dismiss

At this time, Your Honor, at the close of the plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these actions and set aside the restraining order heretofore issued, for all the reasons and upon all the grounds urged in the motion made at the opening of these cases.

And for the further reason that the record now shows that notice of an opportunity to be heard upon the amount or proportion of benefits these plaintiffs have received and the amount or proportion of assessment that will be made against their property for such benefits, has been given to them and the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessment to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases, based upon their judgment of values and benefits con-
430 ferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment

which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred, by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason the record now shows the Board of County Commissioners of Minnehaha County, charged by the law of this State with the execution of the provisions of the drainage ditch law, has jurisdiction to proceed in respect to the property within said drainage area including the property of the plaintiffs in these actions, and if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs or otherwise, and the record does not indicate upon its face any gross departure from the requirements of the statute, therefore this Court cannot inquire into these collateral proceedings, and the same are not questions presenting a federal question.

The Court: The motion is denied pro forma.

The defendants, to maintain the issues on their part, called as a witness F. L. BLACKMAN, who being duly sworn testified in substance as follows: My name is F. L. Blackman. I resided in the city of Sioux Falls on July 15, 1916, and at that time had property within the drainage area of Drainage Ditch No. 1 & 2. Defendants' Exhibit 10 being a petition dated July 15, 1916, addressed to the Board of County Commissioners of Minnehaha County, South Dakota, signed by the City and others, the name of F. L. Blackman appearing thereon, was signed by me.

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431 GEORGE W. BURNSIDE, being called as a witness on behalf of the defendants, testified as follows:

"As mayor of the City of Sioux Falls, I signed defendants' Exhibit 10, being a petition addressed to the board of County Commissioners of Minnehaha County, dated July 15th, 1916; at a special meeting of the city commission, they decided to ask the County Commissioners to protect the destruction of the drainage ditch in order to protect our water plants.

F. E. WARD, being recalled as a witness on behalf of the defendants, testified in substance as follows:

Defendants' Exhibits 10 to 32, inclusive, are records and files in my office as County Auditor of Minnehaha County, with reference to the establishment of Drainage Ditch No. 1 and 2. Defendants' Exhibit 10 is the petition of the City of Sioux Falls, F. L. Blackman, et al, for the establishment and construction of Drainage Ditch No. 1 and 2. Defendants' Exhibit 11 is the bond accompanying and filed with the petition. The material portion of said Bond, being defendant's exhibit 11 is as follows:

"Bond on Petition for Drainage.

Whereas, the parties whose names are signed hereto have prepared and executed and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition to reconstruct and improve drainage ditches Number 1 and 2, in Minnehaha County, South Dakota, and to construct a new spillway or outlet to the said drainage ditches numbered 1 and 2, and to pay therefor by an assessment upon the property, persons and corporations benefited thereby, a copy of which petition is hereto attached marked Exhibit "A" and made a part hereof.

432 Now, Therefore, we F. L. Blackman, E. D. Clark, W. Brady, Dan Donahoe, Den Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, as principals, and Inter State Surety Company as surety, do hereby undertake, promise and agree to and with the County of Minnehaha, of the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or in case the said petition is denied on appeal.

F. L. Blackman, E. D. Clark, W. Braley, Den Donahoe, Dan Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary C. Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, Inter State Surety Company, by A. B. Fairbanks, Its Attorney in Fact.

This bond approved August 1, 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 12 is the order of the Board of County Commissioners for filing said petition and bond. Defend-

ants' Exhibit 13 is a letter of transmittal of said petition with reference to Drainage Ditch No. 1 and 2, to the State Engineer at Pierre, the material portions of which are as follows:

"August 4, 1916.

Homer M. Derr, State Engineer,
Pierre, South Dakota.

Dear Sir:

I enclose herewith new drainage petition with reference to Drainage Ditches Numbers 1 and 2 and the spillway thereof, which have been ordered filed and transmitted to you. It is the especial wish of the County Commissioners that you view this drainage proposition with them at your earliest
433 convenience, as it is necessary that this improvement be made soon, so as to avoid further damage. The parties have agreed to abandon the Covell's Lake extension terminus, in case the drainage proposition is established in accordance with this petition, or a modification thereof.*****

Please give this matter your immediate attention, and advise as to when you can view this drainage proposition with the Commissioners.

Yours truly,

EOJ:M County Auditor."
Enc.

Defendants' Exhibit No. 14 are the minutes of the Board of County Commissioners of August 3, 1916, of adjournment from that date to August 14, 1916. Defendants' Exhibit 15 are the proceedings of the Board of County Commissioners, under date of August 14, 1916. Defendants' Exhibit 16 is the resolution of Board of County Commissioners for a survey of the territory to be drained by Drainage Ditch No. 1 and 2. Defendants' Exhibit 17 is the Surveyor's Report, the material portions of which are as follows:

"Report of Preliminary Survey of Said Proposed Drainage Ditch for the Territory now Partially Covered by Drainage Ditches Numbers 1 and 2, Sioux Falls, South Dakota.

To the Honorable Board of County Commissioners, Minnehaha County, South Dakota:

In accordance with the resolution of your Honorable Board dated August 14th, 1916, authorizing and directing a survey of the proposed drainage of the territory covered by drain-

age ditches numbers 1 and 2, as now established, and directing that the exact line or lines of said proposed drainage be established under the supervision of the State Engineer, I took up the work, and, as per your request, file here-
434 with a limited report of the survey of such territory showing the exact line of the proposed drainage ditch as follows, to-wit:

Section One

Commencing at a point 58 feet West and 1035 feet North of the Southeast Corner of Section 29, Township 102, Range 49, West of the 5th P. M., running thence South *****, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number one as now established and constructed.

Section Two.

Commencing at a point 1035 feet North and 58 feet West of the Southeast Corner of Section 29, Township 102, Range 49, the same being the commencement point of Section 1, hereinbefore described, running thence North *****.

Section Three.

Commencing at a point 1640 feet East of the center of Section 18, Township 103, Range 49, running thence North ******, the said line being the center line of said proposed drainage.

That in addition thereto, the Big Sioux River is to be straightened in Sections 17, 18 and 20, Township 103, North of Range 40, in order to afford better means of communication between the lower end of Section 3 of said ditch, and the upper end of Section 2 thereof, the same being intended to cover the exact location of drainage ditch number 2, as now established and constructed.

I further recommend that the Big Sioux River be straightened *****.

All of the above cut offs to have a bottom width of 60 feet, and side slopes of one and one-half to one. A right-of-way 100 feet in width and one-half each side of the above described center lines will be required. The plans and specifications for the proposed spillway on Section 9, of
435 Township 101, Range 49, will be furnished later.

Dated this 13 day of September, A. D. 1916.

Respectfully submitted, L. E. Stevens, Deputy State Surveyor. Filed in the office of the Auditor of Minnehaha County, S. D. this 13 day of September, 1916, Harry F Howe, County Auditor, by E. H. Shenkle, Deputy.

Defendants' Exhibits 18 and 19 are the proceedings of the Board and the resolution of the Board fixing the exact line and width of Drainage Ditch No. 1 and 2, of September 13, 1916. Defendants' Exhibit 20 is the drainage ditch notice for Drainage Ditch No. 1 and 2. Defendants' Exhibit 21 is the affidavit of publication of drainage ditch notice, the material portion of which is as follows:

"Affidavit of Publication

C. L. Dotson, being first duly sworn, deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a Daily Newspaper of general circulation, printed and published in the City of Sioux Falls, in said County and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper and in charge of the advertising department thereof, and has personal knowledge of all facts stated in this affidavit, and that the notice and advertisement headed Drainage Ditch, a printed copy of which is hereunto attached, and made a part hereof, was printed and published in the said newspaper for ..... issues.

That the first publication of said notice in said newspaper aforesaid was on Saturday, the 16th day of September, A. D. 1916, and that the succeeding publications were severally on Saturday, the 23rd day of September A. D., on Saturday, the 30th day of September, A. D. 1916; that the fees charged for the printing and publication of said notice and advertisement in said newspaper, as aforesaid, were ..... dollars and ..... cents, and for this affidavit, Twenty-five cents, and that the said fees for the printing and publishing of said notice and advertisement and for this affidavit, as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper, as provided in Ses-

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sion Laws of 1903, and amendments thereto. * * * * * Filed in the office of the Auditor of Minnehaha County, S. D., this 30th day of Sept. 1916 Harry H. Howe County Auditor.

Defendants' Exhibit 22 is a Certificate of Posting said Drainage Ditch Notice, the material portion of which [—] Drainage Ditch Notice, is as follows:

'I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby certify that on the 21 day of September, A. D. 1916, I posted three copies of the annexed Notice in three public places near the route of the proposed drainage mentioned therein, as follows, to-wit: One on the bridge on North Minnesota Avenue crossing Drainage Ditch Number One, in the City of Sioux Falls; one on the bridge in Berwick's Addition to the City of Sioux Falls, crossing Drainage Ditch Number One near Fifth Avenue; and one on the bridge crossing Drainage Ditch Number One on Section 29 of Mapleton Township; that I also posted one of said copies at the South Front Door of the Court House in the City of Sioux Falls, all in Minnehaha County. * * * * * *

437 Filed in the office of the Auditor of Minnehaha County, S. D. this 23 day of Sept., 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 23 are the minutes of the Board of County Commissioners in relation to Drainage Ditch No. 1 and 2, of October 2 and 3, 1916, the material portions of which are as follows:

"October 2, 1916.

At the meeting in the County Court room, the Commissioners listened to arguments presented by those in favor of the drainage ditch, and the straightening of the Big Sioux River, and also to arguments against the straightening of said Big Sioux River, there being no objection to the establishment and construction of the main ditch project. The State Engineer, Homer Derr, recommended that the main drainage ditch, as petitioned for, be established and constructed with proper controlling gates and a sufficient spillway.

Claims for damages were filed as follows:

Kittery Realty Company	$2000.00
Margaret Finnegan	1000.00
James L. Finnegan	8000.00

The whole afternoon was taken up in the discussion of the drainage project, and the suggested straightening of the Big Sioux River. At the hour of five o'clock P. M. an adjournment was taken until ten o'clock A. M. on Tuesday, October 3, 1916."

"October 3, 1916.

Pursuant to adjournment, the Board convened at ten o'clock A. M., and in company with the State Engineer, Homer Derr, visited the site of the proposed spillway and control gate, at the head thereof. The Board then returned to the Commissioners' Room, and held a conference with the State Engineer with reference to said proposed drainage. Mr. C. T.
438 Charnock then moved the adoption of the resolution establishing said drainage, and that the vote be taken by districts. Mr. J. E. Johnson seconded the motion. Upon roll call

A. G. Risty, District No. 1 voted yes.

J. E. Johnson, District No. 2 voted yes.

J. L. Fritz, District No. 3, voted yes.

C. T. Charnock, District No. 4, voted yes.

J. A. Jensen, District No. 5, voted yes.

The Chairman then declared the resolution adopted. The State Engineer was then requested to prepare and submit plans and specifications for the necessary spillway and control, or headgates, at his earliest convenience. * * * **

Mr. C. T. Charnock moved that the hearing on damages occasioned by the establishment of Drainage Ditch No. 1 and 2, be adjourned until Friday, October 6, 1916, at ten o'clock A. M., and be made a special order for that date. Motion seconded by J. A. Jensen, and carried unanimously."

Defendants' Exhibit 24 is the resolution of the Board of County Commissioners establishing Drainage Ditch No. 1 and 2 upon the petition of the City of Sioux Falls, F. L. Blackman, et al. Defendants' Exhibit 26 are the minutes of the Board of County Commissioners for October 6, 1916. Defendants' Exhibit 27 is a resolution of the Board of County Commissioners of October 6, 1916, assessing damages as compensation for lands taken in the construction of Drain-

age Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch No. 1 and 2.

Resolution Assessing Damages.

Whereas, the matter of assessment of damages caused by the establishment and construction of Drainage Ditches No. 1 and 2, was, on Tuesday, October 3, 1916, at a regularly adjourned meeting of the Board, deferred to and made a special order for Friday, October 6, 1916, at ten o'clock A. M., and the Board having met on said last named date,
439 and having heard and considered the claims for damages, and having taken into consideration the fact that the principal portion of said drainage ditch has already been constructed, and assessments for damages therefor having already been made and paid in the original construction of said Drainage Ditches No. 1 and 2, and that the principal part of the work to be done consists of building a proper spillway, flood or control gates, cleaning, deepening and widening the channel of the said drainage ditches as now constructed, building levees and dikes where deemed advisable, and other improvements to said drainage system;

Now, Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the damages arising from the establishment of Drainage Ditch No. 1 and 2, including compensation for the lands to be taken for said drainage, be and they are assessed and awarded as follows, the same being in accordance with plats thereof, filed in connection with the original construction of Drainage Ditches No. 1 and 2:

To the Kittery Realty Company, for damages to Tract One (1), etc. * * * * *

Be It Further Resolved, that it is the judgment and determination of this Board that in consideration of the fact that damages were assessed and paid in the original construction of Drainage Ditch No. 1 and Drainage Ditch No. 2, for all damages sustained by each tract of land, or other property, through which the said drainage ditches and the present drainage ditch pass, as damages and compensation for the land taken by the route of such drainage, that no damages will accrue, or should be paid, by reason of the establishment and construction of said Drainage Ditch No. 1 and 2, except as hereinbefore provided, and that the claims of Margaret Finnegan and James L. Finnegan for damages by rea-
440 son of the recommended straightening of the Big Sioux River, which straightening has not been con-

sidered and determined, be and the same are hereby disallowed, without passing upon the merits of said claims, in case it is determined to straighten said Big Sioux River, and said claims are refiled, and that no other damages will accrue to any person or property by reason of the establishment and construction of said Drainage Ditch, except as herein awarded.

Be It Further Resolved that a fund to be known as "Drainage Ditch No. 1 and 2 Fund", be and it is hereby established, and that the proceeds of any assessment, or assessments, hereafter to be made in this proceeding be and they are hereby pledged to such fund, and when such assessments are collected, it is ordered and directed that they be deposited to the credit of such fund, to be applied in the payment of the warrants to be issued on such fund, in the order of the registry of such warrants with the County Treasurer. It is ordered that the warrants to be issued on such fund draw six per cent., interest from date of issue. It is further ordered that, if any of the persons entitled to damages under this resolution will accept a warrant or warrants on such fund in lieu of money, then that warrants on such fund for the proper amounts be issued therefor to the persons entitled thereto, to be signed by the Chairman and countersigned by the Auditor, but if any person or persons will not accept a warrant upon such fund in payment of the damages herein awarded, then the Chairman of this Board, and the Auditor, are authorized to issue warrants on such fund, in such sums as may be found advisable, and to sell the same at not less than par, and out of the proceeds thereof, to pay the damages herein awarded, taking the receipts of the persons entitled thereto therefor. It is further ordered that all expenses in connection with said Drainage Ditch No. 1 and 2, hereafter to be incurred up to the time of the letting of the contract for the construction of said ditch, be paid by warrant upon such fund.

441 Be It Further Resolved that in case any person herein awarded damages will not accept the same, the Chairman of the Board is directed to tender him the amount thereof, and in case of his non-acceptance thereof, to deposit the same in the Sioux Falls, South Dakota, to the credit of such person, and to give such person notice of such deposit.

Approved this 6 day of October, A. D. 1916, by the Board of County Commissioners of Minnehaha County, South Dakota.

By A. G. Risty, Chairman."

Attest:

County Auditor.

Defendants' Exhibit 28 are minutes of the Board of County Commissioners of December 16, 1916, relative to Drainage Ditch No. 1 and 2, passing a resolution fixing the exact line and width of drainage ditches straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, and fixing the time and place for hearing thereon, and defendants' Exhibit 29 in said resolution, the material portions of which are as follows:

"Resolution.

Whereas, on September 3, 1916, this Board, by resolution duly adopted, established Drainage Ditch No. 1 and 2, but expressly reserved for further 'consideration and determination the question of the straightening of the Big Sioux River at the several points recommended in said Engineer's report, without passing upon the merits thereof, for some later date when the straightening of the Big Sioux River will be given more complete consideration covering the points recommended and other points requested at the hearing': and

Whereas, the Engineer, L. N. Stevens, has filed his supplemental report with reference to the straightening of the Big Sioux River, recommending narrower ditches than previously recommended, and also recommending the ex-
442 tension of the straightening of the said Big Sioux River, and thereby varying the route of said drainage, together with maps and profiles; and

Whereas, the Board has personally inspected the route of said proposed drainage, as described in said petition for Drainage Ditch No. 1 and 2, and as described in said Engineer's reports;

Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of the ditch straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, be and the same is hereby fixed as described in said Engineer's original report, as amended by his supplemental report, and that the requisite right-of-way of said drainage ditch and dump

space, be and the same is hereby fixed as described in said Engineer's report; and

Be It Further Resolved that it is deemed practicable and necessary to vary the route of said drainage occasioned by the proposed straightening of the said Big Sioux River, so that it will pass through other lands than those described in the original notice of hearing; and

Be It Further Resolved that the further consideration and hearing of said matter be adjourned to Saturday, the 30 day of December, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of said County, in the City of Sioux Falls, South Dakota, and the same is hereby fixed as the time and place for the hearing of the said petition with reference to the straightening of the said Big Sioux River, as recommended in the said Engineer's original and supplemental reports, and that notice thereof be given in accordance with the provisions of Section 4, 5, and 28, of Chapter 138 of the Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota. * * * * *

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443 Defendants' Exhibit 30 is a notice of hearing on the Sioux River cut-offs on Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch Notice.

Sioux River Cut-offs on Drainage Ditch 1 and 2.

Notice is hereby given that Saturday, December 30, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, filed August 3, 1916, for the establishment and construction of a drainage ditch pursuant to the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909, insofar as said petition refers to the straightening of the Big Sioux River, as prayed for in said petition, and as recommended by the Engineer's original and supplemental reports. The consideration whereof having been deferred for further consideration, when Drainage Ditch No. 1 and 2 was established, and said meeting having been adjourned for that purpose. The exact line and width of said ditch was determined by the action of said

Board on December 16, 1916, and in general terms is as follows: * * * * *

The tract of country likely to be affected by the establishment and construction of said proposed cut offs in the Big Sioux River is in general terms described as all of the lands and property affected by the construction of Drainage Ditch No. 1 and 2, as established by resolution in these proceedings under date of October 3, 1916, and of record in the office of the County Auditor of Minnehaha County, South Dakota.

444 The separate tracts of land through which said proposed drainage will pass, and part of which will be required therefor, and for dump space, and the names of the owners of said tracts, as appears from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, on August 3, 1916, that being the time of filing said petition, are as follows: * * * * *

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have, why the said drainage should not be established and constructed, and all persons deeming themselves damaged by said proposed drainage, or claiming compensation for the lands proposed to be taken for said drainage, are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 16 day of December, A. D., 1916.

BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY, SOUTH DAKOTA,
By A. G. Risty, Chairman."

Attest:
Harry H. Howe,
County Auditor.
(Seal)

Defendants' Exhibit 31 is the certificate of posting the aforesaid notice, the material portion of which is as follows:

"I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby specify that on the 20 day of December, A. D. 1916, I posted three copies of the annexed notice in three places near the route of the proposed drainage mentioned therein, as follows, to-wit:

One on the bridge over the Sioux River between Sections 29 and 32, in Mapleton Township; One on the bridge over the Sioux River on the North Half of Section 8, in Mapleton Township, and one on the bridge over the Sioux River between Sections 29 and 32, in Sverdrup Township; that I also posted one of said copies at the South Front Door of
445 the Court House in the City of Sioux Falls, South Dakota, all in Minnehaha County, South Dakota. * * * *

Defendants' Exhibit 32-A is the affidavit of publication of the aforesaid notice, the material portion of which is as follows:

"C. L. Dotson, being first duly sworn deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a daily newspaper of general circulation; printed and published in the City of Sioux Falls, in said County, and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper, and in charge of the advertising department thereof, and has personal knowledge of all the facts stated in this affidavit, and that the notice and advertisements headed Drainage Ditch Notice No. 1 and 2, a printed copy of which is hereunto attached and made a part hereof, was printed and published in said newspaper for ..... issues. That the first publication of said notice in said newspaper aforesaid, was on Wednesday the 20th day of December, A. D. 1916, and the succeeding publications were severally, on Wednesday, the 27 day of December, A. D. 1916. That the fees charged for the printing and publication of said notice and advertisement in said newspaper as aforesaid, were Ten Dollars and ....cents, and for this affidavit, Twenty-five Cents, and that the said fees for the printing and publishing of said notice and advertisement, and for this affidavit as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement, inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or understanding for the division thereof has been made
446 with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper as provided in Session Laws of 1903, and amendments thereto. * * * *

The defendants' Exhibit 32 is the minutes of the Board of County Commissioners of August 10, 1917, adjourning said hearing until August 11, 1917, at which time the Board passed a resolution establishing said river cut-offs, a material portion of which resolution is as follows:

"Commissioners' Proceedings.

August 10, 1917.

Pursuant to resolution of July 27, 1917, adjourning and fixing the time of hearing upon the straightening of the Big Sioux River, under the petition upon which Drainage Ditch No. 1 and No. 2 was established, all members of the Board being present, and a delegation of farmers and property owners interested, Engineer L. E. Stevens having made and filed his report of the exact line and location of the several cut offs suggested and recommended, and the Board having heard the protests of those objecting thereto, and the petitioners in like manner having been heard, and the Board having heard the argument of counsel thereon, the further consideration thereof was adjourned to August 11, A. D. 1917, at two o'clock P. M."

"Commissioners' Proceedings.

August 11, 1917.

Pursuant to adjournment, The Board of County Commissioners convened at two o'clock P. M. All members of the Board being present, and after taking up and considering the project of straightening the Big Sioux River upon the petition for the establishment of Drainage Ditch No. 1 and 2, heretofore established, and the Board being fully advised
447 with reference thereto, it was moved by C. T. Charnock, and seconded by J. A. Jensen, that the following resolution be adopted:

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, pursuant to the resolution of this Board of October 3, 1916, establishing Drainage Ditch No. 1 and 2, and reserving the consideration and determination of the question of the straightening of the Big Sioux River at several points recommended in the Engineer's report, that it is the determination of this Board that it will be conducive to the public health, convenience and welfare, and that it is necessary and practicable for the drainage of agricultural lands within the drainage area of said drainage ditch No. 1 and 2; that the hereinafter described ditches straightening the Big Sioux River be established and con-

structed as a part of the drainage system hereinbefore established, and designated as Drainage Ditch No. 1 and 2.

Be It Further Resolved that the said ditches straightening the said Big Sioux River be, and the same are hereby established, with a bottom width of 20 feet; and a depth of not to exceed the depth of the main channel of said Big Sioux River, with a right-of-way for ditch and dump space of 100 feet, one-half on each side of the center line along the lines of hereinafter and particularly described as follows * * * * *."

All of the foregoing Exhibits were offered and received in evidence.

Mr. Ward, as County Auditor of Minnehaha County, identified Defendants' Exhibits 2 and 3, and 33 to 42, both inclusive, as records and files of his office in relation to this drainage ditch proceeding, all of which were offered and received in evidence.

Defendants' Exhibit 2, being a petition signed by O. S. Thompson et al, to abandon the outlet of old Drainage Ditch No. 1 and for the establishment of a new outlet thereto, the material portion of which is as follows:

448 "To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

The undersigned petitioners respectfully represent that they are all residents of the County of Minnehaha, South Dakota, and that each of them is the owner of certain lands situated in said County, in the Valley of the Big Sioux River, all of which lands will be affected by the drainage herein mentioned and proposed.

Your petitioners further represent that it is necessary for the drainage of agricultural lands in the said Big Sioux River Valley, including all of the lands affected by Drainage Ditches No. 1 and 2, as the same have been established and constructed, that said ditches be repaired and put in proper condition and that the same be cleaned, deepened and widened, and that the Levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary in order for said ditches to carry off the surplus water and properly drain the lands affected thereby;

That it is also necessary to permanently close said Ditch No. 1 above the present spillway, or outlet, thereof, at a point in the Northeast quarter of the Southeast quarter of Section

5, in Township 101, of Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a Southeasterly direction, and to extend said ditch from such point, running thence in a Southwesterly direction, through Covell's Lake in the City of Sioux Falls, across the Southeast quarter of Section 5, the East Half of the Southwest Quarter of Section 8, the West Half of Section 17, the East Half of the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, about 40 rods
449 north of the bridge across said river commonly known as the "12th Street Bridge", situated on the section line between said Section 18 and Section 19.

Your petitioners further represent that the proposed maintenance and repair of said drainage ditches No. 1 and 2, and the extension of said Ditch No. 1, are necessary for the reasons that the present spillway and outlet of said Ditch No. 1, as now constructed and used, is impracticable for the purpose for which it was intended, and if allowed to remain in its present condition, will probably cause large damage to the owners of property adjacent thereto and affected thereby; that it is impossible to put said spillway or outlet in a condition to carry off the surplus water and properly drain the lands affected by said drainage ditches, without causing great damage to the owners of property as aforesaid; that for these reasons it is necessary to establish and construct a new outlet for said drainage ditches, which can be done by establishing and constructing the extension herein proposed.

Your petitioners further represent that the proposed repair and maintenance of said Drainage Ditches No. 1 and 2, and the establishment and construction of said proposed extension of or outlet to Drainage Ditch No. 1 will be conducive to the general health, convenience and welfare of the City of Sioux Falls, and of the inhabitants of the Big Sioux River Valley between the Cities of Sioux Falls, and Dell Rapids, and will prevent the annual loss of many thousand acres of crops in said valley, and will prevent great damage to the lands in said territory, and to the buildings, bridges, highways and other improvements thereon.

Your petitioners further represent that the territory likely to be affected by the proposed repairs to and maintenance of said drainage ditches, and the establishment and construction of the proposed extension to or outlet of said
450 drainage ditch No. 1 includes all of the lands in said Big Sioux River Valley that are affected by said

Drainage Ditches No. 1 and 2, as the same have been established and constructed, and all of the lands in said valley between the cities of Sioux Falls and Dell Rapids that are subject to overflow by the Big Sioux River.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold."

Defendants' Exhibit 3, being the bond accompanying the petition of O. S. Thompson, the material portion of which is as follows:

"Whereas, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold have prepared and executed, and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition for drainage, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof;

Now, therefore, We, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold, as principals, and R. J. Huston and Iver R. Peterson, as sureties, do hereby undertake, promise and agree to and with the County of Minnehaha, in the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or the same is denied on appeal.

Dated at Sioux Falls, South Dakota, April 8th, 1916.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold, R. J. Huston, Iver R. Peterson.

I hereby approve the foregoing bond and the sureties thereto.

HARRY H. HOWE, County Auditor."

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451 Defendants' Exhibit 33, being the order for filing the petition of O. S. Thompson, et al, the material portions of which are as follows:

"Order for Filing Petition for Drainage.

Whereas, O. S. Thompson, and others, of the County of Minnehaha, South Dakota, have this day presented to this Board a petition for the drainage of lands in the Big Sioux River Valley, which lands have heretofore been drained by drainage ditches Nos. 1 and 2, as hereinbefore established and

constructed, in which said petition is represented that it is necessary to permanently close said drainage ditch No. 1, above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast Quarter of Section 5, in Township 101, Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a Southeasterly direction, and to extend said ditch from such point running thence in a Southwesterly direction through Covell's Lake in the City of Sioux Falls, and across the Southeast Quarter of Section 5, the East Half and the Southwest Quarter of Section 8, the West Half of Section 17, the East Half and the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of said Section 18, about forty rods North of the bridge across said river, known as the Twelfth Street Bridge, situated on the Section line between Sections 18 and 19, all in said Township and Range, and said petition having been by this Board examined, and being found sufficient in form, and being accompanied by a proper bond, with sureties approved by the County Auditor;

Now, Therefore, It Is Ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that said petition be forthwith filed with the County Auditor, and a copy thereof be transmitted by said County Auditor
452 to the State Engineer."

Thereafter, on April 12, 1916, a copy of said petition was transmitted to the State Engineer at Pierre, South Dakota, and on May 3, 1916, a resolution was passed by the Board ordering a survey to be made for this proposed extension, and ordering the surveyor to report to the Board upon the length, size, width and depth of the ditch required for this proposed outlet. On May 24, 1916, the surveyor reported his survey, the exact line and width of the ditch, and the amount of right-of-way, together with the estimated cost of the same, and on June 9, 1916, the Board of County Commissioners, by resolution, fixed the exact line and width of the proposed outlet of Drainage Ditch No. 1 and designated the time and place for hearing the same, and designated June 29, 1916, as the time of hearing thereon, and ordered notice to be given. On June 10, 1916, notice dated on that day was published and posted as required by law.

Defendants' Exhibit 42 is the resolution of the Board establishing a drainage ditch as an outlet of Drainage Ditch No. 1 and the abandonment of the old outlet of Drainage

Ditch No. 1, and the repair of Drainage Ditch No. 1 and Drainage Ditch No. 2, the material portions of which are as follows:

"The matter of the petition of O. S. Thompson, and others, representing that it is necessary that drainage Ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, Township 101, Range 49, and that such ditch be extended from such point running thence in a Southwesterly direction through Covell's Lake, and terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in said Township, and that it is also necessary that drainage ditches No. 1 and 2 be required and put in proper condition, coming on to be heard by the Board
453 of County Commissioners at a meeting of said Board on Thursday, June 29, 1916, pursuant to notice theretofore given, and written objections thereto having been filed by the City of Sioux Falls, the South Dakota Central Railway Company and Catherine W. Peck, and others, and such objections having been presented orally by counsel for the various objectors, and the said petitioners having appeared personally and by counsel in support of said petition, and various parties having filed claims for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet, and said hearing having been adjourned to this 8th day of July, 1916, and this Board having fully heard and considered said petition and all matters, evidence and arguments presented in opposition to and in support of the same;

Now, Therefore, Be It Resolved that the repair and maintenance of said drainage ditches 1 and 2, and the establishment and construction of said proposed extension to or outlet of drainage Ditch No. 1 will be conducive to the public health, convenience and welfare, and it is necessary and practicable for draining agricultural lands, and it is so found.

Be It Further Resolved that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point on the West bank of Drainage Ditch No. 1, 1610 feet North and 58 feet West of the Southeast Corner of Section 5, Township 101, Range 49, where said drainage ditch swings Southeasterly from a Southerly direction, and that a new extension to or outlet of said drainage ditch, commencing at said point and running thence in a Southerly direction through Covell's Lake in the City of Sioux Falls, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in Township 101, Range 49, as described in the resolution adopted by the Board June 10,

1916, be constructed, and that such extension or outlet be and the same hereby is established.

454 Be It Further Resolved that drainage ditches No. 1 and 2 be repaired and put in proper condition, and that the same be cleaned, deepened and widened, and that the levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary, in order that said ditches may carry off the surplus water and properly drain the lands affected thereby, the amount and extent of such repairs to be determined by this Board after an inspection, and, if deemed necessary, a survey of said drainage ditches.

Be It Further Resolved that this Board proceed to consider the claims presented and filed by various persons for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet; that before the assessment of damages this Board personally inspected each tract of land or other property through which said extension or outlet will pass, and that the damages sustained by each tract of land or other property through which said extension will pass, and damages as compensation for the land taken for the route of such drainage be assessed by this Board at a regularly adjourned meeting.

Dated this 8th day of July, 1916.

* * * * * * * *

The material portion of the judgment in the case of Oluf O. Gilseth vs. A. G. Risty, and others, as County Commissioners of Minnehaha County, South Dakota, et al, Defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, Intervening Defendants, rendered by the Circuit Court of Minnehaha County, South Dakota, upon the 19th day of July, 1921, offered and received in evidence, is as follows:

"The Court having heard and considered the evidence introduced on behalf of the parties, and having heard the argument of counsel, and being fully advised in the premises, and having made and entered its decision in writing, con-
455 sisting of Findings of Fact and Conclusions of Law;

Now, Therefore, on motion of Messrs. E. O. Jones, R. H. Warren, and Porter & Bartlett, representing the defendants and interveners,

It is hereby Ordered, Adjudged and Decreed that the plaintiff's complaint herein be, and the same is hereby dismissed on its merits."

LEONARD BOYCE, being called as a witness in behalf of the defendants, testified in substance as follows: (Tr. p. 229).

My name is Leonard Boyce. I have lived in Sioux Falls for about fifteen years. In 1917 and 1918 I was connected with the Sioux Falls Construction Company, as Superintendent of the construction of the spillway on drainage Ditch No. 1 & 2, constructed by the County Board. As such Superintendent, I made arrangements with the Water Department of the City of Sioux Falls, by which it furnished water to be used in
456 the construction of the spillway on Drainage Ditch No. 1 & 2. The City put in a meter in front of the Penitentiary in a manhole where the main runs into the Penitentiary. We ran a line from there down to the spillway. They knew at the time they put the meter in, the purpose the water was to be used for. We used the water from that connection upon which they furnished the meter in the construction of the spillway. The City rendered bills from month to month, or from time to time for the water so used. These bills were presented to the County Board, and allowed, and warrants were drawn in favor of the City of Sioux Falls, or its water works department, for the amount of these bills, which warrants were delivered by me to the City.

As Superintendent of this work, I had certain steel reinforcing material delivered for that work. Some of it came in on the Milwaukee Railroad, and some on the Great Northern Railroad. There is a spur or sidetrack that extends to near the spillway North of the Penitentiary. I made arrangements with the officers or agents of the Chicago, Milwaukee & St. Paul Railway Company and the Great Northern Railway Company, in the City of Sioux Falls, to have this freight spotted or delivered to us out near the end of this spur near the spillway, and such freight, several car loads, was in fact delivered to us on this spur near the spillway.

During the construction of this spillway in 1917 and 1918, electrical power was used in the work of construction. The Northern States Power Company furnished power or electricity used for power in such construction work. They had a power line that ran by or near the work of construction
457 of this spillway. The agents of the Northern States Power Company made the connections for us so that we used this electrical power which they furnished. They ren-

dered us statements from time to time of the electricity which we used, which statements were presented to the Board of County Commissioners and by them audited and allowed. I think the warrants were drawn direct to these parties.

During the time that I was Superintendent of construction on the spillway on Ditch No. 1 & 2 I saw the City Commission up there looking over the work as it progressed. The whole Commission was together.

Cross-Examination.

My recollection is that they were up there in the Fall of 1917 when we were working on the West side of the bridge on the highway. Possibly October or November, 1917.

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458 C. W. KNODT, being called as a witness in behalf of the defendants, testified in substance as follows:

My name is C. W. Knodt. I live in Hartford. I have lived in Minnehaha County since 1878, in the West end of the County, and have done business in Sioux Falls more or less regularly. In 1897, during the flood, I had occasion to visit Sioux Falls. I started on a handcar from Hartford with a Section Foreman, and went as far as Ellis. That is on the Chicago, St. Paul, Minneapolis & Omaha Railroad. I did not take the train because the tracks were damaged down on the West Sioux River bottom just west of the City of Sioux Falls, so they could not cross. I walked across on the ties. The water was up to the rails mostly all the way on the West of the river in the valley there. There was one place in the road-bed, where an opening had washed out, and the ties were hanging on the rails. There were a few ties gone and it was quite difficult to even walk across. There were two other smaller places I think where the road bed was washed out, and also some ties hanging on the rails. The track was impassable for trains for a number of days. This condition existed, I would say, possibly for ten days or two weeks before the trains crossed.

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459 W. R. LARSON, being called as a witness in behalf of the defendants, testified in substance as follows: (Tr. p. 251).

My name is W. R. Larson. I had the contract with the Board of County Commissioners to deepen and widen these drainage ditches in controversy. The work was done in 1918

and 1919. We started in May, 1918, at the Minnesota road bridge, about one thousand feet from the water works, right across the Sioux Falls & Watertown Railroad, with a trenching machine shipped from Chicago over the Great Northern Railroad into Sioux Falls. It was shipped to their freight depot, and then I made arrangements with their agent here to have it spotted to the side-track over by the water-works. From the bridge we worked North towards Renner, up until about September. In the process we widened, and deepened it, and threw up an embankment on one side. There was a dike on the other side. The following year we did work on this ditch with another machine brought from Sioux City over the Chicago, Milwaukee, & St. Paul Railway, and delivered at Renner. There being no agent at Renner, I arranged therefor, and paid the freight through the Sioux Falls Agent. Those machines extend up, in the air about thirty feet, and this ditch is about 1000 or 1500 feet from the Chicago, Milwaukee & St. Paul right-of-way, or line of railroad. (p. 253)

(Stipulation that intervening defendants are owners of ditch warrants to amount alleged in their answer.)

At this time make the record show that it is stipulated between the respective parties to these actions, that the intervening defendants are the owners of ditch warrants drawn on Drainage Ditch No. 1 & 2 to the amount alleged in their answers, which have been issued and are now unpaid. (Tr. p. 253).

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460 JOHN A. JENSEN, being called as a witness in behalf of the defendants, testified in substance as follows: (Tr. p. 243).

My name is John A. Jensen. I am one of the defendant County Commissioners, and was such during the year 1916. During that year I had a conversation with the local agent of the Chicago,, Milwaukee & St. Paul Railway Company regarding the hauling of certain supplies to be deposited along their track about three miles North of the City at what is known as Schjodt's, and other conditions about the ditch. I told him we needed some assistance up along the ditch and along the river.

I had a conversation with the agent of the Chicago, Milwaukee & St. Paul Railway Company relative to transporting material and men up the river, up their right-of-way, to be depos-

ited near the drainage ditch. I told him we needed this help there, and he said he would take it up with the Superintendent at Sioux City. The reason he had to take it up with him was the stop between stations. We took rock up there and we wanted to dismantle the bridge where the water was coming in, and had to put in a dam there to hold it back into the river, and we wanted them to stop the freight train for us right between Baltic and Renner. I had a gang of prisoners there to unload the rocks while they were holding the train, and worked there after the train had gone. Up to Schjodt's dam they ran it with a switch engine, but they couldn't take the switch engine beyond the first station out, so they ran up with the switch engine three miles, and I had the same gang there working in the rock.

I also had a conversation with Mr. Beardsley, the Superintendent of the Chicago, Milwaukee & St. Paul Railway Company. He came up to look over the water situation here because a lot of track had washed out up North of Sioux
461 Falls, and he told me I could get anything I wanted to help to control this water. Subsequent to that I worked a gang of men up there several days, and the Chicago, Milwaukee & St. Paul Railway Company took them up on their passenger train. I gave them an order on the County for the tickets. They stopped the passenger train between Renner and Baltic to let us off in the morning, and coming back in the evening about five o'clock they stopped and picked us up and brought us back to Sioux Falls. They rendered bills for the tickets, and we gave them a warrant. The dam we were working on was at Schjodt's. There was no dam there under the old ditch proceedings.

"Before the old spillway went out in April, 1916, and under the old Drainage ditch No. 1 project there was no dam at Schjodts. There was a kind of a [slew] or something went into the river there. It kept on washing out so that the last time we were there it was about sixteen feet deep and the water went down in the cut-off that we made west of it and came back up the river for about a quarter of a mile and went down into the ditch."

I had a conversation in the Summer of 1918 with the then Manager of the Northern States Power Company, Mr. Roffelty. He asked if they could not put in a temporary dam up at Schjodt's, and keep the water they were losing there, and he did put in such a dam. Later he asked for a longer one. In 1919 and 1920 we put in a dam together. He drove the pil-

ing for us. He had a pile driver up there, and I had some plank. We got in a dam and got team and scrapers afterwards and filled up the dam and made it about sixty feet on the bottom and forty feet on the top, in width.

Exhibits 43 to 50, inclusive, are the bills which I have testified about that were rendered by the Chicago, Milwaukee & St. Paul Railway Company, and O. K'd by me, and presented to the Board of County Commissioners, for work done on Drainage Ditch No. 1 & 2.

462 These are orders that I gave to them for passenger tickets. From the date which they bear, it is apparent that the work was done in 1917.

Cross-Examination.

Mr. Roffelty called me up and asked permission to put in a dam in order to keep the water from going out of the river into the ditch.

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463 W. R. LARSON, being called as a witness in behalf of the defendants, testified in substance as follows: (Tr. p. 251).

My name is W. R. Larson. I had the contract with the Board of County Commissioners to deepen and widen these drainage ditches in controversy. The work was done in 1918 and 1919. We started in May, 1918, at the Minnesota road bridge, about one thousand feet from the water works, right across the Sioux Falls & Watertown Railroad, with a trenching machine shipped from Chicago over the Great Northern Railroad into Sioux Falls. It was shipped to their freight depot, and then I made arrangements with their agent here to have it spotted to the side-track over by the water-works. From the bridge we worked North towards Renner, up until about September. In the process we widened, and deepened it, and threw up an embankment on one side. There was a dike on the other side. The following year we did work on this ditch with another machine brought from Sioux City over the Chicago, Milwaukee & St. Paul Railway, and delivered at Renner. There being no agent at Renner, I arranged therefor, and paid the freight through the Sioux Falls Agent. Those machines extend up in the air about thirty feet, and this ditch is about 1000 of 1500 feet from the Chicago, Milwaukee & St. Paul right-of-way, or line of railroad. (p. 253).

(Stipulation that intervening defendants are owners of ditch warrants to amount alleged in their answer.)

At this time make the record show that it is stipulated between the respective parties to these actions, that the intervening defendants are the owners of ditch warrants drawn on Drainage Ditch No. 1 & 2 to the amount alleged in their answers, which have been issued and are now unpaid. (Tr. p. 253).

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464 C. T. CHARNOCK, being called as a witness on behalf of the defendants testified in substance as follows:

My name is C. T. Charnock, I am one of the defendant County Commissioners in these actions; have lived in Sioux Falls about twenty-five years, and am familiar with the value of farm land in the vicinity of Sioux Falls, also the value of City property in the City of Sioux Falls. I have been over and am familiar with all the lands within the area of Drainage Ditch No. 1 & 2. Prior to fixing the apportionment of benefits thereon on June 10, 1921, I accompanied the Board of County Commissioners in making a personal inspection of all of the lands within the drainage area. The Board selected and determined the benefit to the unit adopted, which unit is situated about three and one-half miles North of Sioux Falls. We placed a value upon this land without the ditch, and a value upon it with the ditch. The difference between these values was the sum of $25.00 which, in our judgment, was the real beneficial value to this unit produced by the construction of this drainage ditch. The Board applied that unit to all the lands within the drainage area, and used the same method of determining the number of units of benefit to all of the lands affected. In applying this unit towards fixing the proportion of benefits to the Chicago, Milwaukee & St. Paul Railway Company, we first took into consideration the land belonging to the railroad company, the acreage, and we assessed that practically the same as abutting lands, and then we took into consideration the benefits to the grades and the culverts that could be done away with, and to tracks and bridges, etc. That was figured out by our Engineer. The amount or number of units was arrived at by figuring it out in dollars and cents, and then dividing the total amount by the benefit to the unit or twenty-five, thereby obtaining the number of units of benefit which was, in our judgment, received by this railroad company.

465 We pursued the same course in fixing the number of units of benefit to the Chicago, St. Paul, Minneapolis

& Omaha Railroad Company; also to the Chicago, Rock Island & Pacific Railroad Company; also to the Great Northern Railroad Company. We used the same method in arriving at the proportion of benefits which, in our judgment, the Northern States Power Company received from this drainage ditch. In fixing the proportion of benefits to the Northern States Power Company there were a number of different elements taken into consideration. First, was the dam at Schjodt's. We put that in to control the water there in the river, and also controlling gates or wiers at Thompson's, and the cut-offs of the river. We also took into consideration the property here in Sioux Falls known as the hydro-electric plant. These benefits, were arrived at by the same process of figuring the total benefit and dividing the same by the value of the benefit to the unit. The number of units which were fixed against these various plaintiffs in these actions represented the judgment of the Board in fixing the proportion of benefits upon the showing that was made, and the computation of our Engineer. We adopted the same process in arriving at the number of units which were fixed against the City of Sioux Falls for benefits. We used the same process all the way through on all the property that was taken under the ditch here.

Cross-Examination.

The unit we used was one acre of agricultural land. In determining the benefit to the Northern States Power Company, the Board took into consideration the dam at Schjodt's, the purpose of which was to prevent the water from the Big Sioux River, where the River had broken through into the ditch, from being diverted into the ditch. The Power Company was objecting to the ditch taking its power. The same con-
466 dition is true with reference to the controlling gates at Thompson's. The agricultural land had a value placed upon it, and was computed by the acre. I don't mean to say that all the land was assessed at one price. They vary in price according to benefit. Referring to the property of these plaintiffs, the method pursued was to figure the benefit in dollars and cents. The property now before the Court was not computed on the acreage plan. When we were making this assessment, we placed for everyone the same value on it.

We did not make any difference whether the property belonged to the City or individuals. In assessing the railroads, we took the land that the railroad companies owned into consideration first, then the railroad itself, and then the culverts and bridges. The acreage that the railroad companies owned was only one element taken into consideration, and it was all

assessed upon the unit plan. We took in the mileage but mileage was not the only element taken into consideration. We did not use the valuation of the railroads, but we used the valuation of the benefits that we thought the railroads would receive from it. The Board went over the proposition with the Engineer, and he figured out the method to use and it was approved by the Board. We accepted his figures. The Engineer figured the proportion of bridges that could be saved by diverting the water through the spillway, and that was computed in dollars and cents, and divided by twenty-five, which made so many units. The whole system was figured on that plan. All of the different elements of benefit were figured up and added together. The Engineer showed us what benefits this would be, what it would amount to, and that is the way we handled it, by the $25.00 unit, the same as we did the farms.

467 It was all figured out for us on paper. Then we took the map and travelled over the entire system. The Engineer figured the savings to the bridges, the benefit to the road-bed, and the culverts and the land owned by the railroad. That was all taken in. Those are all the elements I remember.

Q. Now, Mr. Charnock, what was the basis upon which the streets of the City of Sioux Falls were figured on. What were the elements that entered into that?

A. If I remember right they were taken in about the same value as the property abutting.

Q. You mean that all of the streets within the drainage district were figured by the acreage and also other benefits?

A. We didn't figure the lots by the acre.

Q. I am not talking about lots, I am talking about streets?

A. When you get to the streets they are in where lots are laid out.

Q. I am asking about the city property or streets?

The Court: As I understand the witness, they did not consider that upon the acreage basis at all. Am I right?

The Witness: Yes sir.

Q. Upon what basis was the benefits figured?

A. It was figured on the valuation.

Q. Valuation? A. Yes.

Q. Upon the acreage valuation?

A. We figured if you kept the water off this lot you had benefitted it so many dollars.

Q. I am asking about the city streets.

A. I am telling you that we took the streets by the same value.

Q. And figured them in acre valuation?
A. No, not in acre valuation, lot valuation.
Q. Upon what basis?
468 A. I don't know as I can explain it so you can understand it.
Q. What benefits did you figure out that the city would derive to their streets from this spillway and ditch?
A. The drainage. Keeping the water off of them would be certainly a benefit to the streets as well as abutting property.
Q. Upon what basis, what theory?
A. I cannot tell you just how much.
Q. Upon what basis did you figure, for instance, Sherman Park?
A. I believe Sherman Park was run in by the acre.
Q. As agricultural land?
A. Somewhere near that.
Q. Was the streets that you just referred to also figured upon the basis of agricultural land?
A. Whenever they were on that, they were assessed along about the same as the property where the street was located.
Q. As agricultural land?
A. You wouldn't call city lots agricultural land?
Q. I am asking you what you done?
A. I am telling you we assessed the street along with the property where it laid.
Q. As agricultural land?
A. No, not as agricultural land.
Q. What about Phillips Park, how did you assess that?
A. There is only a portion of Phillips Park, I think, taken in. That is the north end.
Q. Upon what basis did you put that?
A. That was the same way.
Q. In fact, you assessed the city property, all of it, the same way you have described it here?
A. I think so.

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469 HERMAN RETTINGHOUSE, being called as a witness on behalf of the defendants, testified in substance as follows:

My name is Herman Rettinghouse. I am a civil engineer and reside in Sioux Falls. I graduated in 1881 and came to the United States in 1882, and in the following year engaged in engineering work: was employed by the Milwaukee, Mitchell and Western Railway, which is now a part of the Chicago & Northwestern system, as an assistant and gradually ad-

vanced into higher positions until 1893, at which time I engaged in private work in Ashland, Wisconsin, where I was city engineer for three years. Also was engineer for two railroads and in the fall of 1897 again engaged with the Chicago & Northwestern Railway as assistant engineer and was promoted to superintendent of bridges and building on the same road in 1900, in which capacity I served for five years; and from 1905 to 1907 was employed by the Wisconsin Central Railway Company as division engineer; had charge of the engineering construction work and maintenance of the entire road, and on January 1, 1907, again engaged with the Chicao and Northwestern as division engineer of the Northern Iowa and Sioux City Divisions, which position I held until the spring of 1913, when I was made division superintendent of the Iowa and Minnesota division of the Chicago & Northwestern. I remained there until November, 1913, and was then promoted to chief engineer of the Chicago, St. Paul, Minneapolis and Omaha, a part of the Chicago & Northwestern system. I retired from that service on March 1, 1920, at which time I was placed on the pension roll because of my impaired health. Since April 1, 1920, I have been a resident of Sioux Falls and have engaged in private practice as consulting engineer and senior member of the firm of Chenoweth & Rettinghouse, up to the present time. My first experience in public drainage work was in 1905 in a project which was affecting the Wisconsin Central Railway and another similar project in Southern Wisconsin; January 1, 1907, while in the service of the Chicago & Northwestern as division engineer in Iowa, which comprised practically the entire state covered by that railroad, the drainage work was very extensive. It was the principal part of my duties to make myself familiar with and handle the drainage problems which came up constantly. During this time we had from [—] one hundred fifty drainage problems of various magnitudes. When I became chief engineer of the Omaha Railway, we had a number of drainage problems in the states of Wisconsin, Minnesota, South Dakota and Nebraska. It was my duty as chief engineer to make myself very familiar with them and to cover all the phases of the problems as to benefits, damages and the manner of assessing benefits and damages. In November, 1920, my firm was engaged by the Board of County Commissioners of Minnehaha County, to make a topographical survey of the district covered by Drainage Ditch No. 1 and 2 for the purpose of preparing a correct map and furnishing data to the Board as would enable it to place the proportional benefits on the land and interests affected. Defend-

470

ant's Exhibit 1 is the map prepared by my firm, which shows the topography of the country adjacent to and affected by Drainage Ditch No. 1 and 2 of Minnehaha County. Drainage Ditch No. 1 and 2 at its initial point is not exactly in the Sioux River. A small creek connects with the Sioux River near the Southwest corner of Section 29, Township 104, Range 49. The initial point of that particular section which we term section No. 3 is located at that point, a matter of five or six hundred feet from the river proper. There are controlling works and gates there which enable the ditch to be closed off from the river or from the creek, or opened and at flood time part of the water taken out of the river. Section No. 3 is located along the lowest land west of the Sioux River. The
471 land is naturally down lower than the banks of the river proper, a great deal in some instances. The land west of the ditch gradually rises as you go away from the ditch until you get to the foothills. The surface water on the outside of this ditch can most assuredly get into the ditch. The ditch was constructed for the prime purpose of draining this section of the country and inlets have been made at various points, at roads and intervening points, to permit this surface water to drain into the ditch.

This third section terminates in connecting with the river on the east and west line of Section 18, Township 103, Range 49, about a thousand feet west of the east line of Section 18. This ditch connects with the river as stated and the river from that point to a point on the southeast quarter of Section 20 has been straightened at various points, being practically canalized. At the point spoken of there is a bayou or an old portion of the river bed, which is partly filled up along the north, due to the fact that the river has been straightened to the west of it, and Section No. 2 connects with this bayou about eight hundred feet east of the river proper. The ditch then extends parallel to the Milwaukee railway to near the junction point of the South Dakota Central line. At that point it diverges to a distance of about sixteen or seventeen hundred feet, running practically that distance parallel and in a southerly direction until it intersects the old bed of Silver Creek. It then follows Silver Creek in a southeasterly direction, cutting out all bends in it until it reaches a point at or near the Section line between Section 28 and 29, and runs in a southerly direction about a thousand feet parallel to the Milwaukee railway again until it reaches a point about a quarter of a mile north of the city limits, from which point it runs in a southeasterly direction to its terminus in the spillway.

Throughout Section 2 which is described, the ditch runs in the lowest part of the country east of the river and serves the purpose of a drainage ditch as well as for an overflow
472 from the river. It was put in for the dual purpose of serving as an overflow and as a drainage ditch. You will notice on the map that Silver Creek runs in a very circuitous route along the ditch and it terminates in this ditch, so that the waters of Silver Creek are more quickly disposed of than before and it therefore assists in draining the land adjacent to the ditch and Silver Creek and the same is true of the lands between the ditch and the river. The ditch assists in draining territory which is tributary to Silver Creek, which has its source north of the initial point of Section 2 of the ditch. The dam at Schjodts is about eight hundred feet from the former end of the lateral ditch constructed there. This dam is about thirteen hundred feet from the present cutoff channel of the Sioux River. There are two controlling works; the one mentioned composed of a gate at the initial point of Section 3. At the initial point of Section 2 there is a concrete bridge with a wier under the same which permits the water to rise to a certain point before it enters into the ditch and thereby is retained in the river proper. This was installed for the purpose of controlling the rise of the water in the river. In making of the survey of which I had charge, I made frequent trips over the territory in order to familiarize myself with all the elements that might come into consideration and particularly as to the relative benefits derived, bearing in mind that it was necessary to arrive at some certain basis so as to be able to make the proper recommendations to the Board. In going over the territory, I came to the conclusion that at the location of this unit, it was about as good an illustration as could be found along the entire district, and I selected this unit for my recommendation to the Board. On Section 2 of this district, which terminates in the Sioux River, there are openings left at all necessary points to drain off the surface water and carry it into the ditch. After we had made our report
473 to the Board and I can best illustrate it by reading the sentence, "We also submit as an aid in your work of equalizing the benefits, a complete list of all the lands with the acreage of each parcel and proportionate benefits. We have made a thorough investigation and have minutely looked over all of the affected lands. In consideration of the proportion of benefits, we have selected a particular tract for a unit, one acre, more particularly described later, in the west half of the northwest quarter of Section 29, Township 102, Range 49". Together with that report we submitted a recom-

mendation as to the proportional benefits and after the board had received this report, we made a trip over the entire district lasting several days. We had one of the maps with us and we viewed all the lands and all of the other points where other benefits were to be proportioned. The particular percentages of the different parcels of land came under consideration and were pointed out, and if a dispute arose as to whether or not it was the proper amount of percentage, it was corrected and agreed upon right there by the Board, so that at the conclusion of our inspection the Board was familiar with all of the facts of the situation as I was myself. We used this unit selected as one and compared the other real estate with it. It was decided by the Board that the acre in question was worth one hundred dollars prior to the improvements and that it was worth one hundred twenty-five dollars subsequent to the improvements. Therefore the actual value of benefit to the unit selected was twenty-five dollars. All the agricultural land was assessed in relation to this unit. Many of the lands were only 30 or 40% depending upon the amount of benefit derived, as compared with this unit, being one hundred per cent. There were other lands that were as high as three hundred and three hundred fifty per cent of this unit. I am familiar with the cost of construction and upkeep of highways. In arriving at the benefit to the highways within this drain-
474 age area we estimated the benefit in this way. There is a certain amount of annual maintenance necessary for any road, and there is more than that amount [—] under flood conditions. That is to say, a road that is periodically flooded as against a road that never is flooded. The difference in the estimated cost of maintenance was capitalized, or represented the interest on a certain sum of money, and we consider the capitalized portion as a real benefit. We then, after obtaining that result after making a great many calculations, taking into consideration the various locations, some of them benefitted more than others.

"We divided the amount arrived at by the value of the unit of $25, thereby obtaining the number of units as a proportional benefit for these roads. The sum we divided by the unit represented the capitalized value to that part of the highway; we applied the same method to the streets and highways of the City of Sioux Falls." We did not apply the acreage basis to the city property, excepting possibly the grounds where the water works are located. In applying the benefit to the unit and what the Board took into consideration as elements of benefit to the Milwaukee Railway Company, we took into consideration the fact that in the first place there were practical-

ly three elements. First was the right-of-way on the acreage basis, which was estimated in proportion to the adjacent lands. Second, that it was possible to shorten or abandon certain bridges. In order to determine the benefits derived therefrom is simply a mathematical proposition. It costs a certain amount of money each year in order to maintain a bridge, whether it is a pile bridge or a steel bridge. We know how long these structures will last. We figure the cost of a bridge and divide it by the number of years in order to get the amount that is necessary to be expended each year for replacement. Taking the amount in dollars and cents multiplied by the length of the bridge and divide that and capitalize that at 7%, which is the usual rate of interest, and that determines
475 the amount of benefit. This was the second element. The third element is the fact that by reason of the flooding of the territory in which railroads are located, washouts often occur. We obtained data and from my personal knowledge and experience I have a very good idea of what it costs to repair washouts periodically appearing and we estimated as close as possible how much it would amount to every year and capitalized that amount again.

Again as an additional element, a road-bed is solidified or made stronger by not being subject to floods. A road-bed that is constantly or for great lengths of time subjected to submersion is certainly weakened, and again, so far as humanly possible, we figured the amount of benefits in dollars and cents and after getting all of these results or capitalized amounts, we divided that by twenty-five as our measure and determined the number of units of benefit. That system and general method and plan was used to determine the amount of benefits that each railroad received from these separate elements. There were three elements of benefit so far as the Northern States Power Company is concerned. One of them was the fact that through the construction of the wier at the initial point of section 2 and through the construction of the dam commonly known as Schjodt's dam and I believe some dike work done at other points, the power company was assured of a constant flow of water or a normal stage of water. The second element, that through the diversion of a part of the water of the Sioux River through this drainage ditch, which has been estimated at from twenty-six hundred to three thousand second feet, as against a total flood condition of six thousand feet, and all the way from 6000 to 10000 second feet, a benefit was created in that much water was taken away

from the tail race and lowering the available head at
476 the power company's plant. In determining what proportion that would be, I was largely guided by the report made by Mr. Link, in which the results of his investigation were given and the amount of second feet of water in flood stages of the river at certain periods mentioned. I was also dependent upon the information and investigation made by Mr. Shenehon, who designed the spillway, and I came to the conclusion as a fair proportion of the waters diverted, we could assume one-third of the entire river from the end of section 2 in lowering the head of the hydro electric plant, through the flood waters; also the lay of the land opposite the hydro electric plant is such that all of the flood waters, after passing over the dam, must pass through the tail race. All these elements were considered in the determination of the benefits accruing to the Northern States Power Company.

Q. Just a moment, let me call your attention to certain cut-offs in the river. What if any?

A. I said there were three elements and I only mentioned two. The other is the straightening of the river which has been done to a large extent between the upper end of Section No. 2, at this point clear down to this point near the Watertown & Sioux Falls Railway. The velocity of the water was greatly increased of the waters flowing through the river, and it thereby shortened the flood period, in that the water passed through the river much quicker than it did before. The total amount of water that is collected in the initial point of these cutoffs is hastened down the river past the Northern States Power Company's Plant. The ditch takes one third out of the river. I have estimated it as closely as humanly possible at one-third. It may be more. These were the elements we considered in apportioning the benefits to the hydro electric plant. Using these elements, we estimated the amount that would be saved by the power company through the fact
477 that the head was not lowered to that extent and capitalized that amount. The power company, by by-passing these flood waters, would have a constant aggregate output of hydro electric power and in season other than flood seasons the controlling works and dams keep all the water in the river that should be there and pass it around over the power company's turbines, insuring to them a constant flow even at a low stage of water in the river. (Tr. p. 285) The Great Northern had 2.4 acres of right-of-way which the Board considered benefited by reason of this ditch. They have one-fifth of a mile of track, two bridges protected, and 315 feet approximately of bridge that might be abandoned. The Chi-

cago, Rock Island and Pacific has 12-1/8 acres of right-of-way that is benefited, one mile of track and two bridges benefited to be shortened, together approximately 230 feet. The Chicago, Milwaukee and St. Paul Railway has 172 acres of right-of-way, 14.2 miles of track, two bridges protected, one bridge shortened one hundred feet and one bridge of 176 feet abandoned, all benefited thereby. The Chicago, St. Paul, Minneapolis and Omaha has two and one-fourth miles of track, 27 acres of right-of-way, 405 lineal feet of bridges abandoned and two bridges protected.

478 These items I have mentioned, in my opinion, were benefitted by the construction of this ditch and the diverting of the water as I have testified. There were three elements in regard to the assessment of the city of Sioux Falls. First, the streets, estimated at about 14 miles of streets within the drainage district. They are benefited in the same manner as I have explained in regard to the county and town roads, although the benefits were more varied on account of the streets being built of different character. The second item was the parks. We figured that from the diversion of the flood, the annual maintenance of the parks was reduced, that is to say there was less work to maintain the grounds as compared with the ground that was flooded. Another item was the benefit to the water works. It seems to be a fact that through the placing of the spillway the life of the water works was saved, insofar as productiveness of the wells is concerned. Another item is that during flood conditions, the water works were unproductive. We have estimated a certain number of days each year that the water works were out of commission. These wells were flooded by surface water and made them unsanitary and unfit for drinking purposes. We figured the amount that that would bring and capitalized the amount same as the capitalization of the streets and parks and divided that amount by twenty-five in order to arrive at a certain number of units. From my experience and the facts and data that I have been able to gather, the benefits that I have mentioned are direct benefits to the railroad companies and their properties by reason of the construction and maintenance of this ditch; and the benefits which I have outlined to the city and Northern States Power Company were direct benefits to them. After determining the amount of the units and actual amount of money necessary to be raised, that amount is divided by the number of actual units to produce the value of a unit; and by

that process we reduce the actual value of the unit down proportionately to each party affected.

479 Q. You reduced the valuation down proportionately to each property affected whether it was railroad or ranch property? A. All treated alike.

Q. And that, in the final analysis will be the assessed benefit after being equalized? A. It will.

Q. Calling your attention to the fact that the river continues around the city for some miles beyond the outlet of the spillway, what is the effect of by-passing this water upon adjacent lands, starting at the city limits on the north around this city until the ditch dumps the water back into the river. Is that a benefit or not?

A. It constitutes a direct benefit.

Q. The same benefit as to lands farther up the river?

A. Yes.

Cross-Examination,

By Mr. Campbell:

When I speak of the ditch diverting something like three thousand feet of water, I have reference to the discharge capacity of the ditch at its lower end; I couldn't tell what proportion of the water came out of the river during the flood stage; I should think a majority of the water came out of the river; I don't know the capacity of the ditch at its upper end; we haven't figured that; the ditch does not divert water from the river at any other point than that; I do not know what the amount is that is diverted there; the wier that I speak of down here that controls the flood of the river is constructed to keep the water from going into the ditch at normal stage; if the ditch were not there, the waters would go down the river just the same. The second element that I said I took into consideration, that is, the diversion of the flood of the water would lower the tail race of the Northern States Power Company at flood times to the extent of the water that was diverted; I couldn't tell you how much that would be; I couldn't tell you how many kilowatt hours of output the plant would gain by reason of that diversion; that is a matter in hydro-electric engineering that I have not attempted to qualify; the value of that increased head would be measured by the value of the increased output from the hydro-electric plant; this answer is based upon the assumption that it is cheaper to produce electric current from a hydro-electric plant than from a steam plant.

480 By Mr. Grantham:

I didn't know I determined the capacity of the stream; we have several cross sections taken at various points of the

ditch and the river as well; I couldn't tell you whether I have a cross-section of the ditch at about the point where the ditch that runs to the spillway is fed by the river; we have taken cross sections of every half mile; the ditch is not uniform all the way; I have no idea at all of the size of the stream; in testifying here that the ditch carries one-third of the water, I was basing my conclusion upon the investigations made; I determined on my survey the high water mark; the [heighth] above the banks of the stream of the high water varies at various points; the dotted line here on the map shows the high water line; at an elevation of 1438, the [heighth] of the water line is about ten feet above the banks of the river, at that point. I would have to go over the whole map with you and show you every point. It absolutely shows on the map; the water at that point would be about 8000 feet wide on the surface, that is not giving a proper picture of the thing; it is impossible for anyone to tell you off-hand just what the average depth of water would be there without showing cross sections at every point. I have no idea, unless I get down and work on it. We made a topographical survey of the valley.

Q. How did you determine the capacity or amount of water carried if you didn't know the amount of water in the stream? A. I was not engaged for that purpose.

Q. You don't know as a matter of fact the amount of water that is carried down the stream in flood time?

A. I do not. I have already testified as to the source of my information as to the amount of water that came down the Sioux Valley in flood times.

The defendants rest.

481 Endorsed: Filed in the District Court on Jan. 25, 1923 at 2 P. M.

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483 (Approval of statement of evidence by District Judge.)

The above named appellants having presented and filed in this Court their statement of the evidence in the above entitled cause, and the above named respondents having filed their objections thereto and asking that part of said statement be stricken and said respondents' statement of said evidence be substituted in lieu thereof, and the appellants having filed their objections to said substituted statement of said respondents, and said differences having been submitted to the above named court, and said statement having been made up and

completed in conformity with the directions of said
484 Court,

Now Therefore, It Is Ordered that said statement so made in conformity with the order of this Court and hereto attached be and the same is hereby approved as a true and complete statement of the evidence in this cause.

By the Court:

JAS. D. ELLIOTT, Judge.

Attest:

(Seal of Court) Jerry Carleton, Clerk.

Endorsed: Filed in the District Court on Jan. 25, 1923, at 2. P. M.

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485 (Clerk's Certificate to Transcript.)

United States of America,
Southern Division,
District of South Dakota—ss.

I, Jerry Carleton, Clerk of the District Court of the United States of America, in and for the District of South Dakota, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Eighth Circuit, that the foregoing, consisting of 484 pages, numbered consecutively from 1 to 484, inclusive, is a true and complete transcript of all of the record, process, pleadings, orders and final decree as enumerated in the Praecipe of the parties appellant and the Praecipe of the party appellee to this cause filed herein, directing the Clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original Citation, together with the affidavit of service thereof, and in addition thereto a copy of said Praecipes and all written opinions of the Court filed in said cause.

Seal
U. S. Dist. Court,
Dist. of South Dakota.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, in the said District, this 15 day of March, A. D. 1923.

JERRY CARLETON, Clerk.

Filed Mar. 20, 1923. E. E. Koch, Clerk.

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357 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

United States Circuit Court of Appeals, Eighth Circuit.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6313. vs.
Chicago, Milwaukee & St. Paul Railway Company.

Appeal from the District Court of the United Sates for the District of South Dakota.

(Excerpt from Brief for Appellee filed on December 7, 1923, as called for in the Praecipe of Appellants.)

It is alleged by the defendants and Appellants in their answer, and Appellee admits it to be a fact, that Drainage Ditch No. 1 and 2 was a new and independent proposition and not a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and cannot be considered as a proposition for the repair of the original ditches. It is a projcet which must stand or fall upon its own footing.

(Order of Submission.)

Memorandum of Clerk:

On the 17th day of December, 1923, this cause, together with causes Nos. 6312, 6314, 6315, 6316 and 6317, was submitted to the United States Circuit Court of Appeals for the Eighth Circuit and a full copy of the order of submission having been included in the transcript taken for the
358 Supreme Court of the United States on appeal and an application for writ of certiorari in cause No. 6312, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee, the same is omitted from the transcript in this cause, No. 6313.

(Opinion.)

Memorandum of Clerk:

On the 18th day of March, 1924, an opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in causes Nos. 6312 to 6317, inclusive, and a full copy of

the opinion having been included in the transcript taken for the Supreme Court of the United States on appeal and an application for writ of certiorari in cause No. 6312, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee, the same is omitted from the transcript in this cause, No. 6313.

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359 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.
December Term, 1923.

Tuesday, March 18, 1924.

A. G. Risty, et al., as County Commissioner of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., intervening defendants, Appellants,
No. 6313. vs.
Chicago, Milwaukee and St. Paul Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Chicago, Milwaukee and St. Paul Railway Company have and recover against A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., intervening defendants, the sum of Twenty Dollars for its costs herein and have execution therefor.

March 18, 1924.

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360 (Petition for Appeal to Supreme Court, U. S., Assignment of Errors and Allowance of Appeal.)

(Petition for Appeal and Allowance thereof.)

To the Honorable Presiding Justice, or any of the Judges of the Circuit Court of Appeals of the United States, for the Eighth Circuit:

Now comes the above named appellants, by their solicitors, and complain that in the record and proceedings, and also in the rendition of the Decree of the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Louis, in the State of Missouri, in the above styled and numbered cause, on the 18th day of March, A. D. 1924, affirming the Decree of the United States District Court, for the District of South Dakota, Southern Division, in said cause, manifest error has intervened, to the great damage of the petitioners. In substance, said errors are these:

1. Appellee was given said relief by collateral attack, by means of a Bill of Equity, when it had an adequate remedy at law which it could pursue, at its election, either in the Courts of the State of South Dakota, or in the Federal Court.

2. It was given the relief aforesaid, despite the fact that the record shows without dispute that the appellants, the Board of County Commissioners, in establishing the said new project, and in attempting to obtain said contribution from appellee, acted strictly in accord with the statutes of the State of South Dakota governing the establishment of such new project.

3. Appellee got said relief, though, in addition to the fact that said Board had in fact thus complied with said
361 statutes of the State of South Dakota, it was the settled law of said State at the time the Circuit Court of Appeals acted as aforesaid, that the doings of said Board with reference to the aforesaid project were in compliance with the statutes of South Dakota, as construed by the highest court of that State. It was further settled at said time by the highest court of the State of South Dakota, that the very project at bar was the formation of a new drainage district, or ditch. And the Circuit Court of Appeals erred in disregarding the interpretation of the applicable statutes of the State of South Dakota as formulated by the highest court of that State, and substituting its own interpretation for that of said highest court of that State.

4. The Circuit Court of Appeals erred in granting the relief which it did grant and affirm, because neither the pleadings nor the evidence warranted such relief, or any relief, and because its finding that appellee was entitled to the relief which it obtained, is contrary to the pleadings and to the evidence, and contrary to and unwarranted by the law.

5. Said Circuit Court of Appeals erred also for the reasons set out in the assignments of error filed herewith.

The appellee invoked the jurisdiction of said United States District Court, as set out in its bill of complaint, on the ground that it, the appellee, was a citizen of the State of Wisconsin; that the appellants were citizens of the State of South Dakota, and that more than $3,000.00, besides costs, was actually in controversy. It did not invoke the jurisdiction solely on the aforesaid grounds, but, in addition, asserted in its bill of complaint that appellants were not proceeding in accordance with the requirements of the applicable statutes of the State of South Dakota; that if it were assumed they were acting in compliance with said statutes, such statutes themselves were unconstitutional and void, and violative of
362 the Constitution of the United States, and amendments thereto, and that the action of appellants was depriving appellee of its property without due process of law, in violation of said Constitution and amendments thereto.

Therefore, your appellants and petitioners say that this cause and matter is not one in which the decision of the said Circuit Court of Appeals of the United States is made final, and say further that the controversy between appellants and appellee involves an actual controversy over more than One Thousand Dollars, besides costs.

Wherefore, petitioners pray for an allowance of the appeal, to the end that the cause may be carried to the Supreme Court of the United States, and petitioners pray for a supersedeas of said judgment, and such other process as is required to perfect the appeal prayed for, to the end that the errors therein may be corrected.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Solicitors for Appellants.

Appeal and supersedeas allowed, and bond fixed at the sum of One Thousand and no /100 Dollars ($1000.00), conditioned as the law provides, this 31st day of May, A. D., 1924.

WM. S. KENYON,
Judge of the Circuit Court of Appeals of the United States, for the Eighth Circuit.

Assignments of Error.

Now on this 31 day of May, 1924, comes A. G. Risty, et al. as County Commissioners, etc. et al., Appellants, by their solicitors, Benj. I. Salinger, Elbert O. Jones and Norman B. Bartlett, and in connection with their petition for ap-
363 peal to the Supreme Court of the United States say that in the findings, judgment and decree entered in the above cause on the 18th day of March, 1924, manifest error has intervened, to the injury, wrong and prejudice of this appellant, and that the same is erroneous and unjust to appellant;

1. Because the Circuit Court of Appeals failed to follow the construction of the South Dakota Constitution and statutes as pronounced by the highest court of the state and did its own construing of said state law and based its affirmance of the decree of the District Court on a construction of its own part, which is in conflict with the construction of the highest court of the state.

2. Because it was based on the reasoning that appellant Board had no authority to make an assessment except in aid of a drainage project to drain agricultural lands and that said Board had no authority in law to establish a drain except for the drainage of agricultural lands.

This is erroneous and the interpretation of the Constitution and statutes by the Circuit Court of Appeals is erroneous because it is and for a long time has been the settled law of South Dakota as declared by the highest court of the state in construing its said Constitution and statutes that a Board such as appellant Board is, is by such Constitution and statutes authorized to establish and construct a drain for a public purpose and that such public purpose included but was not limited to the drainage of agricultural lands, and that such authority existed as to such drainage as the very one at bar is, and it is undisputed in the evidence that one object of this project was to drain agricultural lands.

3. Because it is not only a fact that the highest court of the state has ruled in construing the Constitution and statutes of the state of South Dakota that the drainage ditch a bar was lawfully established and that the acts of appellant Board were lawful, but the record shows both facts
364 without dispute; and the Circuit Court of Appeals' affirmance is despite such ruling and despite said state of the evidence.

4. Because the affirmance was based on an interpretation of the statutes of South Dakota by the Circuit Court of Appeals that such statutes did not permit or authorize appellant Board of County Commissioners to establish and construct a new drainage ditch over the line of two older ditches, which new project contained a materially larger area than the combined areas of such old ditches and called for cleaning out, widening, deepening and diking of the older ditches to double their former capacity—the construction of river cut-offs to accelerate the flow of water therein, and the installation of a new and larger spillway, all at a cost of more than double the cost of the original ditches; which interpretation was contrary to the interpretation given to such statutes by the highest court of the state of South Dakota in this very drainage project.

5. Because the statutes of South Dakota, as interpreted by the highest court of the state, permit and authorize the appellant Board to establish over the line of one or more old drainage ditches a new drainage project containing a materially larger drainage area than the combined area of such old ditches—with additional river cut-offs—new and larger spillway, and a cleaning out and deepening, widening and diking of the old ditches to double their former capacity, at an expense of more than double the cost of the original ditches; and the undisputed evidence in this case shows the proceedings of the appellant Board sufficient under such statutes to establish and construct such new drainage project and make an apportionment of benefits for the payment of the cost thereof, and did not warrant the finding and conclusion of said Circuit Court of Appeals that said proceedings were in fact for repair and maintenance only.

6. Because it is based on the holding and reasoning
365 that appellant Board had acted without authority from and had not complied with the provisions of the statutes of South Dakota regulating the maintenance and repair of ditches already established. The appellees, City of Sioux Falls, C. Milwaukee & St. P. Ry. Co., and the C. St. P. Minneapolis and Omaha Ry. Co., conceded that the project at ber was the creation of a new ditch and a new project. That fact is established by the undisputed evidence as against all of the appellees. It is undisputed in the evidence that there was a full compliance with every statute dealing with the establishment of a new ditch. Therefore, the affirmance was given because there had been a failure to comply with statutes that had nothing whatever to do with the establishment of a

new ditch or assessing for the cost of its construction. The court disregarded that the relevant statutes had been complied with and based its action wholly on the fact that statutes that had no application had not been complied with.

7. Because the appellant Board to whom had been delegated by the statutes of South Dakota the authority to determine the purpose and character of this drainage project had, after notice and hearing, determined that this drainage project, among other things, was for the benefit of the public health, welfare and convenience and was necessary and practicable for draining agricultural lands, from which determination no appeal was ever taken; and the highest court of the state of South Dakota has held in interpreting such statutes that such determination is final, no appeal from the same ever having been taken.

8. Because the notice dated September 15, 1916 and the hearing held pursuant thereto on October 2, 1916 was a notice to and an opportunity to be heard by appellee on the formation of this new drainage project with an enlarged area subject to benefits and that appellee's property was included therein, and gave to it its day in court and its opportunity to contest the establishment of said drainage project,
366 the legality thereof, the necessity therefor, the character and purpose thereof, and it having waived the same and defaulted therein and not having appealed from said determination, is bound thereby.

9. Because what was in effect done was to restrain legislative action on the part of the appellant Board acting in a legislative capacity under delegation from the legislature of the state. The legislature itself could have by enactment of a statute done everything the Board did or was proposing to do, and it should be conceded that the legislature could not have been enjoined from enacting such a statute. The only difference is, that the Board was bound to give certain notices and hearings before any assessment could become a lien, and the Board did what it was bound to do.

10. Because appellee admitted in court and in its brief and argument that this "Drainage Ditch No. 1 and 2" was a new and independent project and not a continuation of or a proposition for the repair of old Drainage Ditch No. 1 and Old Drainage Ditch No. 2, and the highest court of the state, in interpreting the statutes of said state, has determined that such statutes gave authority to the appellant Board to construct this very ditch and authority to construct a ditch for a

public use or purpose and that corporate drainage districts therefor were not necessary.

11. Because the proceedings at bar were proceedings in rem, for the purpose of taxation, and dealing in this matter or any review of the same involves property rules, over which the courts of the state are the final authority, and both resident and non-resident property owners must, at least in the first instance, report to and exhaust the remedies provided by the statute in the state tribunals for reviewing such controversies before they may enter either the state or the federal courts at all.

12. Because although where a resident of a state may enter the courts of a state, one who has diversity and a con-
367 troversy involving more than $3,000.00 need not submit himself to those state courts but may at his election enter the federal courts, yet in a proceeding in rem like a drainage project the resident of the state must first submit to administrative review and may not enter the courts of his state without first exhausting such administrative review, and the non-resident cannot disregard such administrative review and have his proceedings in rem reviewed in the first instance in the federal courts. The non-resident can enter the federal court only when the resident of the state can enter the state court.

13. Because the injunction was granted on the reasoning that one should not be compelled to appear at the hearing to equalize apportionments for the reason that it would be had before said Board and said Board had no authority whatever to act—that one should not be compelled to submit to a hearing before a mere treaspasser. This disregards, first, that the mere assertion that the Board was without authority did not justify the failure to appear at said hearing, and second, it disregards the decisions of the highest court of the state that the Board was acting on full authority, and, third, it appears by the undisputed evidence that they had full authority.

14. Because the hearing enjoined was one to be had for the purpose of equalizing a tentative estimate only which had been made by the appellant Board. This estimate was not final and additional acts by the Board were necessary after such hearing was held before any tax, assessment or servitude could become operative. Manifestly the holding of such hearing could not give rise to a multiplicity of suits as against this appellee, no matter how many suits might arise as to other parties, Manifestly the proposal to hold such hearing cast no cloud on title, because other acts by the Board were

necessary before any amount that was finally fixed could become a tax, assessment or servitude upon its property, and there was no evidence at all that there would result
368 irreparable injury to appellee. This is especially applicable to the appellee City of Sioux Falls and to the four railway company appellees, because even if an assessment had been made and a tax levied, it would have created no lien upon their property.

15. Because appellee made no case under any acknowledged head of equity jurisdiction and in the essence, based its claim for relief upon the assertion that it was threatened with exaction of an illegal tax. At any rate there could be no right to have equitable relief until such time, if ever, as the threatened tax was about to be collected by taking from appellee the title to the lands affected by the assessment. Up to that time nothing could happen more than to exact a sum of money for taxes which were illegal taxes, and for that wrong or threatened wrong the law provides an adequate remedy either in the state or federal courts.

16. Because if, as is contended by the Circuit Court of Appeals, the appellants acted utterly without authority of law and were therefore naked trespassers, that fact gave appellee an adequate remedy at law in either the federal or state courts at their election, to-wit, to sue in trespass—hence appellee's bill in chancery should not have been entertained. If, on the other hand, the acts of the appellants were in all respects lawful, the appellee was not entitled to any remedy either at law or in equity.

17. Because, assuming that appellee could enter the federal courts at all, it had at all times a plain, adequate and complete remedy at law in the premises in said courts by appealing from the establishment of the ditch to the circuit court of the state and thence removing the entire controversy involved, including the making of assessments, to the law side of the federal courts, where a trial de novo could be had. Instead appellee lodged a bill of complaint seeking an injunction.

And while it may be true appellee has waived its right
369 to this appeal from the establishment of the ditch, that does not alter the fact that it had no right to enter a court of equity on the ground that though it had at one time the right to thus appeal to and have review in the federal court and a trial de novo there on the law side, by its default and waiver it had voluntarily lost that right.

The right to enter chancery cannot be created by waiving or failing to exercise an adequate remedy at law.

Passing that, the appellee had the right to appeal from the action of the appellant Board as to apportionment of benefits directly to the circuit court of the state and thereupon to remove this very controversy for review on the law side of the federal District Court and there have a trial de novo.

18. Because, assuming for the sake of argument that the District Court and the Circuit Court of Appeals had authority to pass upon the merits, both of them erred in finding for the appellee in that there is absolutely no evidence to support the contention of the appellee on the merits; that is to say, there is no evidence whatever that the appellant Board ever did anything whatsoever in the premises other than what it was authorized to do by the Constitution and statutes of the state of South Dakota. And in addition to this being the state of the evidence, the highest court of the state, construing said Constitution and statutes of the state, has ruled in a way that is binding upon said federal courts that in truth and in fact appellants acted on full authority and in every way in compliance with the requirements of said Constitution and statutes of the state of South Dakota.

19. Because appellee was not entitled to any relief for the reason that it was given legal notice by the notice dated September 15, 1916 of the proposed formation of this new drainage project containing an enlarged benefited area with its property included therein, and that the same was about
370 to be established and appellee could at a hearing to be held on October 2, 1916, resist such new project, and appellee waived such hearing with full knowledge that it was bound by all subsequent action of the appellant Board which necessarily followed in the premises; and in addition thereto appellee stood by and without any objection on its part to said proceedings, saw the expenditure of over a quarter million dollars, for the payment of which appellee is charged with knowledge that the same must be made out of the property benefited, included in which class is appellees', and in addition thereto, appellee actively aided and abetted said work as the same progressed and made no protest, and it is now estopped from questioning the legality of said proceedings.

Wherefore Appellants pray that the said findings, judgment and decree of the said Circuit Court of Appeals be reversed and that such further orders and proceedings be had

as law and justice may require and that this case be remanded and such relief given to appellants as may be their due.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT.
Counsel for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 31, 1924.

(Bond on Appeal to Supreme Court, U. S.)

Know All Men By These Presents:

That we, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, as principals, and the Southern Surety Company, of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the Chicago, Milwaukee
371 & St. Paul Railway Company, (a corporation) Appellee, in the above cause, in the sum of One Thousand Dollars ($1,000.00);

Conditioned that, whereas, on the 18th day of March, A. D., 1924, in the Circuit Court of Appeals of the United States, for the Eighth Judicial Circuit, in a suit pending in that Court upon appeal, wherein the Chicago, Milwaukee & St. Paul Railway Company, a corporation, was plaintiff and appellee, and A. G. Risty, et al., as County Commissioners, etc., et al., were defendants and appellants, numbered on the Docket as No. 6313, a Decree was rendered against the said A. G. Risty, et al., as County Commissioners, etc., et al., appellants, and the said A. G. Risty, et al., as County Commissioners, etc., et al., having obtained an appeal to the Supreme Court of the United States, and filed a copy thereof in the office of the Clerk of this Court, to reverse the said Decree, and a citation directed to the said appellee, citing and admonishing it to be and appear at a session of the United States Supreme Court to be held in the City of Washington, D. C.;

Now, if the said A. G. Risty, et al., as County Commissioners, etc., et al., shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the

above obligation to be void, else to remain in full force and virtue.

A. G. RISTY,
Signing for All the Appellants,
Principals.

(Seal) SOUTHERN SURETY COMPANY OF DES MOINES, IA.,
By H. B. Charnock,
Attorney-in-Fact.
Surety.

372 The foregoing bond is hereby approved.

May 31, 1924.

WM. S. KENYON,
Judge of the United States Circuit Court of Appeals, for the Eighth Circuit.

* * * * * * * *

(Certified copy of Power of Attorney issued to Mr. H. B. Charnock by the Southern Surety Company of Des Moines, Iowa, etc., attached to original bond.)

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 31, 1924.

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373 Citation.

United States Circuit Court of Appeals, Eighth Circuit.

A. G. Risty et al. as County Commissioners, et al., Appellants,
No. 6313. vs.
Chicago, Milwaukee & St. Paul Railway Company, a corporation, Appellee.

United States of America, To Chicago, Milwaukee & St. Paul Railway Company—Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Chicago, Milwaukee & St. Paul Railway Company, a corporation, is complainant and A. G. Risty et al. as County Commissioners et al. are defendants, and in which case the said defendants perfected an appeal to the Circuit Court of Appeals, Eighth Circuit, an appeal has been allowed to the said A. G. Risty et al. to the United States Supreme Court. You are hereby

cited and admonished to be and appear in said court at Washington, D. C. sixty days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable William S. Kenyon, Judge of the United States Circuit Court of Appeals, Eighth Circuit, this 31st day of May, A. D. 1924.

WM. S. KENYON,
Judge of the United States Circuit Court of Appeals, Eighth Circuit.

Service of the within Citation this 2nd day of June, A. D., 1924, at Sioux Falls, South Dakota, is hereby acknowledged.

C. O. BAILEY and E. L. GRANTHAM,
Counsel for Appellee.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No. 6313. A. G. Risty, et al., as County Commissioners, et al., Appellants, vs. Chicago, Milwaukee & St. Paul Railway Company, Citation on Appeal to Supreme Court, U. S., and acknowledgment of service. Filed Jun. 5, 1924. E. E. Koch, Clerk.

---

374 (Praecipe for transcript on Appeal to Supreme Court, U. S.)

The Clerk of the above named Court is hereby directed to prepare and certify a transcript of record in the above entitled case for the use of the Supreme Court of the United States by including therein the following:

1. The printed transcript of record filed in your court.

2. Appropriate reference to the hearing held at St. Louis in the Circuit Court of Appeals.

3. The opinion of the Circuit Court of Appeals in this cause except the title thereof.

4. The decree of the Circuit Court of Appeals, except the title thereof.

5. Petition for appeal and order allowing the same, except the title thereof.

6. Assignments of error.

7. The bond on appeal and approval, except the title, and the powers of attorney, verification and authentication which may be shown by sufficient memoranda.

8. That portion of appellee's brief and argument appearing on page 28 thereof which reads as follows: "It is alleged by the defendants and appellants in their answer, and appellee admits it to be a fact, that Drainage Ditch No. 1 and 2 was a new and independent proposition and not a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2 and cannot be considered as a proposition for the repair of the original ditches. It is a project which must stand or fall upon its own footing."

375 9. Citation in appeal and admission of service thereof.

10. Memoranda as to the praecipe filed.

11. Clerk's certificate.

Dated at Sioux Falls, South Dakota, this 3 day of June, 1924.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jun. 5, 1924.

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376 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of South Dakota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, except the order of submission and opinion, had and filed in the United States Circuit Court of Appeals, omitting, however, the full captions, titles and endorsements in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for appel-

lants, in a certain cause in said Circuit Court of Appeals wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Chicago, Milwaukee and St. Paul Railway Company was Appellee, No. 6313, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

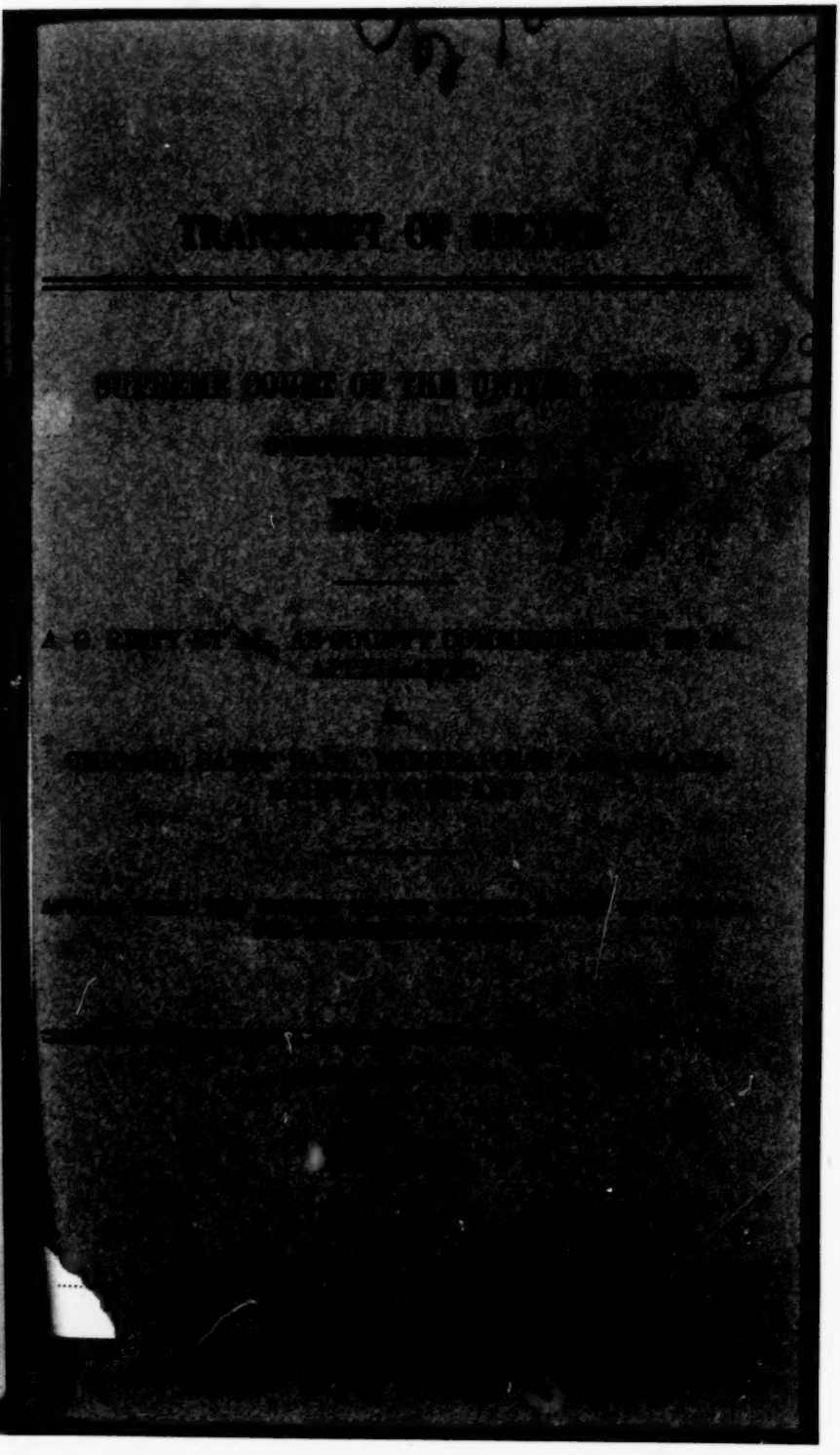
In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this seventh day of June, A. D. 1924.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 30,417. U. S. Circuit Court Appeals, 8th Circuit. Term No. 452. A. G. Risty et al., as county commissioners et al., appellants, vs. Chicago, Milwaukee and St. Paul Railway Company. Filed June 16th, 1924. File No. 30,417.

(4402)



(30,418)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 453

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS, ET AL., APPELLANTS,

vs.

CHICAGO, SAINT PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1923, of said Court, before the Honorable William S. Kenyon, Circuit Judge, and the Honorable Jacob Trieber and the Honorable David P. Dyer, District Judges:

Attest:
(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twentieth day of March, A. D. 1923, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of South Dakota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Chicago, St. Paul, Minneapolis and Omaha Railway Company was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (Affidavit of Service of Citation.)

In the District Court of the United States for the District of South Dakota, Southern Division.

Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Plaintiff,
vs.
A. G. Risty, et al., Defendants,
and
Minnehaha National Bank et al, Intervening Defendants.

District Court of the United States
District of South Dakota—ss.

W. C. Welsh, being first duly sworn on oath, deposes and says: That he is a citizen and elector of the State of South Dakota. That he served the hereto attached citation in the above entitled cause upon the above named plaintiff on the 8th day of December, 1922, in the city of Sioux Falls, South Dakota, by then and there handing to and leaving with C. O. Bailey, its solicitor, a true copy of said citation.

W. C. WELSH.

Subscribed and sworn to before me this 8 day of December, 1922.

(Notarial Seal)

DOUGLAS S. ELLIOTT,
Notary Public, South Dakota.

Citation.

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Plaintiff,
No. 100. vs. In Equity.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as

Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial & Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter, Intervening Defendants.

United States of America to the above named Plaintiff, Chicago, St. Paul, Minneapolis & Omaha Railway Company—Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Chicago, St. Paul, Minneapolis and Omaha Railway Company is complainant and A. G. Risty, et al., as County Commissioners
3 of Minnehaha County, South Dakota, are defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., are intervening defendants an appeal has been allowed the above named defendants and intervening defendants therein to the Circuit Court of Appeals, Eighth Judicial Circuit. You are hereby cited and admonished to be and appear at said Court at the City of St. Paul in the State of Minnesota sixty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable James D. Elliott, Judge of the United States District Court for the Southern Division, District of South Dakota, this 25 day of November, 1922.

JAS. D. ELLIOTT, Judge.

Service of the foregoing Citation, by receipt of copy, at Sioux Falls, South Dakota, is hereby admitted this ..... day of ....., A. D., 1922.

.....

Solicitor for Chicago, St. Paul, Minneapolis & Omaha Railway Company, Plaintiff.

Endorsed: Filed in the District Court on Dec. 13, 1922 at 2 P. M.

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5 In the District Court of the United States of America, in and for the District of South Dakota, Southern Division.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, Plaintiff,

No. 100 S. Div. vs. In Equity.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants.

Be It Remembered, that on the 25th day of July, A. D. 1921, there was filed in the above entitled court, on behalf of the plaintiff, a Bill in Equity; which said Bill in Equity, excluding the verification and Exhibit A, is in words and figures the following, to-wit:

6 (Bill of Complaint.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, Plaintiff,

vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, W. G. Tyler, and C. T. Charnock as County Commissioners of Minnehaha County, South Dakota; Fred E. Ward as Auditor of Minnehaha County, South Dakota; and J. O. Anderson as Treasurer of Minnehaha County, South Dakota, Defendants.

The plaintiff, a corporation of the state of Wisconsin and a resident and citizen of said state of Wisconsin, brings this its bill of complaint against A. G. Risty, J. A. Jensen, C. W.

Knodt, Chris Olson, W. G. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as auditor of Minnehaha County, South Dakota, and J. O. Anderson, as treasurer of Minnehaha County, South Dakota, residents and citizens of the state of South Dakota and of the southern division of the district of South Dakota, and respectfully shows unto the court:

First.

That the plaintiff is and was during all of the times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, and a resident and citizen of the said state of Wisconsin within the meaning and intent of the laws conferring jurisdiction upon the district courts of the United States.

Second.

7 That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, W. G. Tyler, and C. T. Charnock, Fred E. Ward, and J. O. Anderson, are each of them residents and citizens of the state of South Dakota and of the southern division of the district of South Dakota within the meaning and intent of the laws conferring jurisdiction upon the district courts of the United States.

Third.

That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, and C. T. Charnock are the duly elected, qualified and acting county commissioners of the county of Minnehaha, in the State of South Dakota and constitute the board of county commissioners of said county of Minnehaha; that the defendant, W. G. Tyler, is a duly elected and qualified commissioner of said county of Minnehaha, and claims to be the legal commissioner of said county in place of said Chris Olson; that the defendant, Fred E. Ward, is the duly elected, qualified and acting auditor of the said County of Minnehaha, and that the defendant, J. O. Anderson, is the duly elected, qualified and acting treasurer of the said county of Minnehaha.

Fourth.

That the Legislature of the State of South Dakota at the ninth session thereof enacted a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Convenience or Welfare", which purported act was approved by

the Governor of the State of South Dakota on March 7, 1905, and which purported act is commonly known as Chapter 98 of the Session Laws of South Dakota of 1905; that
8 subsequently and at its tenth session the Legislature of the State of South Dakota re-enacted said Chapter 98 of the Session Laws of 1905 by enacting a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Convenience or Welfare or Whenever it Shall be Necessary or Practicable for Drainage of Agricultural Lands", which purported law was approved by the Governor of the State of South Dakota February 21, 1907, and which purported law is commonly known as Chapter 134 of the Session Laws of South Dakota of 1907; that by said Chapter 134 of the Session Laws of 1907 the Legislature of the State of South Dakota attempted to re-enact said purported law known as Chapter 98 of the Session Laws of 1905, together with amendments thereto; that subsequently the Legislature of the State of South Dakota at the Sixteenth Session thereof re-enacted said Chapter 134 of the Session Laws of 1907 with amendments thereto and that such re-enactment is contained in the South Dakota Revised Code of 1919, as Sections 8458 to 8491 inclusive thereof; that at its special session in the year 1920, the Legislature of the State of South Dakota amended sections 8464, 8471, 8472 and 8473 of said Revised Code by Chapter 41 of the laws of the second special session of 1920; that a copy of the purported law of the State of South Dakota known as Chapter 98 of the Session Laws of 1905 as amended and re-enacted as Chapter 134 of the Session Laws of 1907, and as amended and re-enacted as Sections 8458 to 8491 of the South Dakota Revised Code, 1919, and amended
9 at the second special session of 1920 is hereto attached, marked "Exhibit A", and made a part hereof.

Fifth.

That prior to the year 1916 the Board of County Commissioners of the said County of Minnehaha established within said County a drainage ditch known as "Drainage Ditches No. 1 and No. 2", which drainage ditches were designed for the purpose of draining upwards of twenty thousand acres of agricultural land situated in Townships 101, 102, 103 and 104 North, of Range 49, West of the Fifth Principal Meridian, in the said County of Minnehaha; that said drainage ditches were established pursuant to and under the provisions of said purported Law known as Chapter 134 of the Session

Laws of South Dakota of 1907, and extended for a distance of several miles through said townships, and were fully completed prior to the year 1916; that an assessment for the cost of the construction of said drainage ditches No. 1 and No. 2 was prior to the year 1916 made; and that all matters connected with the construction of said ditches and with the assessment of the costs thereof were fully completed prior to the year 1916.

Sixth.

That the land drained by said drainage ditches No. 1 and No. 2 is situated in the valley of the Big Sioux River north of the city limits of the city of Sioux Falls, which city is a municipality of upwards of twenty-five thousand inhabitants; that the Big Sioux River flows in a southerly direction through said townships 101, 102 and 103 north of said Range 49, West of the Fifth Principal Meridian, and that the City of Sioux Falls is situated in said Township 101; that after entering said township 101 at the northern boundary line thereof the said Big Sioux River flows in a southerly direction to the vicinity of the southern boundary line of said township and then flows in an easterly direction for a distance of some miles and then in a northerly direction through the said City of Sioux Falls and towards the north line of said township and then continues in an easterly direction until it passes out of said township over the eastern line thereof; that in its course in a northerly direction through the City of Sioux Falls the said Big Sioux River passes over a series of falls aggregating approximately ninety feet; that the city water supply of the said City of Sioux Falls is situated in a gravel bed extending over a considerable area in said townships 101 and 102 north of the city of Sioux Falls; that the penitentiary of the State of South Dakota is situated north of the said City of Sioux Falls, and that said penitentiary and the lands belonging thereto are situated in said townships 101 and 102.

Seventh.

That the Big Sioux River has its source in Lake Pelican adjoining the City of Watertown in the County of Codington and State of South Dakota, which City of Watertown is situated approximately one hundred miles north of the City of Sioux Falls; that from the said City of Watertown the said Big Sioux River flows in a generally southerly direction but with many crooks and bends through the counties of Codington, Hamlin, Brookings and Moody to the City of Sioux Falls,

in the County of Minnehaha, and that the said Big Sioux River during its southward course drains a large area of territory both eastward and westward of its channel.

Eighth.

That said drainage ditches No. 1 and No. 2 were, when completed prior to the year 1916, of sufficient capacity to drain the agricultural land adjacent thereto and which was assessed for the cost of construction of said ditches; that subsequent to the construction of said ditches various drainage projects were initiated under said purported law of the state of South Dakota, (Exhibit A hereto) for the purpose of draining large areas of agricultural lands along the valley of the Big Sioux River in the counties north of the city of Sioux Falls; that said drainage projects, as plaintiff is informed and believes, operated to drain into the Big Sioux River (or to accelerate greatly the flow into said river of waters naturally draining therein) the water from an area of upwards of one hundred thousand acres of land and to dump upon the lands lower down in the channel of the Big Sioux River a vast amount of additional water at any time of freshet or
11 unusual rainfall; that some of said drainage projects have been carried to completion and that others are in various steps of construction and that work upon the unfinished drainage projects is being done and the same are being brought to completion; that by reason of the construction of said drainage projects north of the said county of Minnehaha vast volumes of water are in times of freshets conveyed to the lands drained by said drainage ditches No. 1 and No. 2 and the lands adjacent thereto and have converted the lands drained by said drainage ditches No. 1 and No. 2 and the lands adjacent thereto into a reservoir for the surplus flood waters of the valley of the Big Sioux River north of the said county of Minnehaha.

Ninth.

That as originally constructed said drainage ditches No. 1 and No. 2 emptied into the Big Sioux River through a ditch constructed across the land immediately north of the City of Sioux Falls, which ditch was between the City of Sioux Falls and the gravel bed from which said city obtains its water supply, and emptied into the Big Sioux River in the Northeast portion of the City of Sioux Falls and north of the series of falls situated upon said river along its course through the said City of Sioux Falls; that subsequent to the construction of said drainage ditches No. 1 and No. 2 and about the

years 1915 and 1916 the vast volumes of water accumulating as aforesaid in the valley of the Big Sioux River and upon the lands drained by said drainage ditches caused the outlet of said drainage ditches into the Big Sioux River, as aforesaid, to wash out a channel upon the land through which said outlet was constructed to such an extent that there arose imminent danger that the course of the Big Sioux River
12 would be changed so that all of the water in the channel of said river would be diverted through said drainage ditches and the outlet thereof, and a new river channel formed by said ditches which would cause the water in said river to cease flowing through its proper and natural channel and over the series of falls in the City of Sioux Falls, and to flow instead through said drainage ditches and the outlet thereof into the Big Sioux River at a point north of the City of Sioux Falls; that such diversion of the channel of the said Big Sioux River threatened to cause enormous damage to property in the said City of Sioux Falls situated along the channel of said river, and to destroy the water power obtained from said river at the falls thereof, and also to destroy the municipal water supply of the said City of Sioux Falls by draining the water from the gravel bed from which said municipal water supply is obtained.

Tenth.

That the change in the channel of the Big Sioux River into said drainage ditches No. 1 and No. 2 and through the outlet thereof into the Big Sioux River at a point north of the city of Sioux Falls if the same had been allowed to continue and become permanent would have operated to relieve the lands drained by said drainage ditches and the lands adjacent thereto of the superabundance and surplus of water flowing upon said lands and that for the purpose of draining the lands adjacent to and drained by said drainage ditches No. 1 and No. 2 no action of any kind was necessary, excepting to permit the water to flow unhindered through said drainage ditches No. 1 and No. 2 into the Big Sioux River and to allow a new river channel to be formed by the natural force of the water flowing through the same.

Eleventh.

That the board of county commissioners of the said county of Minnehaha for the purpose of avoiding the threatened change in the channel of the Big Sioux River and for the purpose of preventing the drainage of the gravel bed from which

the city of Sioux Falls obtains its municipal water sup-
13 ply and for the purpose of preventing the injury to the property owners of the city of Sioux Falls which would be caused by the change in the channel of the Big Sioux River and to prevent the destruction of the water power at the falls of the Big Sioux River in the city of Sioux Falls, caused to be constructed in the summer of the year 1916 various dams and gateways at various places along said drainage ditches No. 1 and No. 2, made changes in the channel of the Big Sioux River along the course of said drainage ditches and constructed a spillway at the outlet of said drainage ditches into the Big Sioux River; that said construction work was done not for the purpose of bringing about the drainage of agricultural lands, nor for the drainage of any lands for any public use, nor of the lands situated within the drainage area of said drainage ditches No. 1 and No. 2 or for the purpose of accelerating the flow of the surplus water from said area, but for the purpose of controlling and retarding the flow of said water so that the same should not wash out a new channel for the Big Sioux River to the damage and injury of the city of Sioux Falls and of its property owners and to the destruction of its water power and its water supply; that the effect of said work has not been to drain the lands situated in the area of said drainage ditches No. 1 and No. 2 but to prevent the drainage of said lands by penning up the flood waters upon said lands until they would gradually pass into the Big Sioux River without danger of changing the channel of said river; that in consequence of the construction of said dams, gateways and spillway and of the making of the various cutoffs and changing of the river channel, the lands of the property owners in said drainage area have for the past crop seasons since the year 1915 been greatly damaged and the crops grown thereon have been annually destroyed or greatly damaged by reason of water being retained
14 thereon through the construction of said dams, gateways, and cut-offs, the changing of the river channel and the construction of said spillway; that instead of having been benefited by the construction of said works the lands of the property owners within the area of the drainage district of said drainage ditches No. 1 and No. 2, as plaintiff is informed and believes, were decreased fully fifty per cent over the value which the same would have been worth had said work not been done and had said drainage ditches been left as originally constructed.

Twelfth.

That there has been expended by the board of county commissioners of said Minnehaha county upon the construction of ditches, dams, gateways and other work as aforesaid, and upon the construction of said spillway upon the outlet of said drainage ditches No. 1 and No. 2 a sum in excess of Two Hundred Fifty-five Thousand Dollars ($255,000.00) for which said sum the said board of county commissioners has issued drainage warrants, and that there is due for principal and interest upon said warrants a sum, as plaintiff is informed and believes, in excess of Three Hundred Thousand Dollars ($300,000.00), that of said sum of money so spent as aforesaid, by the said board of county commissioners approximately sixty per cent (60%) has been expended in the construction of said spillway, dams and retaining gates, designed not for the purpose of the drainage of agricultural lands, but solely for the purpose of controlling and retarding the flow of water, through the outlet of said drainage ditches No. 1 and No. 2 into the Big Sioux River for the purpose of preventing a change in the channel of said river and of preventing the drainage of the gravel bed through which the said city of Sioux Falls obtains its water supply; that as plaintiff is informed and believes, more than Thirty-five per cent (35%) of said moneys expended by the said board of County Commissioners has been expended for the purpose of constructing ditches for the straightening of the channel of the Big Sioux River, and that less than Five Per cent (5%) of said moneys has been expended for any purpose legitimately connected with the construction or maintenance of said drainage ditches No. 1 and No. 2.

Thirteenth.

That prior to the construction of said spillway, dams, retaining gates and other work and straightening of the channel of the Big Sioux River, no petition, therefore, signed by one or more owners of land likely to be affected was ever made or presented to the board of county commissioners of the said county of Minnehaha, excepting that on or about the 3d day of August 1916, there was filed in the office of the County Auditor of the said county of Minnehaha a purported petition signed by F. L. Blackman, and other persons, which said petition purported to be a petition "to reconstruct and improve drainage ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway and outlet to said drainage ditches No. 1 and No. 2, and to pay

therefor, by assessment upon the property, persons and corporations benefited thereby". That upon the filing of said purported petition the county commissioners of said county of Minnehaha did not transmit a copy of the same to the state engineer of the State of South Dakota; that the said board of county commissioners of the said county of Minnehaha did not accept the proposed route of said drainage ditches and did not cause a survey of said drainage ditches to be made by a surveyor; that no survey of the same was ever made under the general supervision of the state engineer of the state of South Dakota, or otherwise, prior to the
16 construction thereof; that no surveyor's report in writing was made to the said board of county commissioners; that no surveyor's report or copy of any map or plan made or filed by said surveyor was furnished to the said state engineer prior to the beginning of said work; that the said board of county commissioners of said Minnehaha County did not file with the said purported petition its determination of its cost, length and width of the drainage improvement furnished in said petition; that the said board of county commissioners did not fix a time and place for a hearing of said petition and did not give notice thereof; that none of the proceedings of the said board of county commissioners in that matter of the said drainage petition have been recorded and indexed in any book kept for that purpose in the office of the auditor of said county of Minnehaha; that no drainage district for the purpose of the construction of said spillway, dams, retaining gates, ditches and other work has ever been constructed or established.

Fourteenth.

That prior to the construction of said spillway, dams, retaining gates, [—] and other work the board of county commissioners of said Minnehaha County did not fix the proportion of benefits of the proposed drainage among the lands affected and did not appoint a time and place for the equalization of the same and did not give notice of said equalization either by publication or posting, and did not make any assessment for the proportioning of benefits against each tract of property affected and did not make any assessment for the payment of damages caused by the construction of said spillway, dams, retaining gates and ditches and did not provide any moneys for the payment of such damages.
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Fifteenth.

That prior to the construction of said spillway, dams, retaining gates, ditches and other work, the said Board of

County Commissioners of Minnehaha County did not prepare plans and specifications therefor, and did not file plans or specifications therefor in the office of the County Auditor of the said County of Minnehaha, and did not let contracts upon competitive bids for the construction of said spillway, dams, retaining gates, ditches and other work; that prior to the construction of said spillway the said Board of County Commissioners did advertise for competitive bids for the construction of the spillway in accordance with certain plans therefor; that bids were received by the said Board of County Commissioners for the construction of a spillway in accordance with such plans, and that the same were rejected by the said Board of County Commissioners, and subsequently the said Board of County Commissioners adopted a new and amended plan for the construction of an entirely different form of spillway, and without advertising for bids for such construction made a contract for the construction of said spillway in accordance with said new and amended plan with the Sioux Falls Construction Company, under which said contract the said Sioux Falls Construction Company constructed such spillway upon the cost plus plan; that under said contract the said Sioux Falls Construction Company was paid the entire cost of the construction of said spillway, together with nine per cent (9%) of the total cost added; that the cost of the construction of said spillway under said cost plus plan was, as plaintiff is informed and believes, upwards of one hundred fifty thousand dollars ($150,000.00) for which said sum drainage ditch warrants upon said drainage ditches No. 1 and No. 2 were issued by the said Board of County Commissioners of Minnehaha County to the said Sioux Falls Construction Company, and to other persons.

Sixteenth.

That on or about the 20th day of November, 1920, the Board of County Commissioners of said Minnehaha County entered into a certain contract with Albert J. Chenoweth and Herman Rettenhouse, co-partners as Chenoweth & Rettenhouse, whereby the said Board of County Commissioners employed the said Chenoweth & Rettenhouse to make a topographical survey showing the lands benefitted and subject to assessment for the payment of the cost of said spillway, dams, retaining gates, ditches and other work, and that by said contract the said Board of County Commissioners agreed to pay the said Chenoweth & Rettenhouse for said survey the sum of Seven thousand five hundred dollars ($7,500.00) to be paid in drainage

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ditch warrants drawn on drainage ditches No. 1 and No. 2; that the said Chenoweth & Rettenhouse thereupon proceeded to make the purported survey of the lands purported to be subject to assessment for the construction of said spillway, dams, retaining gates, ditches and other work; that the said Chenoweth & Rettenhouse made and filed a report with the said Board of County Commissioners, in which report they made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereunto annexed, marked "Exhibit B" and made a part hereof.

Seventeenth.

That on or about the 10th day of June, 1921, the said Board of County Commissioners of the said County of Minnehaha adopted a purported notice of the time and place for equaling the proportioning of benefits for the construction of said spillway, dams, retaining gates, ditches and other work and caused the same to be published on July 13, 1921, and on July 20, 1921, in the Sioux Falls Daily Argus Leader, the official newspaper of the said County of Minnehaha, that a copy of said drainage notice is hereunto annexed, marked Exhibit C, the proportion of benefits assessed against the plaintiff is 839.45 units, out of a proposed total of 32,549.62 units, and that upon the basis of such apportionment the assessment against plaintiff and its property will be in excess of the sum of Seven Thousand Five Hundred Dollars ($7,500.00), and the said Board of County Commissioners of said Minnehaha
19 County are threatening to and will, as plaintiff is informed and believes, unless enjoined by this court make an apportionment of benefits upon plaintiff of 839.45 units and will make an assessment thereon against plaintiff and its property in the sum in excess of Seven Thousand Five Hundred Dollars ($7,500.00) and that the defendant, Fred E. Ward, as County Auditor of the said County of Minnehaha will spread such assessment upon the books of his office and that the defendant, J. O. Anderson, as Treasurer of the said County of Minnehaha will proceed to collect the same pursuant to the provisions of said purported statute Exhibit A.

Eighteenth.

That the plaintiff is a corporation engaged in the operation of a line of railroad in the said county of Minnehaha; that all of its property in said county of Minnehaha consists of its right-of-way, station grounds, line of railroad, bridges, culverts and other property employed in the maintenance and

operation of its line of railroad; that it is not the owner of any agricultural land in said county of Minnehaha other than that required for its right-of-way; that it is not engaged in any agricultural operations and that the construction of said spillway, retaining gates, dams, ditches and other work done as aforesaid by the board of county commissioners of the said county of Minnehaha conferred no benefits upon the plaintiff or its property; that of the property belonging to the plaintiff no part except such as are specified under the heading "Benefits to Roads, Railroads, etc." in said notice, Exhibit C, formed a part of the original area of said drainage
20 ditches No. 1 and No. 2 for which an assessment was made at the time the same was originally constructed and that all other property belonging to the plaintiff and mentioned in said notice consists of property upon which an apportionment of benefits is now for the first time sought to be made; that no portion of the property of plaintiff upon which an apportionment of benefits is now sought to be made for the first time is subject to overflow or is in danger of damage by overflow or is situated within or adjacent to any lands subject to overflow or is drained to any extent by said spillway and other improvements or benefited thereby.

Nineteenth.

That this action is a suit of a civil nature to resist and prevent an assessment upon the property of plaintiff under the pretended authority of a purported act of the Legislature of the state of South Dakota claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000.00) and is the amount of said purported assessment, to-wit: a sum in excess of Seven Thousand Five Hundred Dollars ($7,500.00).

Twentieth.

That the costs of the board of county commissioners of said Minnehaha County in constructing said spillway, dams, retaining gates, and ditches, were unauthorized under the constitution and laws of the state of South Dakota, and that the same have never been approved by the State Engineer
21 of the state of South Dakota; that no benefits have accrued to plaintiff or its property by the construction of said spillway, dams, retaining gates, and ditches, and by the other work done as aforesaid upon the property, in the drain-

age area of said drainage ditches No. 1 and No. 2, but that the same have been and are a positive damage to the property of the plaintiff.

Twenty-First.

That the board of county commissioners of Minnehaha County under the drainage law and under the constitutional provisions of Section 6, Article 21 of the State Constitution is wholly without authority, save and except to provide drainage for agricultural lands; that the improvements made and the work done were not for such purpose, nor did the plaintiff receive nor will the plaintiff receive any special benefit not shared in by the general public therefrom; that in the doing of the work and in the making of the improvements and incurring the indebtedness the board of county commissioners of Minnehaha County was wholly without jurisdiction and the obligations created, for the payment of which assessment is attempted to be made under the purported drainage law, are wholly void and that no assessment under the purported law of the state of South Dakota can lawfully be made or the proceeds thereof applied to the payment of said indebtedness.

Twenty-Second.

That said purported statute of the state of South Dakota, "Exhibit A" hereto, is unconstitutional and void, in that the same is in violation of Section 2 of Article VI. of the Constitution of the State of South Dakota, and in that the same is in violation of the Fourteenth Amendment of the Constitution of the United States; that said Statute, "Exhibit A", is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area, and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad company and other corporation, and upon the property of municipal and quasi-municipal corporations, and upon platted property in cities and villages. Said purported law, "Exhibit A", is further unconstitutional and void in that the same provides for an assessment against property without the right of the property owner to be heard thereon and without notice of any character to the property owner; that if said apportionment of benefits be made as threatened by the said board of county commissioners of said Minnehaha County, and as is provided in said notice, "Exhibit C", the same will consti-

tute the taking of the property of plaintiff and of the
22 other property owners affected by said notice without
due process of law; that a cloud will be placed upon the title of the plaintiff to its real property situated within said drainage area affected by said notice, "Exhibit C" and that there will result a multiplicity of suits and that plaintiff and other property owners affected will suffer irreparable injury.

Wherefore, plaintiff prays judgment that the defendants and each of them, their agents, servants, employees, attorneys and successors in office and each and every one of them be forever restrained and enjoined from proceeding further in the making of an apportionment or equalization of benefits upon the property of plaintiff for the construction of said spillway, dams, retaining gates, ditches and for the other work done as aforesaid by the Board of County Commissioners in the area of said Drainage Ditches No. 1 and No. 2 and restrained and enjoined from making any assessment upon the property of plaintiff for the cost of the construction of said spillway, dams, retaining gates, ditches, and other work or any part thereof, and from proceeding in any manner under said purported statute Exhibit "A" in the construction of any work in the area of said Drainage Ditches No. 1 and No. 2 and from doing any act looking toward the apportionment or equalization of benefits for any work heretofore done in the area of said Drainage Ditches No. 1 and No. 2 and from doing any act tending towards the making of an assessment for the cost of any such work heretofore done and from in any manner proceeding under said purported law Exhibit
"A" in the doing of any work heretofore done in the
23 area of said Drainage Ditches No. 1 and No. 2; that
the defendant, Fred E. Ward, as Auditor of the said county of Minnehaha, be forever restrained and enjoined from making any apportionment of benefits for work done, as aforesaid, in the area of said Drainage Ditches No. 1 and No. 2 and from making any assessment therefor, and from certifying any assessment therefor to the County Treasurer of the said county of Minnehaha; that the defendants A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of the said county of Minnehaha, and their successors in office be forever restrained and enjoined from fixing a proportion of benefits for the construction of said spillway, dams; retaining gates and ditches upon the property of the other property owners named in said notice Exhibit C and forever restrained and enjoined from making any assessment against plaintiff, or its

property, or against the property of any other property owner in the area of said Drainage Ditches No. 1 and No. 2 for the cost of said work; that the defendant J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, and his successors in office be forever enjoined and restrained from filing any assessment and from collecting any assessment against the property of plaintiff or of the other property owners named in said notice Exhibit C, upon any assessment for the construction of said spillway, dams, retaining gates and ditches; that the said purported statute of the state of South Dakota, Exhibit C, hereto be adjudged and decreed to be unconstitutional and void; that all acts of the Board of County Commissioners of the said county of Minnehaha and of the State Enginer of the state of South Dakota heretofore done in connection with the construction of said spillway, dams, retaining gates and ditches be adjudged and decreed to be illegal and void; that it be adjudged and decreed that no benefits have resulted to plaintiff from the construction
24 of said spillway, dams, retaining gates and ditches, and that no apportionment of benefits or assessments of damages ever be made against plaintiff or its property therefor.

That pending the issuance of a perpetual injunction herein, this Honorable Court grant an interlocutory injunction herein restraining the defendants herein, their agents, servants and employes and each and every of them from doing any of the above mentioned acts until the final hearing herein or until the further order of this court; that before the hearing and determination of plaintiff's application for an interlocutory injunction this Honorable Court grant a temporary restraining order restraining the said defendants, their agents and servants and each and every of them, from doing any of the above mentioned acts until the hearing and determination of plaintiff's application for an interlocutory injunction herein.

The plaintiff further prays that a subpoena of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants, A. G. Risty, J. A. Jensen, C. W. Knot, Chris Olson, G. W. Tyler and C. T. Charnock, individually and as County Commissioners of the County of Minnehaha in the State of South Dakota, and to Fred E. Ward, individually and as auditor of the said county of Minnehaha, and to J. O. Anderson, individually and as

Treasurer of the said County of Minnehaha, thereby commanding them and each of them on a day certain therein to be named to be and appear before this Honorable Court, and then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular, the premises and to perform and abide by such order, direction or decree as may be made in the premises, and that on final hearing hereof said order of injunction may be made perpetual. Plaintiff further prays for such other and further relief as shall to Court seem just, proper and equitable, and for its costs and disbursements herein.

25

R. L. KENNEDY and
C. O. BAILEY
Solicitors for Plaintiff.

R. L. Kennedy
of Counsel.

26

Exhibit B.

Proposed Distribution of Proportional Benefits.

	District or Division	Acres	Units	Percent of total.	
1.	Farm lands north of City Limits and North of South Line of Sec. 12-101-50	13,271.09	10862.30	33.4%	$103,191.85
2.	City Lots and Town of Renner lying north of above line,	81.20	42.52	0.1%	403.94
3.	Farm land and tracts south of above line,	2,065.23	2958.45	9.1%	28,105.28
4.	City lots south of above line,	361.60	1372.52	4.2%	13,038.94
5.	City of Sioux Falls,		3147.95	9.7%	29,905.52
6.	Minnehaha County,		2518.36	7.7%	23,924.42
7.	Township roads,		1573.98	4.8%	14,952.81
8.	Railroads,		4721.91	14.5%	44,858.15
9.	Northern States Power Company,		5351.63	16.5%	50,840.49
	Totals,	15,722.12	32549.62	100.0%	$309,221.40

In the above calculation the Value of One Unit is taken at $9.50.

CHART

TOO

LARGE

FOR

FILMING

28 Endorsed: Filed in the District Court on Jul. 25, 1921, at 4:30 P. M.

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29 (Order granting leave to Minnehaha National Bank of Sioux Falls et al., to intervene and be made parties defendant.)

August 19, 1921.

The matter of hearing the show cause order heretofore issued out of this Court at the instance of the Minnehaha National Bank of Sioux Falls, South Dakota, et al, to the above named plaintiff and defendants in the above entitled cause, coming on regularly for hearing before this Court, at the court room thereof, in the Federal Building, in the City of Sioux Falls, South Dakota, the said plaintiff appearing by its attorney of record, and the said defendants appearing by their attorney of record, and the said petitioning interveners appearing by their attorneys, Porter & Bartlett, and after hearing of said matter, it is hereby

Ordered and Adjudged that the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, said petitioning interveners, petition be granted, and the said Minnehaha Nation Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Hartford, South Da-
30 kota, The Colton State Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, the Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, H. E. Donahoe, and W. G. Porter, be and they are hereby made parties defendant to this cause of action, and they are hereby given until the 25th day of August, 1921, at Ten o'clock A. M. thereof, within which time to file their answer to plaintiff's bill of complaint herein, and to make a return to plaintiff's show cause order herein.

And good cause appearing therefor, it is further likewise Ordered that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock

as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, have and they are hereby granted until August 25th, 1921 at Ten o'clock A. M. to file their answers to plaintiff's bill herein, and to make a return to plaintiff's show cause order herein.

And it is further Ordered that the hearing of said show cause order be and the same is hereby adjourned to August 25th, 1921, at Ten O'clock A. M.

Dated this 11th day of August, A. D. 1921.

By The Court:

JAS. D. ELLIOTT,
Judge of the District Court.

(Seal of Court)

Attest:
Jerry Carleton,
Clerk of the District Court.

31 Endorsed: Filed in the District Court on Aug. 19, 1921, at 2 P. M.

And afterwards, to-wit, on the 1st day of September, A. D. 1921, there was filed in the office of the clerk of said court, Answers of Defendants; that the Title of the Case, Paragraphs A, B, C, D and F of defendants' Special Answer, the Introduction and Paragraphs First to Twenty-second, inclusive, of defendants' General Answer, Paragraphs I, VII, VIII, IX, XI, XII, XIV and XV of defendants' Affirmative Defense, the Prayer, Petition of F. L. Blackman and others to reconstruct and improve drainage ditches No. 1 and 2, the Order for filing said Petition, the Resolution for survey under said Petition, the Resolution fixing the exact line and width of the ditch and fixing the time and place for hearing said Petition, and the Resolution establishing Drainage Ditch No. 1 and 2, all as contained in said Answer of Defendants, are in words and figures the following, to-wit:

32 (Answer.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, St. Paul, Minneapolis & Omaha Railway Co., Plaintiff.

vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha, County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, W. G. Porter, Intervening Defendants.

Comes now the above name defendants, A. G. Risty, et al., and for their answer to plaintiff's bill of complaint in the above entitled action, admit, deny and allege as follows:

A.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint, allege that said bill does not state any matter of equity entitling plaintiff
33 to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against the said defendants in that said plaintiff has a plain, adequate and complete remedy at law.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

B.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint and the allegations contained in paragraph twenty-two thereof, to-wit: "That there will result a multiplicity of suits and that the owners affected will suffer irreparable injury", are not truly stated or alleged in good faith and are stated with the false and fraudulent purpose of imposing upon the jurisdiction of this court and they are therefore fictitious and fraudulent. And said defendants say there are no other actions at law or in equity pending or threatened against said plaintiff and that said plaintiff has a plain, adequate and complete remedy at law, all of which these defendants allege to be true and plead the same in bar to said bill.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

C.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint, allege that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this Court in that this suit is wholly based upon the alleged existence of a federal question and diversity of citizenship, and that the amount sued for and the value of the subject matter as alleged in said bill is not truly stated or alleged in good faith. That
34 the allegations of plaintiff's bill show it as being "a suit of a civil nature to resist and prevent an assessment upon the property of this plaintiff under the pretended authority of a purported act of the legislature of the State of South Dakota, claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00) and is the amount of the threatened assessment, to-wit: a sum in excess of Seven Thousand Five Hundred Dollars ($7,500.00)", are false and stated with a false and fraudulent purpose of imposing upon the jurisdiction of this Court and are therefore fictitious and fraudulent. And said defendants say that the amount involved, or value of the subject matter in this suit, does not exceed the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs; that said bill of complaint upon its face shows that under the drainage law referred to in paragraph four thereof the

amount of the assessment, or the amount in controversy herein, has not been, and cannot be, determined until after the equalization thereof provided for in such statute and until such equalization, the amount to be hereinafter assessed, if any, by said Board of County Commissioners or by the Courts of the State of South Dakota, to which an appeal is taken, as provided for by said law is purely speculative, is uncertain and undeterminable at this time by said plaintiff, this court, or anyone at all, and is dependent entirely upon the showing made by this plaintiff at such hearings and determinations provided for by said law, as to the amount of benefits received by this plaintiff; and that no sum has been or can be assessed and determined against the plaintiff's property until such equalization of the proportion of benefits has been had, and at which hearings this plaintiff is permitted to make his showing therein and the amount of benefits, if any, which plaintiff does receive are thereafter equalized and fixed by said Board or Court and the amount so fixed is then extended and assessed against the property of said plaintiff, and not otherwise, all of which these defendants aver to be true and set up the same in bar of plaintiff's bill of complaint herein.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

D.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint herein, allege that on or about December 4, 1920, an equity suit was instituted in the Circuit Court within and for Minnehaha County, in the State of South Dakota, the same being a Court of general jurisdiction and having jurisdiction over the subject matter there presented by one Oluf O. Gilseth, whose lands are affected by the construction of drainage ditch No. 1 & 2 and against which lands the proportion of benefits for the construction of said ditch has been proportioned upon the same basis and in like manner as the proportion of benefits upon the lands of this plaintiff as hereinafter set forth, which action was brought by the said Oluf O. Gilseth, for himself and as representing an informal organization of farmers and others who are similarly situated, against the defendants herein, the Board of County Commissioners of Minnehaha County, South Dakota, and other persons, which action was instituted with full knowledge, approval, acquiescence and consent of the plaintiff herein, its officers, agents and attorneys, and in which said cause the same facts are alleged and relied on in

plaintiff's bill of complaint as herein set forth, and which said bill of complaint prayed that said defendants be
36 forever enjoined and restrained from making or attempting to make any proportion of benefits upon the property of the plaintiffs herein, or the property of other property owners within the drainage area of the drainage ditches No. 1 and No. 2 for the costs and construction of said spillway, dams, retaining gates or other work, and be forever restrained and enjoined from levying any assessment upon the property of the plaintiff or upon the property of other property owners in said drainage area for the payment of the costs of the construction of said spillway, dams, retaining gates or other work, for the reason and upon the grounds that the law under which said drainage ditch was established and constructed was in contravention of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States, to which said bill of complaint said defendant Board of County Commissioners and these intervening defendants set up and relied upon the same facts and defenses as are hereinafter set forth; that said action came on for trial before said Circuit Court of Minnehaha County, South Dakota, with the full knowledge, acquiesence, consent and approval of plaintiff and at which trial plaintiff was entitled to be heard and was represented by its attorneys on the 31st day of January 1921, evidence was introduced upon said hearings on behalf of said plaintiff and these defendants and after the taking of evidence therein was closed and thereafter upon the facts there presented, and in the trial of which the plaintiff could have and did participate, said Court made findings and conclusions and judgment thereon dismissing said action upon its merits. That a duly exemplified copy of said bill of complaint, answer, findings, conclusions and judgment are hereto attached, marked "Exhibit B", and made a part hereof, all of which these defendants allege to be true and plead the same in bar.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

* * * * * * * * * *

37

F.

Comes now the above named defendants, A. G. Risty, et al, and for answer to plaintiff's bill allege that this suit does not really and substantially involve a controversy within the jurisdiction of this court, in that this suit involves the determination of facts and matters controlled and governed by

the drainage statute of South Dakota, mentioned in plaintiff's bill of complaint and which by its provisions creates and provides its own special tribunal with exclusive original jurisdiction to try and determine the questions necessarily involved therein, and which are attempted to be presented for litigation in this action, and that, until such determination by said special tribunal so provided for, this court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, and that said special tribunal has not fully determined the matters and things herein presented for determination. All of which these defendants allege to be true and plead the same to the jurisdiction of this Court.

Wherefore, defendants pray that plaintiff's bill of complaint be dismissed with costs.

* * * * * * * * *

Comes now the above named defendants, A. G. Risty, et al, and for their further answer to the allegations contained in plaintiff's bill of complaint, admit, deny and allege as follows:

First.

That these defendants admit Paragraph I of said bill.

Second.

That these defendants admit Paragraph II of said bill.

Third.

That these defendants admit Paragraph III of said bill.

38 Fourth.

These defendants, answering said bill of complaint, admit that the Legislature of the State of South Dakota, at its Tenth Session enacted a law entitled: "An Act for the Establishment, Construction and Maintenance of Drainage and Levies in Counties, Whenever such Drainage shall be Conducive to the Public Health, Convenience or Welfare, or Whenever it shall be Necessary or Practicable for the Drainage of Agricultural Lands", which law was approved by the Governor of the State of South Dakota on February 21st, 1907, said law being Chapter 134 of the Session Laws of South Dakota of 1907, and that subsequently thereto, the Legislature of the State of South Dakota, in the years 1909, 1911, 1915 and 1917, enacted laws amendatory thereto, and in 1919 re-enacted said law and amendments thereto, as Sections 8458, to 8491, inclu-

sive, of the South Dakota Revised Code for 1919, and thereafter and in the years 1920 and 1921, enacted amendments thereto, which law and amendments now constitute the drainage laws of the State of South Dakota, and specifically deny each and every other allegation of said paragraph.

Fifth.

These defendants answering the Fifth paragraph of complainant's bill, deny that the Board of County Commissioners of Minnehaha County, South Dakota, established a drainage ditch known as "Drainage Ditch No. 1 and No. 2", as therein alleged, but allege the fact to be that in the year 1907 the Board of County Commissioners of Minnehaha County, upon the petition of William H. Lyon, accompanied by a proper bond, approved by the County Auditor, and after due notice and other procedure pursuant
39 to and under Chapter 134 of the Laws of 1907 of the State of South Dakota, established Drainage Ditch No. 1 commencing at a point named in the Southeast Quarter (SE¼) of Section Twenty-nine (29), Township One Hundred two (102), Range Forty-nine (49), running thence about two (2) miles directly South, thence in a Southeasterly course about a mile, cutting through the rim of the natural ridge or bluff just North and East of the State Penitentiary in the City of Sioux Falls, and descending about one hundred (100) feet following the slope of the hill, and terminating in the Big Sioux River on the Northeast Quarter (NE¼) of Section Nine (9), Township One Hundred One (101), Range Forty-nine (49), which said drainage ditch was constructed so as to have a bottom width of forty (40) feet, except where the same cut through the bluff and descended into the Big Sioux River, where a thinly lined concrete gutter or spillway, with sufficient capacity only to carry the water that was planned to come through the said ditch, was constructed, but the terminal thereof was never safely or securely anchored and established, and that thereafter and before the construction of said Drainage Ditch No. 1 had been completed, one Iver R. Peterson and numerous other persons, filed their petition in regular form, accompanied by a proper bond duly approved by the County Auditor, with said Board of County Commissioners, asking and praying that the said Drainage Ditch No. 1 be extended Northward several miles through the Valley of the Big Sioux River, to drain other agricultural lands therein situated; the said petition was found sufficient in form, and was ordered filed and referred to the State Engineer, and a resolution for survey regularly adopted thereon, and thereafter, and

upon the Engineer's written report of said survey, by
40 resolution, the exact line and width of said ditch extension was fixed, and after due notice and hearing, said petition was allowed, and resolution adopted by the Board of County Commissioners establishing said drainage ditch, and designating it as "Drainage Ditch No. 2", extending from the North end of Drainage Ditch No. 1, hereinbefore described, Northward about twelve (12) miles to a point near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, and said drainage ditch was thereafter constructed, which ditch so constructed, tapped the Big Sioux River in two places, and the assessment for the costs and expense of the construction thereof was duly spread upon the lands benefited within the territory embraced within the initial point in Dell Rapids Township, and the terminal point in Section Nine (9) of Sioux Falls Township; and further answering said Paragraph V, these defendants admit that prior to the year 1916 assessments were duly spread upon the lands determined to be benefited by the construction thereof, and such assessments collected, but deny each and every other allegation in said paragraph contained.

Sixth.

These defendants answering the sixth paragraph of complainant's bill, admit the allegation contained in said paragraph, but allege the fact to be that in addition to the lands drained lying North of the City of Sioux Falls, the said Drainage Ditches No. 1 and No. 2 also drained, affected and benefited lands lying West and South of said City and also the lands adjacent to said River through and in said City of Sioux Falls were drained, affected and benefited thereby.

41 Seventh.

These defendants answering the Seventh Paragraph of the complainant's bill, allege that they are without knowledge as to the facts therein set out, and therefore deny the same.

Eighth.

These defendants answering Paragraph VIII of the complainant's bill, specifically deny that Drainage Ditches No. 1 and 2 were ever completed prior to the year 1916, or of sufficient capacity to drain the agricultural lands adjacent thereto, and as to the other allegations in said paragraph, these defendants allege that they are without knowledge of the facts therein stated, and therefore deny the same.

Ninth.

These defendants answering the Ninth paragraph of complainant's bill, admit the statements therein made, but in explanation thereof, allege the further facts to be that after the construction of said spillway, as above described, the capacity of said ditches were increased by the rapidly flowing waters therein, eroding the banks and widening said Ditch No. 1 to nearly twice its original width of forty feet; the natural barrier which originally prevented the waters of the Big Sioux River from flowing into said Ditch No. 1 near its initial point, except in flood times, eroded and wore away and permitted a large part of the water from the Big Sioux River to flow uncontrolled directly into said ditch and through the same to said spillway, which said spillway did not have the capacity to safely carry all of the flood waters that came to it through said ditch; that by reason of the foregoing facts said ditches became out of repair, and filled with sand bars and mud, and other obstructions, and that, owing to the tortuous course of the Big Sioux River through the district drained by said Ditches No. 1 and No. 2, the said river and said ditches were inadequate to carry away the flood waters and properly drain the lands within the area of said drainage ditches during flood seasons; that on or about the 15th day of March, 1916, during a spring flood, said spillway and outlet for said drainage ditches, as above described, was washed out and destroyed, so that the waters passing through said ditches and outlet, were wholly uncontrolled; that at the place where said spillway had been constructed, the waters descend-
42 ed to the basin of the Big Sioux River over a steep bluff by a drop of approximately of the height of one hundred feet, and that after the washing out and destruction of said spillway and outlet, the waters from said ditches washed out a deep gorge in the bluff, and tore away and destroyed the adjacent land to the extent of several acres; that said outlet and spillway were located in the immediate vicinity of State lands belonging to the State of South Dakota, and in the immediate vicinity of the State Penitentiary, and also of the City Water Works of the City of Sioux Falls, by means of which water works the said City was supplied with water from gravel beds immediately adjacent to said drainage ditches, and that by reason of the washing out of said spillway and of the uncontrolled waters of said ditches, the said lands of the State of South Dakota, the State Penitentiary and the water works and water supply of the said City of Sioux Falls, as well as the properties of private citizens in the vicinity of said outlet and spillway, were greatly imperiled and en-

dangered; that there was imminent danger of the waters of the Big Sioux River being entirely diverted from their natural course into Drainage Ditch No. 1 and through the said spillway and outlet, and the water power of the Big Sioux River immediately above the mouth of said drainage ditches thereby destroyed, to the great and irreparable damage of many private property owners.

Tenth.

These defendants answering the Tenth paragraph of the complainant's bill, specifically deny the facts therein stated, and each and every allegation thereof.

Eleventh.

These defendants answering the Eleventh paragraph of the complainant's bill, hereby specifically deny the same, and each and every allegation thereof, and in explanation of the facts attempted to be therein set out, allege that upon the oc-
43 currence of the destruction of the original spillway as hereinbefore set out in the Ninth paragraph hereof, that thereupon the Board of County Commissioners of said Minnehaha County took immediate steps to control the said waters coming through said drainage ditches, by means of dams across said drainage ditches above said spillway, and by driving piling therein, and were so employed when, on or about the 21st day of March, 1916, one Charles Kaufmann, and other persons owning property within the area of said Drainage Ditch No. 2, brought an action in the Circuit Court of Minnehaha County, South Dakota, to restrain said Board from so proceeding to control the waters of said drainage ditches, and obtained an order against said Board, requiring them to show cause why an injunction should not be granted, which said order came on for hearing before the said Court on the 25th day of March, 1916, and the said Court thereupon denied said application for said temporary injunction, whereupon said action was dismissed, the same being Circuit Court
44 File of Minnehaha County No. 15708, which is hereby referred to and made a part hereof.

That on or about April 1, 1916, and because of the conditions above described, the [—] in the last mentioned suit and a large number of his neighbors, similarly situated and affected by said drainage ditches perfected an informal local organization and appointed a committee of eight members to look after their interest with reference to repairing said drainage ditches, and to urge before the Board

of County Commissioners, such improvements as seemed advisable.

That thereafter and on or about the 8th day of April, 1916, several persons representing said local organization or committee, including some of the said plaintiffs in said last mentioned suit, filed a petition and bond with the said Board of County Commissioners praying that the outlet and spillway to said drainage ditches as originally established and constructed, be closed up and abandoned, and that a new outlet for said ditches be provided by diverting the waters thereof at a point above said spillway, as originally constructed, in a westerly direction through Covell's Lake, and thence back into the Big Sioux River above the said City of Sioux Falls, upon which said petition the said Board caused a survey to be made, with the approval of the State Engineer, and a surveyor's report to be filed, and a hearing had upon said petition, after notice, as required by law upon which hearing numerous property owners within the territory affected thereby, appeared before said Board and filed objections to the said proposed proceedings, and filed numerous large claims for damages by reason of said proposed change of outlet, and that upon said hearing, on July 8th, 1916, said Board made an order allowing the prayer of said petition, and established said Covell's Lake outlet, and abandoned said outlet and spillway as originally established and constructed; that thereupon numerous conferences were had between the petitioners in said proceeding last above referred to, and the said objectors and property owners owning lands within the area of said Drainage Ditches No. 1 and No. 2, and that it was agreed at said conference that the proceedings upon said petition last above referred to should be abandoned, and the same were abandoned accordingly, and that a new petition should be filed and new proceedings instituted for the re-establishment of said Drainage Ditches No. 1 and No. 2 and the reconstruction and improvement thereof, and the re-establishment and the reconstruction of the outlet to said ditches, and for the establishment and construction of a new spillway to properly control and take care of the waters flowing through said drainage ditches, and for the enlargement of said drainage district so as to embrace all of the property benefited thereby, extending from the Northern end of said territory included in said Drainage Ditches No. 1 and No. 2, following the course of the Big Sioux River around the City of Sioux Falls, and extending as far down said river as the mouth of said spillway and outlet to said drainage ditches, where the waters

thereof were discharged into the Big Sioux River, below the said City of Sioux Falls, and that thereafter, and in accordance with said agreement, and with the consent and acquiescence of this plaintiff, a new drainage petition and bond, approved by the County Auditor, were filed with the Board of County Commissioners, by the City of Sioux Falls, F. L. Blackman, and other persons who owned lands within the area of and that was assessed for the cost of construction of said Drainage Ditches No. 1 and No. 2, praying for the establishment and construction of a new drainage ditch in the exact location of said original ditches, and the re-establishment and construction of a substantial spillway and outlet therefor, together with several cut-offs or ditches, straightening and canalizing the channel of the Big Sioux River ad-
46 jacent thereto, so as to improve and increase its carrying capacity, and praying that the assessment area be increased to cover said new territory benefited, pursuant to said agreement, which said petition being found sufficient in form by said Board of County Commissioners, was, on August 3, 1916, ordered filed and referred to the State Engineer, who, with the said Board of County Commissioners, on August 4, 1916, inspected the route of said drainage, and had several conferences with the said persons interested as aforesaid, including this plaintiff, and authorized and ordered a survey to be made by Engineer L. E. Stevens, under the supervision of the State Engineer, which said survey was accordingly made by said L. E. Stevens, who, on September 13, 1916, filed his written report with said petition, and thereupon the said Board of County Commissioners fixed the exact route and width of said drainage, and the time and place of hearing thereon, and caused notice of hearing to be given according to law and upon the return date fixed in said notice, after due hearing, and upon the approval and advice of the State Engineer, and without objection upon the part of the plaintiff herein, or any other person, upon October 3, 1916 found said proposed drainage, as petitioned for, to be conducive to the public health, convenience and welfare, and necessary and practicable for draining agricultural lands, and thereupon, by resolution duly adopted, re-established said drainage ditch in the exact location of the original ditches, and fixed the damages caused by the construction thereof, and designated it as "Drainage Ditch No. 1 & 2", and no appeal was taken from such order establishing said "Drainage Ditch No. 1 & 2", and said order so establishing said Drainage Ditch No. 1 & 2 is now in full force and effect.

Twelfth.

These defendants answering the Twelfth paragraph of the complainant's bill, admit that the Board of County Commissioners of Minnehaha County have expended ap-
47 proximately Two Hundred and Fifty-five Thousand Dollars ($255,000.00) in, payment for work done and material furnished in the construction of ditches, dams, gateways and the spillway upon said Drainage Ditch No. 1 and 2, for which drainage ditch warrants upon Drainage Ditch No. 1 and 2 Fund have been issued, payable only out of the assessments to be hereafter levied upon the lands and properties benefited by the construction of said ditch, and there is now due thereon, for principal and interest, about Two Hundred and Ninety Thousand Dollars ($290,000.00) and hereby specifically deny each and every other allegation in said paragraph contained, but further allege that the drainage warrants above referred to were issued, only upon duly verified claims, duly presented, audited and allowed by the County Commissioners, and report of the allowance of the same duly published in said Commissioners' proceedings, as provided by law.

48 Thirteenth.

These defendants answering the Thirteenth paragraph of complainant's bill, hereby admit that on or about the 3rd day of August, 1916, a petition was filed in the office of the County Auditor of the County of Minnehaha, duly signed by the City of Sioux Falls, by George W. Burnside, its Mayor, and duly attested by Walter C. Leyse, City Auditor, F. L. Blackman, and others, which petition was for the purpose of re-constructing and improving Drainage Ditches No. 1 and No. 2, in Minnehaha County, South Dakota, and to construct a new spillway and outlet to Drainage Ditches No. 1 and No. 2, and to pay therefor by assessments upon the property, persons and corporations benefited thereby, but these defendants specifically deny each and every other allegation, matter and thing contained in said Thirteenth paragraph, but allege the facts to be as stated and set forth in the Eleventh paragraph of this Answer, and further allege that all acts negatived in said paragraph Thirteen, were duly taken, done and performed, upon due notice, as required by the laws of the State of South Dakota.

Fourteenth.

These defendants answering the Fourteenth paragraph of complainant's bill, specifically admit the same, except the allegation "and did not make any assessment for the payment of damages caused by the construction of said spillway, dams, retaining gates and ditches, and did not provide any moneys for the payment of such damages", which is hereby specifically denied, and the fact is alleged to be that the Board of County Commissioners did, by resolution, assess the damages sustained by each tract of land, or other property through which the said ditch passes, and the damages as compensation for the land taken for the route of said drainage, and did settle said damages by issuing drainage warrants therefor, which were duly accepted by the persons determined to be entitled to such damages.

49 Fifteenth.

These defendants answering the Fifteenth paragraph of complainant's bill, hereby specifically deny each and every allegation in said paragraph contained, as therein alleged, and allege the facts in relation thereto to be as follows: That immediately after the establishment of "Drainage Ditch No. 1 & 2", as hereinbefore described, the said Board of County Commissioners, acting under said newly established Drainage Ditch No. 1 & 2, proceeded to dike, clean out, enlarge and re-construct original Drainage Ditches No. 1 and No. 2, and the additional river cut-offs were constructed, and the outlet and spillway of said drainage ditches re-built in a more substantial and permanent manner, upon plans approved by the State Engineer; that in the course of the construction of said spillway, plans were prepared under the supervision of the State Engineer, and approved by him on May 7, 1917, and bids for the construction thereof asked for by legal notice, and upon the opening of said bids and a consideration thereof, it was, by resolution of the Board, determined that the "spillway for which bids have been received for 'Drainage Ditch No. 1 & 2' can be constructed for less money than the amount of any bid submitted therefor", and it was "therefore ordered that the Board of County Commissioners cause such spillway to be constructed, hire the necessary labor, machinery, tools and appliances, and a superintendent to oversee the construction thereof, and purchase all necessary material for such construction, without letting a contract for the entire construction thereof", and the Board thereupon proceeded to construct said spillway in accordance

with said determination, ordered the necessary material for the construction thereof, and employed the Sioux Falls
50 Construction Company to furnish the necessary labor, superintendent and supervision of the construction thereof, and to furnish the necessary machinery, tools, etc, to be used in said construction.

From the determination of the Board that it would build said spillway without letting a contract therefor, and by buying the necessary material therefor, and employing the Sioux Falls Construction Company to furnish the necessary labor, machinery, tools, superintendent and supervision thereof, one William H. Lyon, being the original petitioner in the construction of original Drainage Ditch No. 1, appealed to the Circuit Court of Minnehaha County, South Dakota, which appeal came on for hearing before the Court on the 14th day of July, A. D. 1917, and the court, after full hearing and consideration of the evidence introduced on behalf of the appellant and the Board, dismissed said appeal, holding that it appeared that the "decision appealed from is one that rests in the sound judgment of the Board of County Commissioners, and is not a proper subject for review by the Court"; that the proceedings upon said appeal are contained in File No. 16405 of the Circuit Court of Minnehaha County, South Dakota, which file and proceedings are hereby referred to and made a part hereof.

That thereupon the said spillway and outlet to said Drainage Ditch No. 1 & 2 was immediately re-constructed in a more substantial manner in accordance with the determination of said Board of County Commissioners, under the supervision of the State Engineer of the State of South Dakota, at a cost of more than One Hundred Thousand Dollars ($100,000.00); that the soil at the place where said outlet and spillway are constructed is of peculiar formation; that beneath the
51 surface at said point are found deep quicksands, the extent of which was at said time unknown to said Board of County Commissioners; that by reason of the necessity for immediate action in the construction of said spillway, and on account of the difficulties to be encountered in the construction thereof, it was impossible to prepare fully completed working plans at the time said work was commenced, but that the working plans had to be modified and adapted to the difficulties encountered as the work progressed, and that thereupon and by reason thereof, and with the approval and under the supervision of the State Engineer, the said Board of County Commissioners employed one F. C. Shenehon, a

competent civil and [hydralic] engineer, to prepare working plans and to superintend the construction of said spillway as the work progressed, and that said working plans were so prepared by said Shenehon, and said spillway re-constructed under his immediate supervision and the supervision and approval of the State Engineer, in a substantial and adequate manner, and that the same, as so constructed, has ever since said time been in operation, and for the past three years has safely controlled and cared for the waters flowing through said drainage ditches, and protected the properties adjacent thereto, as aforesaid, from injury and damage by reason of the said waters, and the same is now in successful operation.

These defendants further allege that the records and proceedings in the establishment and construction of Drainage Ditch No. 1 & 2, on the petition of F. L. Blackman, the city of Sioux Falls, and other persons, referred to in Paragraph Fifth hereof, except the lengthy notices, are hereunto annexed, marked Exhibit "A", and made a part hereof, and that all of said proceedings were taken and had after due and legal notice, as required by law, which notice specifically named the plaintiff herein, and cited it to show cause why said drainage ditch should not be constructed as petitioned for.

52 Sixteenth.

These defendants answering the Sixteenth paragraph of complainant's bill, hereby specifically admit the facts therein set out, except the allegations that said "Chenoweth & Rettinghouse were to be paid in Drainage ditch warrants drawn on Drainage Ditch No. 1 and 2", and except the further allegation that they "made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereto annexed, marked Exhibit "B", and made a part hereof", which allegations are hereby specifically denied, and the facts are alleged to be that the said Chenoweth & Rettinghouse were paid in drainage warrants drawn on Drainage Ditch No. 1 & 2 Fund, and [and] that said Exhibit referred to, is merely an analysis or resume or deduction drawn from the facts set out in the report, merely for the purpose of showing the results shown by the proportion of benefits recommended.

Seventeenth.

These defendants answering the Seventeenth paragraph of complainant's bill, deny that said Board of County Commissioners, on the 10th day of June, 1921, adopted a purported

notice of time and place of equalizing the proportioning of benefits for the construction of said spillway, etc., as therein alleged, but allege the fact to be that for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum
53 of about Two Hundred and Fifty-five Thousand Dollars ($255,000.00), in payment of the labor, material, etc., used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commissioners, did, on the 10th day of June, 1921, by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and indirect benefits that accrue by the construction of said drainage, taking a particular tract as a unit for comparison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law, to this plaintiff, at which time and place, the apportionment fixed as to the plaintiff's property and other property, will be equalized, and the assessment will be later extended and spread on said equalization, but the defendants have no knowledge of the total number of units or sum in dollars that will finally be equalized and assessed against said plaintiff's property. The defendants further allege that the notice, in addition to being published, as stated, was also posted according to law, and deny the balance of said paragraph.

54 Eighteenth.

These defendants answering the Eighteenth paragraph of complainant's bill, admit that the plaintiff is a corporation engaged in the operation of a line of railroad in the said County of Minnehaha, and that all of its property in said County of Minnehaha consists of its right-of-way, station grounds, lines of railroad, bridges, culverts and other property owned and used in the maintenance and operation of its line of railroad, but specifically deny each and every other allegation, matter and thing in said paragraph contained.

Nineteenth.

These defendants answering the Nineteenth paragraph of complainant's bill, specifically deny the same.

Twentieth.

These defendants answering the Twentieth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

Twenty-first.

These defendants answering the Twenty-first paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

Twenty-second.

These defendants answering the Twenty-second paragraph of complainant's bill, specifically deny the same and each and every allegation thereof.

These defendants further answering complainant's said bill, and by way of affirmative defense, allege:

55 I.

That said proceedings of the said Board of County Commissioners so taken and had in the establishment and construction of said Drainage Ditches No. 1 and No. 2, and in the assessment and equalization of the proportion of benefits, and in the assessment of the cost thereof upon the lands benefitted thereby, were taken and had after due and legal notice as required by law, and that said ditches were so established and constructed in accordance with said proceedings.

* * * * * * *

VII.

These defendants further allege that in the assessment of Drainage Ditch No. 2, hereinbefore referred to, resolutions

were adopted assessing and equalizing the proportion of benefits thereunder upon and including all of the land assessed for the construction of Drainage Ditch No. 1, and other lands, including the lands and property rights of the plaintiff herein, but making due allowance for the assessment already made upon the lands within the area of the original district of Drainage Ditch No. 1 thereby treating and consolidating said two ditches as Drainage Ditch No. 2; that all of the proceedings herein referred to required to be recorded and indexed in a book kept for that purpose in the County Auditor's office,
were so recorded and indexed.

56

VIII.

And the defendants, further answering complainant's bill, admit that they entered into a contract with Chenoweth & Rettinghouse, civil engineers, to make and perfect a topograhical survey of all the lands lying between the City of Dell Rapids and the outlet to said spillway and drainage ditch, lying within the valley of the Big Sioux River, and that said survey was necessary and was made in order that said defendant Board might advisedly make an apportionment of and fix the benefits to the lands and properties affected by reason of the benefits derived by said plaintiff and others like situated, by reason of the diking, cleaning out, reconstruction and improvement made upon said drainage ditch, the river cut-offs and new spillway and outlet to said ditches; and further allege that the original petition for said drainage ditch, river cut-offs and spillway, hereinbefore mentioned, was a compromise between the said petitioners therefor and others affected thereby, as hereinbefore set forth, and that the making and filing of said petition, accompanied by a bond, as provided by law, which was duly approved by the County Auditor of Minnehaha County, South Dakota, transmisssion of a copy thereof to the State Engineer, the inspection of the proposed route of said drainage project, the causing and ordering of a survey thereof to be made by a competent surveyor under the supervision of said State Engineer, the surveyor's report thereon, the filing of the same by the Board with said petition, said Board's determination of the exact length and line and width of said drainage improvement, and the order and resolution of said Board fixing
a time and place for hearing said petition, and the giv-
57 ing of notice thereof, the establishment of said drainage district and project by resolution and order of said Board upon said hearing, and the subsequent notice given to all parties interested, of the establishment of the cut-off ditches, including the plaintiff herein, and the final establish-

ment thereof, and all work done and performed upon said ditches and river-cut off ditches, and the establishment and construction of said spillway and work done thereon, and the manner of doing the same, and all other work done and performed upon said drainage ditch, cut-offs and spillway, were done and performed by said defendant Board, with the notice, actual knowledge, acquiescence, approval and consent of the plaintiff herein, its officers, agents and servants, and all others like situated, and said plaintiff and all others like situated during all the time said ditch, river cut-offs and spillway were being established, layed out and constructed, had notice and actual knowledge that payment therefor was to be made by special assessment against the lands and properties of said plaintiff affected thereby, and the lands of others like situated, and that there was no other provision of law or method of making such payment, and said plaintiff and none other of said parties took any legal steps to stop or prevent the establishment of, or work performed upon said ditches, river cut-offs or spillway, or the issuance of certificates of indebtedness or drainage warrants therefor, which said parties had notice and actual knowledge of, were to be taken up and paid only by said special assessments as aforesaid; and that said plaintiff and others like situated are now, and since 1918 have been, receiving large and continu-
58 ing benefits to their lands and properties affected, by reason of said reconstruction and construction of said drainage ditch, river cut-offs and spillway, under the said re-establishment as Drainage Ditch No. 1 & 2.

IX.

These defendants further allege as special instances of the notice and knowledge of the plaintiff of the proceedings and work being done on the establishment and construction of Drainage Ditch No. 1 & 2, that the said plaintiff's railroad right-of-way passes through the drainage area of Drainage Ditch No. 1 and Drainage Ditch No. 2, as originally established and constructed, and were assessed for and paid a portion of the cost thereof; that said right-of-way and main line passed within viewing distance of the spillway heretofore destroyed, and the new spillway as re-constructed; that the officers, agents and servants passing said spillway on the daily trains could see the re-construction work on said spillway as it progressed, and in fact did see such work as it progressed; that the said plaintiff was summoned in the notice dated September 15, 1916, to show cause why said Drainage Ditch should not be established and constructed.

* * * * * * * * *

59 XI.

That said notice was duly published for two consecutive weekly issues of the Sioux Falls Daily Press, and true copies thereof posted in three public places along and near the route of said drainage ditch; that on the return day thereof, several persons appeared before said Board at the time and place designated in said resolution and notice, but no written objections to said show cause order and notice were filed with said Board, or at all, and thereupon said Board took said matter under advisement and adjourned until the 4 day of August, 1920, at which time said Board duly convened and passed their resolution therein, wherein it resolved and ordered among other things: "That a competent surveyor be employed and a complete survey made of the lands lying in the Big Sioux River valley between the City of Dell Rapids and the terminus of said drainage ditch and project and tributary to and benefited by said drainage ditch and project, for the purpose of fixing the proportion of benefits of said drainage among the lands affected and benefitted thereby", which said resolution and order was thereupon filed in said ditch proceedings in the office of the County Auditor; that more than thirty days have elapsed since the passage of said resolution and determination of said Board, and no appeal from said resolution, order and determination of said Board has been taken by the said plaintiff herein, or any one at all, and the time for appealing therefrom has now elapsed and expired; that thereafter said Board presented said matter to the State Engineer, in whose opinion it was necessary that said survey be made and he gave his approval of the making thereof, and that thereafter said defendant Board entered into a contract with the said Chenoweth & Rettinghouse, surveyors, pursuant to said order and resolution of the Board, passed and filed as aforesaid on the 4th day of August 1920, and not otherwise.

60 XII.

That by reason of each and all of the foregoing facts, acts and resolutions and orders done, passed and performed as hereinbefore set forth, the said plaintiff and all others like situated are now estopped and forever barred from in any manner claiming or asserting any right or relief herein, or at all.

* * * * * * * * *

XIV.

The above named defendants, A. G. Risty, et al, further answering plaintiff's bill of complaint allege that heretofore and on and prior to October 3, 1916, due and legal notice was given to the plaintiff herein of the time and place appointed by the Board of County Commissioners of Minnehaha County, South Dakota, for claiming any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2 and that the plaintiff herein wholly failed and neglected to present to said Board of County Commissioners at said time and place, to-wit: October 3, 1916, any claim for damages therein, and that by reason thereof this plaintiff is now estopped and debarred from claiming or asserting herein any right, or claim to any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2.

XV.

The above named defendants, A. G. Risty, et al, for further answer to plaintiff's bill of complaint, allege that the plaintiff is not entitled to the aid of a court of equity herein, for
61 the reason that said plaintiff has failed, neglected and refused to tender or offer to tender herein the amount of the actual benefits received by it by reason of the establishment, construction and reconstruction of Drainage Ditch No. 1 and 2.

Wherefore, the defendants, above named, pray that the plaintiff's bill of complaint in said action be dismissed, with costs.

E. O. JONES,
L. E. WAGNER,
Solicitors for Defendants.

B. C. Matthews,
Of Counsel.

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62 Exhibit "A"

Petition.

To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefitted Thereby.

To The Honorable Board of County Commissioners of Minnehaha County, South Dakota:

1. The undersigned petitioners respectively represent and show that they are all residents of Minnehaha County, South Dakota, and that each of them is the owner of certain lands and real property situate and lying in said county in the valley of the Big Sioux River and within the territory to be drained, protected and benefitted by the reconstruction and improvement of drainage ditches One and Two in said Minnehaha County, South Dakota, and by the construction of a new spillway or outlet to said drainage ditches numbers One and Two.

2. Your petitioners further represent and show that said drainage ditches Numbers One and Two were established for the purpose of draining agricultural lands in 1907 and 1910 respectively as appears from records of said proceedings in the office of the County Auditor of Minnehaha County, South Dakota, which are hereby referred to and made a part hereof.

3. Your petitioners further represent and show that the said Drainage Ditches Numbers One and Two and the outlet thereto as constructed were and are insufficient to accomplish the purpose for which they were constructed and were
63 and are insufficient to properly drain the agricultural lands within the districts or territory supposed to be drained thereby and insufficient for the drainage of other agricultural lands lying within the valley of the Big Sioux River above the mouth of the outlet to said Drainage Ditches Numbers One and Two and between the mouth of said outlet and the lands heretofore included within the assessment districts upon which the cost of the construction of said drainage ditches One and Two was imposed and insufficient as constructed to improve, promote and conserve the public health and welfare within said territory hereinbefore described above the mouth of the outlet to said ditches Numbers One and Two lying partly within the City of Sioux Falls, South Dakota, all of which said lands and property would be benefitted, drained and protected by a proper reconstruction and improvement of said Ditches One and Two and by the construction of a new and proper spillway or outlet to the same by means whereof the public health and welfare within the area hereinbefore described and referred to above the mouth of the outlet to said ditches would be conserved and improved.

4. Your petitioners further represent that it is necessary for the drainage of agricultural lands within said drainage districts Numbers One and Two and also agricultural lands

lying above the mouth of the spillway or outlet to said ditches and between the mouth thereof and the present boundaries of said drainage Ditches Numbers One and Two to reconstruct, deepen, widen and improve said drainage ditches One and Two and to construct a new outlet or spillway thereto and that the construction of such new outlet or spillway and the reconstruction and improvement of said Ditches One and Two would also be conducive to the public health, convenience and welfare of the
64 City of Sioux Falls, South Dakota, and also of the County of Minnehaha, South Dakota and people resident within the said area hereinbefore described lying between the present boundaries of said drainage districts One and Two and the mouth of the outlet to said ditches and within the valley of the Big Sioux River, partly within the corporate limits of the City of Sioux Falls, and that in the reconstruction of the said ditches One and Two, it will be necessary that the same be cleaned, deepened, widened and that certain levees, dikes, flood gates and barriers thereto be constructed to such extent as may be necessary to carry out the surplus or flood waters and to properly drain and protect the lands within said drainage districts and within the area hereinbefore described and within the city of Sioux Falls and to properly conserve and promote the public health and welfare within the said area as aforesaid.

5. Your petitioners further represent that there should be constructed and installed in the said Drainage Ditches Numbers One and Two and at the head of the said Spillway or outlet of said Drainage Ditches, controlling gates for the purpose of regulating and controlling the amount of water flowing through the said ditches and over the said Spillway, the number and location of said gates and the manner in which they should be installed should be determined by the County Commissioners upon the advice of their engineers.

6. Your petitioners further represent that the present spillway or outlet to said Drainage Ditches Numbers One and Two where the same empties into the Big Sioux River in Section Nine (9) Township One Hundred and one (101) of Range forty-nine (49) is wholly insufficient and has been prac-
65 tically destroyed by the action of the water therein, so that the same has become inefficient as a means of disposing of the waters flowing in said drainage Ditches Numbers One and Two and to such an extent that it has become dangerous to abutting property and to persons living within the vicinity thereof and that it is necessary to entirely aban-

don said present spillway or outlet and to construct an entirely new outlet or spillway in place thereof in accordance with a new and different plan therefor, the new spillway to be located at or near the present location of the present spillway.

7. Your petitioners further represent that the said drainage ditch or drainage system should consist of the following ditches: First a ditch having its initial point at the beginning of Section Two (2) of Drainage Ditch Number Two (2) of Minnehaha County as now established at the creek near the Northeast corner of Section thirty-one (31) Township One hundred four (104) of Range Forty-nine (49) and should then run Southwesterly to near the center of said Section thirty-one (31) and then south near the center line through said Section Thirty-one (31) and through Sections Six (6) and Seven (7) of Township one hundred three (103) of Range forty-nine (49) into Section eighteen (18) and then in a Southeasterly direction having its terminal point upon the Big Sioux River Sixteen hundred forty feet (1640) east of the said center of Section Eighteen (18), Township One hundred three (103) of Range forty-nine (49) following the present location of the said Section Two (2) of Drainage Ditch Number Two of Minnehaha County as now located.

Also a ditch having its initial point at the present beginning of Section One of Drainage Ditch Number Two of Minnehaha County, at the high water channel of the Big Sioux
66 River in the Southeast quarter of Section Twenty (20) Township One hundred three (103) of Range forty-nine (49) thence running in a general southerly direction through the Southeast quarter of Section Twenty (20) Township one hundred three (103) of Range forty-nine (49) and the Northeast quarter of Section twenty-nine (29), The Southwest quarter of Section twenty-eight (28), the west half of Section thirty-three (33) all in Township one hundred three (103) of Range forty-nine (49) and the west half of Section four (4) the northwest quarter of section nine (9) the Southeast quarter of Section eight (8) the east half of Section seventeen (17), the east half of section twenty (20) and the east half of Section twenty-nine (29) all in Township one hundred and two (102) of Range Forty-nine (49) with its terminal point at the southern end of said Section One of Drainage Ditch Number Two in the Southeast quarter of Section twenty-nine (29), Township One hundred two (102) of Range forty-nine (49) following the line of the said Section One of Drainage Ditch Number Two as now established in Minnehaha County.

Also a ditch having its initial point at the present beginning of Drainage Ditch Number One of Minnehaha County at or near the Northeast quarter of the Southeast quarter of the Southeast quarter of Section twenty-nine (29) Township one hundred and two (102) of Range forty-nine (49) thence running south across the East half of the East half of Section Thirty-two (32) in Township one hundred two (102) of range forty-nine (49) and the East half of the Northeast quarter of Section Five (5) Township one hundred one (101) of Range forty-nine (49) and the Northeast quarter of the Southeast quarter of Section five (5) Township one hundred one (101) of Range forty-nine (49) thence across the West half of the Southwest quarter of Section four (4) in Township one hundred one (101) Range forty-nine (49), thence across
67 the northwest quarter of Section Nine (9) Township One hundred one (101) of Range forty-nine (49) and the Southwest quarter of the Northeast quarter of Section nine (9) township one hundred one (101) of Range forty-nine (49) where it empties into the Big Sioux River having its initial point and terminal point the same as and following the line of Drainage Ditch Number One as now established in Minnehaha County. With also a branch drain or second part beginning at the point near the center of the Northeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49) running thence in a southeasterly direction across the Southeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49) to where it connects with the main ditch of Drainage Ditch Number One as now established in Minnehaha County.

8. Your petitioners further represent that in order to make the foregoing drainage system complete and adequate for the purposes for which it is designed, that it will be necessary to straighten, clear out and deepen the channel of the Big Sioux River at a number of places within the said Drainage District and especially to straighten the channel of the said River upon Section thirty-two (32) Township one hundred three (103) of Range forty-nine (49) by a ditch cutting off the bend in said river on said Section. Also to straighten the said River upon section Eight (8) Seventeen (17), Twenty (20) and Twenty-nine (29) in Township one hundred two (102) of Range forty-nine (49) by cutting off bends of the said Sioux River situated upon those Sections, the exact location of the

said ditches for straightening, clearing out and deepening
68 ing the channel of the said Sioux River to be determined by the County Commissioners upon advice of their engineers.

9. Your petitioners further represent and show that the lands and territory likely to be affected by the construction of such new spillway or outlet and by the reconstruction and improvement of said drainage ditches One and Two and which will be drained, benefitted and protected thereby and within which territory the public health and welfare will be promoted includes all of the lands lying in the valley of the Big Sioux River and included within the present boundaries of said Drainage Districts Numbers One and Two as well as all of the lands in said valley of the Big Sioux River between the mouth of said spillway or outlet to said ditches and the City of Dell Rapids, South Dakota, that are subject to overflow by the waters of the Big Sioux River and that will be subject to overflow and damage by the waters of said River if the said outlet to said Drainage Ditches Numbers One and Two be abandoned and said outlet thereto closed and that the said District should be so extended and enlarged as to include all lands and property benefitted thereby as far down the valley of the Big Sioux River as the mouth of said outlet or spillway and including therein the corporation of the City of Sioux Falls as well as the corporation of the County of Minnehaha, South Dakota, which said corporations your petitioners further represent are and will be largely benefitted by the reconstruction and improvement of said ditches and construction of said new outlet or spillway thereto to their highways, bridges and other corporate properties owned by them respectively.

Dated this 15th day of July, A. D. 1916.

Attest: WALTER G. LEYSE,
City Auditor

CITY OF SIOUX FALLS
(Seal of the City of Sioux Falls) By Geo. W. Burnside,
Mayor.

F. L. BLACKMAN,

W. BRALEY,

DEN DONAHOE

DAN A. DONAHOE,

W. M. DONAHOE

CATHERINE PECK

PORTER P. PECK

MARY C. BRACE

JOHN P. BLEEG

FRANCES G. CARPENTER

M. RUSSELL, By Louis Caille, Agt.

McKINNEY & ALLEN

E. D. CLARK

69 C. C. BRATRUD

L. P. CALDWELL

Filed in the office of the Auditor of Minnehaha County, S. D. this 3 day of Aug. 1916.

HARRY H. HOWE,
County Auditor.

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70 Order for Filing Petition for Drainage.

State of South Dakota,
County of Minnehaha—ss.

In re Drainage Ditch Numbers 1 and 2 Minnehaha County, South Dakota.

Whereas F. L. Blackman and others of the County of Minnehaha, State of South Dakota, have this day presented to this Board a petition for the construction of a drainage ditch conducive to public health, convenience and welfare and for the purpose of draining agricultural lands in the Big Sioux River Valley which lands have heretofore been drained and protected from overflow by ditches Number 1 and 2 of Minnehaha County as heretofore established and constructed, in which petition it is represented that it is necessary to re-construct, improve and extend said drainage ditches Number 1 and 2 and to construct a new spillway or outlet where said drainage ditch number one empties into the Big Sioux River in Section Nine (9), Township One Hundred and One (101), Range Forty-nine (49) by reason of the fact that the spillway or outlet of said drainage ditch number 1 is inadequate for its purpose and has been destroyed by action of the water; also that the drainage ditches number 1 and 2 are not adequate for the purpose of which they are constructed and

that they should be cleaned, deepened and widened and levees, dikes, and barriers remodeled, re-constructed and improved in such places and to such extent as may be necessary to carry off the surplus or flood water and properly drain the land to be drained thereby and protect other land subject to overflow; also that there should be constructed and installed in said drainage ditches 1 and 2 necessary flood gates for the purpose of regulating the amount of water flowing
71 through; also that it is necessary in order to make such drainage system complete and adequate for the purpose for which it is designated to straighten, clear out and deepen the channel of the Big Sioux River at different places within the drainage district of said drainage ditches number 1 and 2, and said petition having been by this board examined and found sufficient in form and being accompanied by bond with sureties approved by the County Auditor.

Now Therefore it is hereby ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that the said petition be forthwith filed with the County Auditor of this County and that a copy thereof be transmitted by the said County Auditor to the State Engineer.

A. G. RISTY,
Chairman of County Board.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of Aug. 1916.

HARRY H. HOWE
County Auditor.

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72 Resolution for Survey.

Whereas on the 3rd day of August, A. D. 1916, the City of Sioux Falls, F. L. Blackman and others of Sioux Falls, Minnehaha County, South Dakota, presented to this board a petition for the drainage of lands in the Big Sioux River Valley for the establishment of a drain chiefly to carry off the overflow water of the Big Sioux River, such drain to begin at the beginning of Section two (2) of drainage ditch number 2 of Minnehaha County, as now established at the creek near the northeast corner of Section 31, Township 104, Range 49, and should end at a point on the said river near the center of Section 9, in Township 101, Range 49, where drainage ditch number 1 as now established in Minnehaha County, empties

into the Big Sioux River, which petition was accompanied by a proper bond with sureties approved by the County Auditor of said County; and

Whereas said petition was by this board examined and found sufficient in form and was ordered filed with the County Auditor of said County, and was so filed on the 3rd day of August A. D. 1916; and

Whereas this board together with the State Engineer did on the 14th day of August, A. D. 1916, inspect the proposed route of said drainage; and

Whereas this board deems it necessary that a survey of the proposed drainage be made by a competent surveyor.

Now Therefore it is Ordered that a survey be made of the lands in the Big Sioux River Valley between the City of Dell Rapids and the terminus of said proposed drainage for the purpose of determining the exact line of said drainage and the most practicable method of draining the entire sec-
73 tion of the country of which the lands proposed to be drained are a part. Such surveyor shall include in his report to this board a description of the exact line of said drainage ditch or ditches as suggested in said petition, the size and width thereof, such survey to be made under the supervision of the State Engineer and report filed with the County Auditor with all convenient speed.

And the chairman of this board is hereby authorized to employ such surveyors and his assistants and purchase such material as may be necessary for such survey.

Approved this 14th day of Aug. 1916.

A. G. RISTY.

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74 Resolution Fixing the Exact Line and Width of Ditch and Fixing the Time and Place for Hearing Petition.

(Commissioners Proceedings, September 13, 1916)

Whereas, on September 13, 1916, Mr. L. E. Stevens, Civil Engineer employed by this Board for the making of a survey for a proposed drainage ditch, in the valley of the Big Sioux River, in Minnehaha County, South Dakota, in the territory previously partially drained by Drainage Ditches Numbered One and Two, as heretofore established, pursuant to the pe-

tition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, did file his report of such survey, together with maps and profiles; and

Whereas, this Board has personally inspected the route of said proposed drainage, as described in said petition and as described in the engineer's said report;

Therefore, be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of said proposed drainage, be and the same is hereby fixed as described in said Engineer's report, and that the requisite right of way for said drainage ditch and dump space be as described in said engineer's report; and

Be it further resolved that Monday, the 2 day of October, 1916, at 2 o'clock, P. M. at the Office of the County Auditor of said County be and it is hereby fixed as the time and place for hearing the said petition and that notice thereof be given in accordance with the provisions of Section Four (4) of Chapter 134, of Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication once in each week
75 for two consecutive weeks in the Sioux Falls Daily Press, and by posting copies of said notice in at least three of the most public places near the route of said proposed drainage ditch, such posting to be made at least ten days prior to the time of said hearing.

Approved:

A. G. RISTY,
Chm. Co. Bd.

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76 Resolution Establishing Drainage Ditch No. 1 and 2.

The matter of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on August 3, 1916, coming on to be heard by the Board of County Commissioners of said county at a regularly adjourned meeting, on Monday, the 2 day of October, A. D. 1916, pursuant to notice heretofore given, the said Board having heard and considered said petition and all matters in support of the same, and in opposition thereto, and being fully advised by the state engineer with reference thereto, now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said principal drainage ditch as hereinafter described and set forth, is conducive to the public health, convenience and welfare and it is necessary and practicable for the drainage of agricultural land and it is so found;

Be It Further Resolved that the said drainage ditch as hereinafter described be, and it is hereby named and designated as "Drainage Ditch No. 1 and 2";

Be It Further Resolved that the said Drainage Ditch No. 1 and 2 be and the same is hereby established in accordance with the resolution adopted by this Board on September 13, 1916, in so far as the same is set out and described in Sections One, Two and Three of the engineer's report of preliminary survey, filed herein on September 13, 1916, and particularly described as follows:

77 Section One.

Commencing at a point Fifty-eight (58) feet west and Ten Hundred and Thirty-five (1035) feet north of the Southeast corner of Section Twenty-nine (29), Township One Hundred and Two (102), Range Forty-nine (49) west of the 5 P. M. running thence South parallel to the adjacent highway Two Thousand and Eighty-five (2085) feet to Station One Hundred and Fourteen (114); also commencing at a point Six Hundred and Seventy-four (674) feet north and about Thirty-five (35) degrees west of said Station number One Hundred and Fourteen (114) thence southeasterly Six Hundred and Seventy-four (674) feet to said Station number One Hundred and Fourteen (114), thence south and parallel to said highway Seventy-seven Hundred (7700) feet to station number Thirty-seven (37) thence south forty-five (45) degrees east Three Thousand Seven Hundred (3700) feet to station number zero (0) the same being on high water line, thence South Fifty-nine (59) degrees and Thirty-six (36) minutes east, Four Hundred and Fifty (450) feet, thence south Thirty-one (31) degrees east to the Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point Ten Hundred and Thirty-five (1035) feet north and Fifty-eight (58) feet west of the Southeast corner of Section Twenty-nine (29) in Township One

Hundred and Two (102) of Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north Five Hundred and Forty-seven (547) feet; thence north Twenty-three (23) degrees west Thirty-three Hundred and Eighteen (3318) [degrees]
to a point Fifty-eight (58) feet west of the
78 quarter quarter line in the northeast quarter of Section Twenty-nine (29) in said Township; thence north parallel with and fifty-eight (58) feet west of said quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17) and a part of Section Eight (8), Twelve Thousand Nine Hundred and Thirty-five (12,935) feet; thence north Fifty (50) degrees east Twenty-seven Hundred and Thirty-two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way of the Chicago, Milwaukee & St. Paul Railway Company, in the Northwest quarter of Section Nine (9) in said Township; thence Northerly parallel with and Thirty-three (33) feet west, of said right of way line Nineteen Thousand Three Hundred and Sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the Southeast Quarter of Section Twenty (20) in Township One Hundred and Three (103) North of Range Forty-nine (49).

Section Three.

Commencing at a point Sixteen Hundred and Forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103), Range Forty-nine (49); running thence north Thirty-three (33) degrees west Thirty-one Hundred and Fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty feet (60) west of the quarter line in Sections Seven (7) and Six (6) in said Township and in Section Thirty-one (31) in Township One Hundred and Four (104) North of Range Forty-nine (49) to the center line running east and west
through said Section Thirty-one (31); thence north-
79 easterly to the creek near the Northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River is to be straightened in Sections Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred and Three (103), North of Range Forty-nine (49) in order to afford better means of communication between the lower end of Sec-

tion Three (3) of said ditch and the upper end of Section Two (2) thereof; the same being intended to cover the exact location of drainage ditch Number Two (2) as now established and constructed.

Be It Further Resolved that the consideration and determination of the question of the straightening of the Big Sioux River at the several points recommended in said engineer's report, be deferred, without passing upon the merits thereof, to some later date, when said straightening of the Big Sioux River may be given more complete consideration, covering the points recommended and other points requested and suggested at the hearing.

Be It Further Resolved that in the construction of the said Drainage Ditch, the rights of flowage of the owner of the mill at or near Baltic, South Dakota, will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch where the same joins with the creek near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, that it will not diminish or interfere with said rights of flowage and that the headgate or other protection now established, be maintained to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

80 Be It Further Resolved that headgates or controlling gates be established in said drainage ditch, on Section Twenty (20) of Sverdrup Township and on Section Twenty-nine (29) or Thirty-two (32) in Mapleton Township at such place and of such size and material as the state engineer may direct;

Be It Further Resolved that a good substantial adequate spillway be constructed, under the supervision of the state engineer, in said ditch on Section Nine (9) of Sioux Falls Township and that an efficient, substantial controlling gate be constructed at the upper end of said spillway in such manner that the same can be closed and all water be prevented from entering said spillway;

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and

that the same may be made a special order for Friday, October 6, A. D. 1916, at ten o'clock A. M.

A. G. RISTY,
Chairman of Board of County Commissioners of Minnehaha County, South Dakota.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of October 1916.

HARRY H. HOWE
County Auditor.

* * * * * *

81 Endorsed: Answer filed in the District Court on Sept. 1, 1921, at 9:30 A. M.

And afterwards, to-wit, on the 28th day of November, A. D. 1921, there was filed in the office of the clerk of said court, Stipulation as to certain Drainage Ditch Notice and that same be considered as a part of the answers and returns of the defendants and intervening defendants; that attached to said Stipulation is a "Drainage Ditch Notice"; which said Drainage Ditch Notice is in words and figures the following, to-wit:

82 Drainage Ditch Notice.

Notice is hereby given that Monday, October 2, 1916, at 2 o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others filed August 3rd, 1916, for the establishment and construction of a drainage ditch, pursuant to the provisions of chapter 134 of the laws of 1907 of the State of South Dakota, as amended by chapter 102 of the laws of 1909, the exact line and width of said drainage ditch was determined by action of said board on September 13, 1916, to be as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of section twenty-nine (29) township one hundred and two (102) range forty-nine (49) west of the 5th P. M. running thence south parallel to the adjacent highway two thou-

sand eighty-five (2085) feet to station one hundred fourteen (114); also commencing at a point six hundred and seventy-four (674) feet north and about thirty-five (35) degrees west of said station number one hundred fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station [numer] one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south 45 degrees east thirty-seven hundred feet (3700) to station number zero (0), the same being on high water line, thence south fifty-nine (59) degrees thirty-six (36) minutes east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to the Big Sioux River, the said line being the
83 center line of said drainage ditch and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five feet (1035) north and fifty-eight (58) feet west of the southeast corner of section twenty-nine (29), in township one hundred and two (102) of range forty-nine (49), the same being the commencement point of section one (1), hereinbefore described running thence north five hundred and forty-seven (547) feet; thence north twenty-three (23) degrees west three thousand three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the northeast quarter of section twenty-nine (29) in said township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through sections twenty-nine (29), twenty (20), seventeen (17) and a part of section eight (8), twelve thousand nine hundred and thirty-five (12,935) feet; thence north fifty (50) degrees east twenty-seven hundred and thirty two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way of the Chicago, Milwaukee & St. Paul Railway Company in the northwest quarter of section (9), in said township; thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the southeast quarter of section twenty (20) in township one hundred and three (103) north of range forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of section eighteen (18) in town-
84 ship one hundred and three (103), range forty-nine (49) running thence north thirty-three (33) degrees west thirty-one hundred and fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between sections seven (7) and eight (8) in said township; thence north parallel with and sixty (60) feet west of the quarter line in sections seven (7) and six (6) in said township and in section thirty-one (31) in township one hundred and four (104) north of range forty-nine (49) to the center line running east and west through said section thirty-one (31); thence northeasterly to the creek near the northeast corner of said section thirty-one (31). The said line being the center line of said proposed drainage ditch.

That in addition thereto the Big Sioux river is to be straightened in sections seventeen (17), eighteen (18) and twenty (20) in township one hundred and three (103) north of range forty-nine (49) in order to afford better means of communication between the lower end of section three (3) of said ditch and the upper end of section two (2) thereof; the same being intended to cover the exact location of drainage ditch number 2 as now established and constructed.

I further recommend that the Big Sioux river be straightened on section thirty-two (32), township one hundred and three (103) north of range forty-nine (49) west by the construction of a cut off beginning at the intersection of the center line of the highway bridge across the Big Sioux river, on the town line between sections thirty-two (32), township one hundred and three (103), range forty-nine (49) and section five (5), township one hundred and two (102), range forty-nine (49) and the center line of said river; thence northerly at right angles to said bridge two hundred (200) feet; thence
85 northwesterly at an angle of twenty (20) degrees to the west, nine hundred and fifty (950) feet; thence northerly at an angle of nineteen (19) degrees to the east twenty-eight hundred and fifty (2850) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8), township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at a point in the center line of the Big Sioux river, twenty-one hundred and seventy (2170) feet easterly and seven hundred and eighty-five (785) feet southerly from the north-

west corner of section eight (8) township one hundred and two (102), range forty-nine (49); thence easterly parallel with the north line of said section eight (8) three hundred (300) feet; thence northeasterly at an angle of twenty degrees (20) to the north, four hundred (400) feet, to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8) township one hundred and two (102) range forty-nine by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the east and west quarter line of section eight (8), township one hundred and two (102), range forty-nine (49); thence northerly at an angle of forty-one (41) degrees and thirty (30) minutes to the north eight hundred (800) feet; thence northwesterly at an angle of seventy-five (75) degrees to the west five hundred and fifty (550) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section seventeen (17), township one hundred and two (102), range forty-nine (49) by the construction of a cut off beginning at a point in the center line of the Big Sioux river seven hundred and twenty (720) feet southerly and six hundred and twenty (620) feet easterly from the west quarter post of section seventeen (17) township one hundred and two (102), range forty-nine (49); thence northerly parallel with the westerly line of said section seventeen (17) six hundred (600) feet; thence northwesterly at an angle of twenty-nine (29) degrees to the west fourteen hundred and ten (1410) feet; thence northerly at an angle of twenty-nine (29) degrees to the east fifteen hundred and sixty (1560) feet; thence northeasterly at an angle of fifty-five degrees (55) to the east eight hundred and seventy (870) feet to the center of said river.

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I further recommend that the Big Sioux river be straightened on section twenty (20), township one hundred and two (102), range forty-nine (49), by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty (20), township one hundred and two (102), range forty-nine (49), thence southeasterly at an angle of one hundred and thirteen (113) degrees to the east six hundred and ten (610) feet; thence southwesterly at an angle of thirty-one (31) degrees to the west ten hundred and eighty (1080) feet; thence southwesterly at an angle of twenty-one (21) degrees to the west thirteen hundred and eighty (1380) feet to the center of said river.

Also in said section twenty (20) beginning at the intersection of the center line of Big Sioux river and the south line of section twenty (20), township one hundred and two (102) range forty-nine (49); thence northwesterly at an angle of sixty-two and one-half (62½) degrees to the north twenty-one hundred and ten (2110) feet; thence northerly at an angle of
twenty-eight (28) degrees to the east five hundred (500)
87 feet to the center of said river.

I further recommend that the Big Sioux River be straightened on section twenty-nine (29) township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty-nine (29) township one hundred and two (102), range forty-nine (49); thence southerly at an angle of 81 degrees to the south twenty-nine hundred and ninety (2990) feet; thence southeasterly at an angle of thirty-five (35) degrees to the east ten hundred and ninety (1090) feet; thence southerly at an angle of thirty-seven and one-half (37½) degrees to the west eleven hundred (1100) feet, to the center of said river.

All of the above cut-offs to have a bottom width of sixty (60) feet and side slopes of one and one-half (1½) to one (1). A right of way one hundred (100) feet in width, one-half each side of the above described center lines will be required.

The tract of country likely to be affected by the establishment and construction of the said proposed drainage is in general terms described as follows: Sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty-two (22), twenty-seven (27), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), in township one hundred and one (101) of range forty-nine (49); sections thirteen (13), twenty-four (24) and twenty-five (25) in township one hundred and one (101), range fifty (50); sections three (3), four (4), five (5), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-eight (28), twenty-nine (29), thirty-one (31), thirty-
two (32) and thirty-three (33) in township one hundred
88 and two (102), range forty-nine (49); section five (5),
six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), twenty (20), twenty-one (21), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty-two (32), thirty-three (33) and thirty-four (34) in town-

ship one hundred and three (103), range forty-nine (49); sections twenty-nine (29), thirty-one (31) and thirty-two (32) in township one hundred and four (104), range forty-nine (49), including also the mill property at or near the town of Baltic and the tracts of country covered by the right of flowage belonging to said mill property. Also the following additions to the City of Sioux Falls, Minnehaha County, South Dakota; North Boulevard addition, Carpentar's addition, Central Park addition, Meredith's First Addition, Meredith's Second addition, Harrison's addition, Lincoln Park addition, Englewood addition, West Lawn addition, Sioux Falls Improvements Company's addition, North Park Addition, North Park Second addition, Brooks' addition, Bunker's addition, Lake View addition, Brookings addition, Berwick addition, Summit addition, McClellan's Second addition, West Park addition, Pettigrew & Tate's Eighth addition, Glendale addition, Scott's Second addition, Morningside addition, Van Eps' addition, Millspaugh's addition, Daniels' addition, Morse's addition, Gale's addition, Gale's Sioux Falls, Phillips' addition, Syndicate addition, Central addition and W. R. Green addition.

The separate tracts of land through which said proposed ditch will pass and parts of which will be required therefore and for dump space, and the names of the owners of said tracts as appears from the records in the office of the
89 register of deeds of said county on August 3rd, 1916, that being the date of filing said petition, are as follows:

Owner	Description		Township	Range
Lars Simonson	NW¼ of NW¼	Sec. 32	104	49
Lars Simonson	NE¼ of NE¼	" 31	104	49
Lars Simonson	SE¼ NE¼	" 31	104	49
Gustava Nelson	SW¼ of NE¼	" 31	104	49
P. G. Thompson	E½ of SW¼	" 31	104	49
Julia L. Moe	NW¼ of SE¼	" 31	104	49
Even O. Fossum	NE¼ of NW¼	" 6	103	49
Gunerius Thompson	All that part of SE¼ of NW¼ Sec. lying south of a certain slough running West of Northwest to end of drain ditch	6	103	49
F. P. Sorkilmo	All that Part of SE¼ of NW¼ Sec. 6 located & lying on the north side of a certain intermittent water-course or slough running through the			

	center of said section in a northwesterly course to ditch on the west line of said "40" except the N½ of N½ of said SE¼,	103	49
Lina Hanson,	N½ N½ SE¼ NW¼ Sec. 6,	103	49
Gunerius Thompson	E½ of SW¼ Sec. 6	103	49
Ole J. Ustrud	E½ of NW¼ Sec. 7	103	49
Magnhild Floren, Olaf Berthum Floren, Mabel Floren & Ovidia Mathilda Floren	E½ of SW¼ Sec. 7	103	49
Andrew Swenson Aas	E½ of NW¼ Sec. 18	103	49
John O. Aasen	S½ of NE¼ Section 18	103	49
B. G. Flamoe	NE¼ of NW¼ Sec. 20	103	49
Bernt G. Flamoe	SE¼ of NW¼ Sec. 20	103	49
Peter Paulson,	E½ of SE¼ Sec. 20	103	49
Olymphious S. Thompson	Tract 3 of County Auditor's Subdivision of the NE¼ of Sec. 29	103	49

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Owner	Description		Township	Range
Olymphious S. Thompson	SE¼ of NW¼ and W½ of SW¼ of Sec. 28		103	49
Bertha Peterson, Alice, Christina Thompson, John Oscar Thompson, William Henry Thompson, Fred Raymond Thompson, Reuben Victor Thompson, Mabel Josephine Thompson, Carl Melvin Thompson	SW¼ of NW¼	Sec. 33	103	49
Andrew J. Aason	NW¼ of NW¼	" 33	103	49
Joseph C. Thompson	NW¼ of SW¼	" 33	103	49
Thomas Hendrickson	SW¼ of SW¼	" 33	103	49
Ole Thompson Aspass	W½ of NW¼	" 4	102	49
Martin H. Oyen and Cleopatra H. Oyen	W½ of SW¼	" 4	102	49
Martin Oien	W½ of NW¼	" 9	102	49
Martin H. Oien	SE¼ of NE¼	" 8	102	49
Ole Gunderson	W½ of SE¼	" 8	102	49
Leonard Renner	E½ of SE¼	" 8	102	49
Ingeberg Peterson Peter R. Peterson Iver R. Peterson Gertie R. Peterson,	W½ of NE¼	" 17	102	49

Christian J. Orstad	W½ of SE¼	" 17	102	49
Albert N. Allis	W½ of NE¼	" 20	102	49
Robert J. Huston	W½ of SE¼	" 20	102	49
Charles E. Kaufmann,	NE¼ & NE¼ of SE¼ of Section 29		102	49
State of South Dakota	SE¼ of SE¼	Sec. 29	102	49
State of South Dakota	E½ of NE¼ & NE¼ of SE¼	" 32	102	49
Hans Ruvald	SE¼ of SE¼	" 32	102	49
Hans Ruvald	E½ of NE¼ & NE¼ of SE¼	" 5	101	49
City of Sioux Falls	Starting at Southwest corner of Section 4, running thence east along Sec. line to the center line of County Ditch #1 as shown on Map #3 of the recorded plat of said ditch, thence in a northwesterly direction along the center line of said ditch to the west line of Sec. 4 thence south along said section line to the place of beginning		101	49

91

Name	Description	Township	Range
State of South Dakota	SW¼ of Sec. 4, except above described tract	101	49
Southern Minnesota Railway Extension Company (Now Chicago Milwaukee & St. Paul Railway Company.	Right of way across the SW¼ of SW¼ Sec. 4	101	49
Watertown & Sioux Falls Railway Company	Right of Way across the SW¼ of SW¼ Sec. 4	101	49
Watertown & Sioux Falls Railway Company	Right of Way across the East ½ of SE¼ Sec. 5,	101	49
Chicago, Milwaukee & St. Paul Railway Company	Right of Way of Madison Branch, on Sections 8 and 9,	102	49
Mapleton Township	Interest in Highway adjacent to the line of the proposed ditch in Sections 4, 8, 9, 17, 20 and 29	102	49
Sverdrup Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 6, 7, 18, 20, 28, 29 and 33.	103	49
Dell Rapids Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 29, 30, 31 and 32,	104	49

Sioux Falls Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 4 and 5 and 9	101	49

92 Berwick Addition to Sioux Falls.

	Lot No.	Block No.
Elwin L. Potter	1, 2 and 3	5
Arthur D. Horton	5, 6, 7, 8, 9, 10 and 11	4
State of South Dakota	1, 2 and 3	13
Grant Lines	5, 6, 10 and 11 lying east of Drainage Ditch	14
State of South Dakota	7, 8, and 9	14
State of South Dakota	1, 2 and 3	19
Sophia Krull,	4	18
Sophia Krull, Emma Buchholz, Mary Toepfer, Charles Krull, William F. Krull and Otto R. Krull	5 and 6	18
Sophia Krull	7, 8, 10, 11	18
George W. Hanson (Fee) Security Savings Bank (Tax title)	9	18
Moses M. Robinson	1	31
Security Savings Bank	2 & 8	31
James Kennedy	3	31
Security Savings Bank	All of Block	32

* * * * * * * * *

The Kittery Realty Company—Tract 2 of NE¼ Section 9, Twp. 101, Rge. 49.

The Kittery Realty Company—Tract 3 of NE¼ Sec. 9 Twp. 101 Rge. 49.

State of South Dakota. Tract 3 of NW¼ Sec. 9, Twp. 101 Rge. 49.

93 The separate tracts of land wherein the Big Sioux River is proposed to be constructed and which will likely be affected thereby and the names of the owners of said tracts as appear from the records of the office of the Register of deeds of said County on August 3rd, 1916, that being the date of the filing of said petition, are as follows:

Name of Owner.	Description	Township	Range
Andrew J. Aasen,	W½ NE¼ Section 32	103	49
Andrew J. Aasen	NE¼ of NE¼ Sec. 32	103	49
Joseph O. Thompson,	S½ of SE¼ of NE¼ Section 32,	103	49
Gus S. Thompson,	N½ of SE¼ of NE¼ Section 32.	103	49
Jonas L. Finnegan,	N½ of SE¼ of Sec. 32,	103	49
Margaret Finnegan,	SE¼ of SE¼ Sec. 32,	103	49
John Finnegan,	SW¼ of SE¼ Sec. 32	103	49
Ole Gunderson,	NW¼ Sec. 8	102	49
Iver Nelson,	NW¼ of SW¼ Sec. 8,	102	49
Jonas Olson,	SW¼ of SW¼ Sec. 8,	102	49
Ole Gunderson,	E½ of SW¼ Sec. 8,	102	49
Iver R. and Palma Peterson,	NW¼ of NW¼ of Sec. 17	102	49
Bernt Mekvold,	SW¼ of NW¼ Sec. 17	102	49
C. C. Fleischer,	NW¼ of SW¼ Sec. 17,	102	49
Iver R. and Palma Peterson,	East 26 acres of NE¼ of NE¼ Sec. 18	102	49
Bernt Mekvold,	SE¼ of NE¼ Sec. 18	102	49
W. O. Quincy,	W½ of NW¼ Sec. 20	102	49
Albert N. Allis,	E½ of NW¼ Sec. 20,	102	49
Robert J. Huston	N½ of SW¼ Sec. 20,	102	49
Charles Kaufmann,	S½ SW¼ Sec. 20,	102	49
Charles Kaufmann,	W½ of NE¼ Sec. 29	102	49
Charles Kaufmann,	NE¼ of NW¼ Sec. 29	102	49
94			
Name of Owner	Description	Township	Range
Ole P. and Maria Schjodt	W½ of SE¼ Sec. 29	102	49
Berit Johnson,	NE¼ of SW¼ Sec. 29	102	49

In addition to the above, notice is also given to Minnehaha County, Townships of Sioux Falls, Mapleton, Sverdrup, and Dell Rapids in said County and the City of Sioux Falls in said County on account of benefits to highways, bridges, parks and city waterworks plant in the said drainage area and notice is also given to the Chicago, Milwaukee & St. Paul Railway Company, also to the Watertown & Sioux Falls Railway Company on account of the benefits to their rights of way within said drainage area;

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have why the said drainage should not be established and constructed;

And all persons deeming themselves damaged by said proposed drainage or claiming compensation for the lands proposed to be taken for said drainage are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 15th day of September A. D. 1916.

THE BOARD OF COUNTY COMMISSIONERS,
By: A. G. Risty, Chairman.

Attest:

(Seal) Harry H. Howe, County Auditor
By E. H. Shenkle Deputy.

95 Filed in the office of the Auditor of Minnehaha County, S. D., this 15 day of Sept., 1916.

HARRY H. HOWE, County Auditor,
By E. H. Shenkle, Deputy.

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97 (Order permitting amendment to bill of complaint.)

The above entitled suit coming on for hearing upon the 31st day of January, 1922, upon the application of the plaintiff for leave to amend its bill herein to conform to the proof by adding an additional paragraph to the original bill to be known as Paragraph "Eighteenth (and One-half)" and plaintiff appearing by Messrs. Bailey & Voorhees, its solicitors, and the defendants appearing by Mr. E. O. Jones, their solicitor and the intervening defendants appearing by Messrs. Porter & Bartlett, their solicitors, and the Court being fully advised in the premises, and it appearing to the Court that upon the trial of said suit evidence was offered and received
98 by and from all parties to the said suit relevant to the issue proposed to be raised by said amendment and that in the furtherance of justice the said amendment should be permitted. It is hereby ordered that the application of the plaintiff to amend its original bill of complaint herein be and the same is hereby allowed, and that such amendment be made

and filed nunc pro tunc as of the date of the trial of the said suit on the 15th day of December 1921.

It is further ordered that the amendment be made by attaching to the original bill of complaint herein a copy of said amendment and making it a part of the original bill, and that the bill as amended need not be rewritten in full.

It is further ordered that the amendment hereby allowed is in words and terms as follows:

"Eighteenth (And One-half)

That the equalization of benefits of 1839.45 units out of a total number of units of 32,549.62 estimated in dollars and cents at approximately $7,500. fixed by the Board of County Commissioners of Minnehaha County, South Dakota, on the 10th day of June, 1921, against the property of the Chicago, St. Paul, Minneapolis & Omaha Railway Company as above set forth is wholly speculative, arbitrary, unjust, illegal and discriminatory and was made by the said board of County Commissioners without any reasonable or rational basis therefor, and is not in proportion to any benefit which the property of the plaintiff has received or ever can receive by reason of the rebuilding of the spillway and the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and No. 2 as set forth herein. That the property of the plaintiff has not and never can be benefited by the work performed by the Board of County Commissioners as herein set forth to the extent of $7,500, or to any extent whatever. That the as-
99 sessment sought to be collected from the plaintiff as above set forth is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the city of Sioux Falls. That the said equalization of benefits is so arbitrary and discriminatory against the property of the plaintiff as to deprive the plaintiff of its property without due process of law and to deprive the plaintiff of the equal protection of the laws."

And the defendants and intervening defendants having asked permission to submit further evidence upon the issues set out in said amendment, it is further ordered that they may do so at any time within ten days from the date hereof upon two days notice to the solicitors for the plaintiff.

Done at Sioux Falls, South Dakota, this 31st day of January, 1922.

By the Court:

JAS. D. ELLIOTT,

(Seal of Court) Judge.

Attest:

Jerry Carleton,
Clerk.

Endorsed: Filed in the District Court on Feb. 10, 1922, at 11:30 A. M.

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101 (Exception of defendants to order allowing amendment to bill of complaint.)

February 10, 1920.

Come now the defendants, by their attorney, E. O. Jones, Esq., and the Intervening Defendants, by their attorney, N. B. Bartlett, Esq., and except to the Order permitting the amendment to the Bill to conform to the proof, which exception is allowed by the Court.

(Amendment to Bill of Complaint.)

103 Eighteenth (and One-Half)

That the equalization of benefits of 1839.45 units out of a total number of units of 32,549.62 estimated in dollars and cents at approximately $7,500, fixed by the Board of County Commissioners of Minnehaha County, South Dakota on the 10th day of June, 1921, against the property of the Chicago, St. Paul, Minneapolis & Omaha Railway Company as above set forth is wholly speculative, arbitrary, unjust, illegal and discriminatory and was made by the said Board of County Commissioners without any reasonable or rational basis therefor, and is not in proportion to any benefit which the property of the plaintiff has received or ever can receive by reason of the rebuilding of the spillway and the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and No. 2 as set forth herein. That the property of the plaintiff has not and never can be benefited by the work performed by the Board of County Commissioners as herein set forth to the extent of $7,500, or to any extent whatever. That the assessment sought to be collected from the plaintiff as above set forth is out of all proportion to the assessment sought to

be collected from the agricultural lands situated north of the city of Sioux Falls. That the said equalization of benefits is so arbitrary and discriminatory against the property of the plaintiff as to deprive the plaintiff of its property without due process of law and to deprive the plaintiff of the equal protection of the laws.

(Endorsed): Filed February 10, 1922, nunc pro tunc as of December 15, 1921, Jerry Carleton, Clerk.

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105 (Opinion of the District Court.)

James D. Elliott, District Judge.

United States District Court, District of South Dakota.
Sioux Falls, S. Dak., Feb. 17th, 1922.

Chicago, Rock Island & Pacific Railway Company, a corporation, Plaintiff,
No. 98 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, Milwaukee & St. Paul Railway Company, a corpoi poration, Plaintiff,
No. 99 S. D. vs. In Equity
A. G. Risty, Et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation, Plaintiff,
No. 100 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Northern States Power Company, a Corporation, Plaintiff.
No. 101 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

City of Sioux Falls, a Municipal Corporation, Plaintiff.
106 No. 102 S. D. vs. In Equity.
A. G. Risty, et al., Defendants

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Great Northern Railway Company, a Corporation, Plaintiff.
No. 103 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

C. O. Bailey, Esq., Sioux Falls, S. D. and others, Counsel for Plaintiffs.

Messrs. Porter & Bartlett, and C. O. Jones, Esq., Sioux Falls, S. D., Counsel for Defendants.

Gentlemen:—

I have finally disposed of the questions presented in the various drainage ditch cases, consolidated for the purpose of trial, and which were tried and submitted upon single record.

The question of the constitutionality of the South Dakota drainage statute is pleaded by each plaintiff, and upon this issue, the interests of the plaintiffs in all these suits are identical. It is urged by the plaintiffs in the various suits that the entire South Dakota drainage statute is unconstitutional for the reason that it is in conflict with the Fourteenth Amendment of the Constitution of the United States.
107 Plaintiffs call the Court's attention to the provision of the Fourteenth Amendment that prevents the taking of property "Without due process of law."

If the South Dakota statute does not give the person whose land is to be assessed for the drainage of agricultural lands

his "day in court", then there is no "Due process of law." I find upon investigation of the various drainage ditch statutes that almost universally the provision is made for the organization at the inception of the proceeding of a drainage district, with boundaries defined, organized after notice to all property owners within the district, and endowed by statute with certain powers consistent with the purpose for which the district is organized. I also note that ordinarily, where no provision is made for the formation of a drainage district, as is the case in this state, provisions are usually made for the notification of the property owners whose interests are supposed to be included in the drainage district, and for the giving to them of an opportunity to be heard in respect to the question of the practicability or feasibility of the drainage proposition, and whether or not the benefits will exceed the cost, and whether or not the particular lands of the owner, shall be included within the drainage district and assessed its pro-rata share of the benefits.

It is urged by the plaintiffs, and must be conceded, that in this regard the South Dakota statute differs from the drainage statutes of most other states. Section 8459, Revised Statutes of South Dakota, provides that a petition for proposed drainage may be filed with the Board of County Commissioners. This is the first step in the proceeding.
108 This petition is only required to set forth the necessity for the drainage, a description of the route, its initial and terminal points, and its general course, or of its exact course in whole or in part, and a general statement of the territory likely to be affected thereby.

Under this statute petitioners are not required to describe the specific tracts of land to be included within the drainage area, or which will be affected thereby or assessed therefor. Neither is it necessary to give the names of the owners of the property. The statute requires only a "general statement" as to the extent of the territory affected.

Section 8461 of said Revised Statutes, provides that the Board shall fix a time and place for the hearing of the petition and shall give notice by publication at least once each week for two consecutive weeks in a newspaper in the county, and by posting notices near the route of the proposed drainage. It also provides that such notice shall describe the route of the proposed drainage, and the tract of country likely to be affected thereby, in general terms, the separate tracts of land through which the proposed drainage will pass, and give the names of the owners thereof as appears from the records

in the office of the Register of Deeds on the date of the filing of the petition. It is further provided that such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed.

Plaintiffs note that this statute, except as to property
109 owners through whose property the proposed drainage will pass, provides only this general notice, and especially complain that it gives no property owner any notice that his particular tract of land is included among the lands affected by the proposed drainage, and insist that the notice is broad enough to take in each and every tract of land included within the boundaries of the county in which the drainage project is situated.

It is true that, other than this general notice, there is no notice whatever given to the property owner that his particular land is affected by the drainage proposition, or that he has any interest in it, or will be mulcted in assessment for benefits by reason thereof. He receives no summons or other notice, either by personal service or by mail. He has, however, the general notice given in the published summons by the Commissioners to "All persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed."

By Section 8461 of the said Revised Statutes, the County Commissioners pass upon the petition at the time named in the summons and notice, and if they find it feasible to establish the drainage, no provision is made for any other notice to any property owner, unless it should be found necessary to change the initial or terminal points so that the drainage will pass through other lands than those described in the original notice, or to increase the width of the lands to be taken for the proposed drainage, in which case the Board must give the owners of such lands notice. There is
110 no provision, however, for any notice to any property owner after the drainage ditch is established.

The Board may then proceed without further notice, to its construction. It may incur construction expense before taking any proceedings towards making an assessment for the payment of the costs, or it may before doing the work, estimate the costs and make an apportionment of benefits upon which the assessment may subsequently be spread by the County Auditor.

Section 8463 of said Revised Statutes authorizes the said County Commissioners, after establishing the drainage, to fix the proportion of benefits of the proposed drainage among the lands affected, and also appoint a time and place for equalizing the same. It is then provided that notice of such equalization of proportion of benefits shall be given by publication for two weeks. It is provided that this notice must give a description of each tract of land affected by the proposed drainage, and the names of the owners as appears from the records of the office of the Register of Deeds. It is further provided that the lands to be charged with benefits include all pieces of property that, in the judgment of the Board of County Commissioners are benefitted by the drainage proposition. At this hearing the Board fixes the proportion of benefits for each tract of land, taking any particular tract as a unit, and also fixes the benefit which any railroad company may obtain for its property by such construction and equalizes it together with the proportion of the bene-
111 fits to tracts of land. This statute seems to provide for this hearing for fixing the proportion of the benefits before the ditch is constructed and before it is known what will be the actual amount of money expended. This hearing may be delayed until after the ditch has been built. It also provides that in event there is further expense incurred, or if for any reason, parties assessed do not pay the tax, a new proportion of benefits shall be fixed and new assessments made.

At this hearing the owners of the lands alleged to be benefitted have notice, have the right to appear and contest the amount of the benefits upon their lands, and may even urge that no benefits are derived. From this assessment there is a provision granting an appeal to the Circuit Court of the County in which the lands are situated, in which the proportional benefit may be an issue, and the owner of the land, upon such appeal, may contest the fact that there are any benefits to the land in question. The law further provides for an appeal from the determination of such issue in the Circuit Court to the Supreme Court of the State.

After such proportional benefits are determined the County Auditor spreads the tax and it then becomes a lien upon the property benefitted.

This brief statement of the provisions of the statute, not at all complete, but in a general way outlines the general powers of the Board and the method of the establishment of the ditch, and the various steps up to the spreading of the tax against the lands benefitted.

These proceedings are peculiarly limited to the drain-
112 age of agricultural lands, because the Constitution of the State of South Dakota provides that:

"The drainage of agricultural lands is especially declared to be a public purpose and the Legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest corporate authorities thereof and the corporate authorities of counties, townships and municipalities, with powers to constitute levees, drains and ditches * * * * * by special assessments upon the property benefitted thereby according to the benefits received."

Pursuant to this provision of the Constitution, the Legislature of the State has provided for the drainage of agricultural lands, but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands "for any public use". Without repetition, and calling attention now to the reasons urged by the plaintiffs sustaining the unconstitutionality of this statute enacted for the purpose of draining agricultural lands, and considering the objections urged in various forms by the different plaintiffs, we find that all of the objections center about the criticism that no notice is provided the owners of lands affected by the drainage ditch, except the general notice, and in fact, no personal notice until the date fixed by the Board for the equalization of pro-
portional assessments for the various tracts of land
113 benefitted by the drainage. It will be noted that the Legislature has provided that no tax can become effective, no assessment can be made, until the benefits have been ascertained and proportioned, and before this can be done a definite day must be named by the Board and the various land owners are given notice.

The question resolves itself into one of whether or not this hearing after notice, with the right of appeal, constitutes "a day in Court" to the various land owners. I have reviewed the authorities submitted by plaintiffs and I am frank to confess that the statutes of this state do not provide for the description of the lands alleged to be benefitted by the ditch, or the owners of the lands, or that notice shall be given to such owners, or that the owners shall appear and show cause, if any they have, why the ditch is not practicable or should not be established, or have the opportunity to show that the cost would be greater than the benefits, or would be confiscatory, and yet, I am satisfied that the courts of the various states

and the Supreme Court of the United States have recognized the power of the Legislature to provide the method of the levying of this tax against the lands benefitted by a drainage ditch, and have held that a law that provides for notice and an appearance and the right to contest the amount of the tax, and to contest the right to tax at all, with the right of appeal therefrom, if given to the land owner prior to
114 the time that a tax is levied and becomes effective, is "due process of law."

I was impressed upon the oral argument with counsel's reference to the decision in the North Dakota case, Soliah vs. Heskin, etc., 222 U. S. 522. Counsel urged that the law of North Dakota, very similar to ours, was sustained because it provided for a notice at the time of the establishment of the ditch. Reference to this opinion demonstrates that the Court held as follows:

"Neither does that Amendment invalidate an act authorizing an appointed Board to determine whether a proposed drain will be a public benefit and create a drainage district consisting of land which it decides will be benefitted by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property.

(Underscoring is mine.)

Under the South Dakota statute, applying this rule as announced in the North Dakota case, clearly, the notice is provided and an opportunity to be heard is afforded the land owner before the assessment becomes a lien upon his property, in the drainage of agricultural lands.

Louisiana has held that:

"Whenever by the rules of the state or by state authority, a tax assessment, servitude or other burden is imposed upon property for the public use, * * * * * * * * * and those
115 laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person of such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without 'due process of law.' " Davidson vs. New Orleans, 96 U. S. 97.

Massachusetts has held that:

"If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." Spencer vs. Merchant, 125 U. S. 578.

Construing the statutes of the State of Missouri, it was held that:

"It is granted that the land owners were not afforded an opportunity to be heard in respect to the value of their land. While no hearing is given when the lands are appraised a hearing is given when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice when owners aggrieved by the valuation may have a full hearing upon that question. This is due process of law." Embree vs. K. C. & L. Road Dist. 240 U. S. 242.

The drainage statute of Michigan was considered in re Roberts vs. Smith, 72 N. W. ....., and also in Gillette vs. McLaughlin, 37 N. W. 551, and in Smith vs. Carlo, 72 N. W. 22. In these cases the same objections were made to
116 the constitutionality of the law that are argued by the plaintiffs here, and especially that the persons who did not own lands traversed by the drain, but who are within the assessment district, have no opportunity to be heard upon the necessity for laying the drain. And, further, that persons within the assessment district are entitled, under the constitution, to a hearing upon the question of the public necessity for the drain. These contentions were denied in these cases, the law held constitutional, and a full discussion of the questions is to be found in these cases and the cases therein cited.

The Michigan statute is construed again in re Voight vs. Detroit, 82 N. W. 253, and on appeal, 184 U. S. 115, in which it was urged that no provision is made for a notice to property owners of the time and place of hearing upon either the question of fixing the taxing district or the amount of the award to be spread thereon. This, it is claimed, leads to taking property without due process of law, and therefore the law is unconstitutional. It was claimed in this case, by counsel, that the complainant was entitled to notice of the hearing relating to the establishment of the assessment district, and of the amount of the total assessment, and because the statute did not provide for these notices it was unconstitutional. It was held in this case that this position could not be maintained.

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"The provision of law by which, when the proceeding has reached the stage where it is proposed to levy the tax, a notice must be served on the property owner, was held sufficient to avoid the constitutional objection, notwithstanding no
117 notice is required in respect to the creation of the district or the determination of the aggregate amount of the tax to be collected.

In re Paulson vs. Portland, 149 U. S. 30 it is held:

"It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question, What proportion of tax shall be assessed upon his land, there is no taking of his property without due process of law."

I repeat that under the South Dakota statute there is ample provision for notice to every land owner, and an opportunity given to be present at the hearing, at which time and place he may assert all objections against the validity and justice of the proposed charge upon his property before the tax is levied, and carried by the County Auditor as such on the books of his office and made a lien upon the property. It follows that, in my judgment, the South Dakota statutes, enacted in the light of that provision of the Constitution of the State providing for the drainage of agricultural lands, is constitutional.

The case made by the bills filed by the plaintiffs in these various actions involve a real and substantial question under the Constitution of the United States. The amount involved in each case is greatly in excess of Three Thousand Dollars, exclusive of interest and costs. On the question of the jurisdiction of this Court, I am of the opinion that each
118 plaintiff states a case in his bill plainly cognizable in this court. All of the plaintiffs except the City of Sioux Falls allege diversity of citizenship, in addition to the Constitutional question, and the proper amount involved. I repeat that there can be no question as to the bills involving a real and substantial question under the Constitution of the United States, and in such a case the jurisdiction of this Court extends to every question involved, whether of Federal or State law, and enables the Court to rest its judgment or decree on the decision of such of the questions as in its opinion effectually dispose of the cases. Davis et al. vs. Wallace et al. (Opinion Jan. 9, 1922,.... U. S. .... with cases there cited).

It conclusively appears on the face of these pleadings that there is no speedy or adequate remedy at law. The remedy at law must be a remedy on the law side of the Federal Court, not a remedy in the State Courts of South Dakota. In each of the cases where there is a diversity of citizenship, this Court of Equity will not deny the plaintiff relief because there may be a remedy in the courts of the state, for the reason that the non-resident is not required to subject himself to jurisdiction of the Courts of the State in order to obtain relief. U. S. Life Ins. Co. vs. Cable, 95 Fed. 761.

In neither of the cases at bar is there a remedy at law on the law side of the Federal Court. If plaintiffs, or either of them are compelled to pay this tax, no action would lie on the law side of the Court that would give them relief. No action on the law side of the Court would protect them,
119 or either of them, from future assessments and future responsibilities.

There is the further issue presented on the face of the bills, that for the reasons therein stated, no Drainage Ditch No. 1 and 2, under which it is pretended this assessment is made, was ever established. That this is simply a pretense for the maintenance and repair of the ditches that had been theretofore established, and that the steps that have been taken by the County Commissioners are without authority of law. In substance, that the Board of County Commissioners are trespassers, acting with no right or color of right. That insofar as there is an attempt to assess benefits to the property of the plaintiffs, or other property in the City of Sioux Falls, the proceedings are entirely void. That as to each of the plaintiffs the assessment of benefits made is arbitrary, unjust, illegal and void. This is the basis of the claim that the assessment is such as to result in the property of the plaintiffs bearing more than its share of the burden of improvements while such property is in no wise benefitted thereby. That the alleged benefits from this improvement have not been estimated upon these properties with the farm lands according to any standard which will produce approximately correct general results. That the taxes upon the plaintiff's property are upon some fanciful view of future benefits, while the farm
120 property is assessed wholly according to its area and position. That the property of the respective plaintiffs is sought to be burdened for this improvement upon a basis so wholly different from that used for ascertaining the contribution demanded from individual owners of agricultural lands adjacent to the drain, as necessarily to produce

manifest inequality. That the plaintiffs are therefore deprived of the protection of the law which must be extended to all.

The determination of these various issues necessarily requires a consideration of the facts as they appear in the record. Fortunately there is practically no dispute as to the facts. The only dispute is as to the legal effect of the acts of the Board of County Commissioners.

What, then, was the situation at and prior to the time that the said Board assumed authority to require the plaintiffs and others in the City of Sioux Falls, to pay for the building of this new spillway, and the repair of the ditches hereinafter referred to? The Sioux River flows from the north, in a southerly direction, west of the City of Sioux Falls, then flows in an easterly direction, south of the main portion of the city, then flows north through the city of Sioux Falls, flowing a distance of some ten miles from a point north of the city where the drainage ditch hereinafter referred to leaves the river, to a point where the drainage ditch empties its waters into the river. The river thus describes a large horse-shoe, the drainage ditch cutting across the open end, practically from the river on one side to the river on the other. Dell Rapids is situated in the Sioux Valley more than twenty miles north of Sioux Falls.

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At first there was established Drainage Ditch No. 1, and then Drainage Ditch No. 2. These two ditches extended from a point north of the City of Sioux Falls some distance to a point some fifteen miles north of Sioux Falls, at which point Drainage Ditch No. 2 was intended to take the flood water from the Sioux River and conduct it down its length into and through Drainage Ditch No. 1, to the river north of Sioux Falls, cutting through the hills adjacent to the river, and necessitating the conduct of the water down a fall of more than one hundred feet into the river. Drainage Ditch No. 1 and Drainage Ditch No. 2 were duly constructed under the provisions of the Constitution and laws of the state for the drainage of agricultural lands and were operated for the purpose for which they were constructed. The first petition for said Drainage Ditch No. 1 was filed in 1907, and the petition for Drainage Ditch No. 2 was filed in 1910. Such proceedings were had that these two ditches were constructed down the valley in a southerly direction, near the Sioux River until a point was reached north of the City of Sioux Falls, when the ditch was turned in an easterly direction across

to the Sioux River at a point north and east of the City of Sioux Falls. Benefits were assessed and paid by the owners of adjacent lands under the provisions of the statutes of the State of South Dakota to which I have referred. In
122 1915 the force of the waters conducted by these two drainage ditches was so great as to wash out what is called the spillway, through the bluff adjacent to the point where the waters from the ditches entered the river. The ditches in the meantime also became out of repair, and at one point several miles above the City where the ditch approached the river, the water was cutting from the river into the ditch, threatening to turn the entire course of the Sioux River at this point into the ditch, and through the ditch back into the river, leaving the Sioux River from that point and for about twelve miles around to where the ditch flowed into the river, without water. The spillway from the ditch through the bluff down into the river was so unskilfully, inefficiently and unscientifically constructed that it would not stand the force of the water with a fall of one hundred feet into the river. It was washed out, and the bluff being of soil and sand, washed out to the entire depth of the river and began washing back through the bluffs, threatening to cut clear back to a point where the water cut through from the river to the ditch, thus taking away from the City of Sioux Falls the benefits of the river, its sewer system and the advantages of the stream, and take the water from the plaintiff, The Northern States Power Company, that naturally flowed down the river except for the interference by this drainage ditch. And in the cutting into this bluff also threatened to cut into the gravel bed in which the water supply of the City is located, a few miles west of it, and thus drain and destroy and take away from the City of Sioux Falls, its water supply. This was the situation in 1916.

This situation presented no question of the
123 drainage of agricultural lands. The people who had been responsible for the establishment of these two drainage ditches and the conduct of the water down through the hill to the river below, because of the inefficient manner in which the spillway had been constructed, had caused all of the trouble. The thing that confronted the Board of County Commissioners at that time, having charge of these two drainage districts, was the maintenance of the ditches and of the spillway which was a part of the ditch that had already been constructed. In the construction of these ditches no suggestion had ever been made that the City of Sioux

Falls, all lying entirely south of the districts drained, was in any manner interested in the drainage, or that there could be any benefits assessed to such city or any property owner thereof. The situation that confronted them was not drainage of agricultural lands, it was the maintenance of the ditches that had been established by them, and the prevention of the dangers threatened by the water that they were conducting down through these ditches, through this hill, into the river. They might have taken their chances upon the damages that their acts were responsible for, and let the river cut down through the ditch that they had constructed and turned the course of the river there and taken the water away from the City of Sioux Falls entirely, and exhausted and destroyed the City's water supply, and destroyed the power of the plaintiff, the Northern States Power Company, by taking the water from the stream at the point where the power plant is located, without in any way endangering the agricultural lands along this ditch, except so much of it as would be
124 washed away in forming this new bed of the river. I apprehend that we may reasonably find from the evidence here that such a cut-off in the river would be to the advantage of the land owners and prevent floods, so that it was not the drainage of the lands that was bothering the Commissioners, it was not the purpose to drain agricultural lands that impelled the Commissioners to act; the thing that impelled them to give this situation any consideration was the dangers that were threatened by reason of their having constructed these two ditches, and an effort to stop the ravages of the water they were conducting down there, by the construction of a substantial, adequate spillway. It was also necessary for them, in order to stop this threatened danger, to stop the ravages of the water at the point where it was cutting into their ditch. Certainly, this condition never could have existed if they had never built the ditch. They were responsible for it and it was their duty to maintain the ditch and to stop the ravages of the water cutting into it and through it.

This was one of the questions that they had before them, one of the problems that they had to solve, and they did proceed to construct this spillway in a substantial way and to dike, and with cement to hold the water in the stream at the place where it was cutting into the ditch. The statutes of the State of South Dakota specifically provide the duty and the method for the maintenance of these ditches. Section 8470 of the said Revised Statutes, provides as follows:

"Assessments for maintenance. For the cleaning and
125 maintenance of any drainage ditch established under the provisions of this article, assessments may be made upon the land owners affected, in the proportion determined for such drainage, at any time, upon the petition of any person setting forth the necessity therefor, and after due inspection by the Board of County Commissioners."

When this river cut through into the ditch, when the ditch became clogged in places and was not wide enough in others, when the spillway washed out by the force of the water they were conducting down the ditch, and the cutting of the bluff began and large areas of land were being washed away, and the other dangers were threatened, there was only one proposition presented to the Commissioners, and that was one of maintenance; was one of taking care of the water that they were conducting down these two ditches, No. 1 and No. 2.

Instead of proceeding frankly to maintain the ditches they had established in the manner provided by statute; instead of carrying out the obligations they had assumed when they brought the water down there through these ditches, and attempted to deliver it through this bluff into the river; instead of proceeding regularly under this statute to do that which it was their duty to do; instead of performing the obligation that they had assumed when they established the ditches, that of maintaining them, they proceeded to act upon the assumption that because they had conducted the water down into these ditches, and because of the inefficient manner in which
126 they had constructed the ditches and built the spillway, and all of these dangers were threatened, therefore, the plaintiffs, and others in Sioux Falls, were necessarily to be damaged. And, although a proper maintenance of these two ditches, No. 1 and No. 2, would stop the damage, would prevent any danger, the Commissioners evidently reasoned that because the plaintiffs and others in Sioux Falls were in danger, they must pay for the repair of these ditches. That could not be done by simply saying the ditches shall be repaired and the City of Sioux Falls, the plaintiffs, and others, shall pay for it, or pay a part of it, and therefore, they proceeded to do indirectly what it was conceded they could not do directly. In other words, they then began to look around and see what they would do in the way of taking care of the water and stopping these dangers.

At first it was proposed to change the spillway and conduct the water down in a southerly direction, through a slough or lake, into the river west of the City, and save the great fall that is involved at the point where the water enters the river from the spillway northeast of the city.

This was abandoned and they finally then pretended to act under a statute authorizing the abandonment of ditches. As a matter of fact there was no abandonment in good faith. No attempt to abandon the ditches. In fact, the reading of the resolution shows it was simply that they abandoned the spillway. That they filed a petition which was headed, "To reconstruct and improve Drainage Ditches No. 1 and No. 2, Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches
No. 1 and No. 2, and to pay therefor by assessment
127 upon the property, persons and corporations benefitted thereby."

This petition was filed in July, 1916, with the Board of County Commissioners. There had never been an abandonment of Ditch No. 1 and Ditch No. 2. There had been a pretended abandonment of the spillway. But the Commissioners proceeded then to construct a proper spillway on the identical location of the old one. In other words, no change whatever was made in the two ditches, No. 1 and No. 2, except to properly construct an efficient, adequate, substantial spillway, and prevent the river cutting from its bed into the ditch, cleaning out the ditch and repairing it, changing the gates at the head of the ditch where the flood waters were taken from the river.

Upon this petition, for this purpose, the Board of Commissioners assumed authority and power to re-christen this Ditch No. 1 and Ditch No. 2, and call it Ditch No. 1 and 2, and for the purpose of making these repairs and maintaining the old ditches under the new name, proceeded as if no ditch had been established, and as if the Ditches No. 1 and No. 2 were not in existence, and as if no obligation had been assumed by the drainage districts when they diverted the water down through the bluffs to the river, and proceeded to make the repairs and to reach out and say that the various plaintiffs were benefitted. Instead of charging the repairs and [maintainence] of the ditches to those who were responsible for their construction under the provisions of the statutes above
referred to, the Commissioners proceeded to assume
128 the right and authority to constitute a new drainage ditch without any abandonment of the old ditches, with

no thought of using new or different drainage in any way, except to maintain them and to perfect that which had been inefficiently constructed, with no thought or purpose except to repair the damage that had already been done, and prevent future damage.

Under these circumstances, I am of the opinion that the Commissioners were acting entirely without authority of law. There is no provision in the statutes of the State of South Dakota for the taking in of any other lands and assessing them, for the maintaining of a ditch after it has been constructed, and the benefits of its building have been assessed.

I am of the opinion that the forming of this new ditch was simply a pretense, and that the plaintiffs' pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed.

I am of the opinion that Section 8489 of said Revised Statutes, in regard to invalid and abandoned proceedings is not applicable to any situation such as existed here. That section has reference to the abandonment of a ditch that has been enjoined, vacated, set aside or declared void, and specifically provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expenses paid on the old ditch, and give credit for any payment
129 made upon the old ditch by people benefitted. No such proceeding was attempted to be followed in this case. The proceedings establishing old ditches No. 1 and No. 2 have never been held void, never been set aside, never been abandoned. They are in force today and are responsible for the manner in which the ditches were constructed and for any damages that result from their negligence.

Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and [maintainence] of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage Ditch No. 1 and 2 was ever established and has no existence.

I am of opinion that the proceedings of the Board of Commissioners in the repair and [maintainence] of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess

benefits to the property of the plaintiffs, insofar as they are located in the City of Sioux Falls, are void. Entertaining this view it follows that plaintiffs' prayer for an injunction should be granted.

I may suggest in conclusion, however, that even if the Court had found that Drainage District No. 1 and 2, was legally constituted, and that the Board of County Commissioners had the right to extend the benefits to property within the City of Sioux Falls, the proofs overwhelmingly bring the plaintiffs within the rule recently expressed in re Thomas et al. v. Kansas City Southern Railway Co., et al. (De-
130 cember term A. D. 1921,.....Fed.....) in that the taxation that is imposed upon each of the plaintiffs is a much higher rate, and upon a different basis, than the tax upon land lying within the district. As a matter of fact no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiffs' property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. Taking, for instance, the tax upon one of the plaintiffs, the City of Sioux Falls, for its miles of streets in the City of Sioux Falls, with no pretense that there is any method of taxation or measuring a benefit or a gain, that would produce even approximately correct general results, when considered with benefits to the lands in the district. Simply a vague, indefinite generality, indulged in by the engineer and adopted by the Board. Benefits purely fanciful, with no substantial basis. Take the railroads, different plaintiffs, there is no pretense that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all.

Referring to the testimony showing the manner of making assessments and the amount, in a general way: I think it fairly appears from the record in the case that the conten-
131 tion of the plaintiffs that the attempt to assess the property of these plaintiffs was an afterthought. It, in my judgment, is established that they could not be benefitted, even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reason-

able ground upon which the action of the Board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands. The plaintiff, Chicago, Rock Island & Pacific Railway Company, is simply arbitrarily assessed Eight Thousand Dollars, in raising a total of Three Hundred Thousand Dollars. The Northern States Power Company was assessed Fifty Thousand Dollars, one fifth of the entire expense although there is included in the pretended district agricultural lands something like twenty miles in length and several miles in width. The injustice of this is apparent when it is noted that the record disclosed that it was located upon the rapids of the Sioux River, in the City of Sioux Falls, had been located there for many years. It was, therefore, entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business.

The injury that was to be remedied by this improvement was one that had been caused by Drainage Ditch No. 1 and Drainage Ditch No. 2, one that could not have existed
132 but for the establishment of those ditches. The duty to maintain these ditches involved the duty to repair the break from the banks of the river, and the duty to prevent the taking of the water from the river, that would, or should, naturally flow therein to plaintiff's benefit.

Even if there had been a valid establishment of a drainage ditch at the time and place in controversy, and even if the Board of County Commissioners had jurisdiction, there was an entire failure to present any evidence upon which any benefit could possibly be predicated against this plaintiff. The engineer who pretended to work out the hypothetical benefit admitted that he was not a hydro-electric engineer, and therefore, not able to analyze and state the result of the different conditions of the water in the river. The suggestion applies with special force to the status of this plaintiff that the amount of benefits were fanciful, exorbitant and arbitrary, with no possible appreciation in the value of its property as a result of this improvement, and it is self-evident that upon no basis that can be used and applied to all of the property tributary to this ditch, could Thirty Thousand Dollars be ascertained as the reasonable contribution to be demanded of this particular plaintiff.

These suggestions are applicable in a general way to the attempted assessment of the property of all of the plaintiffs, and I am of the opinion that the plaintiffs have all properly invoked the aid of this Court from an arbitrary, unwarranted exercise of power by the Board of County Commissioners of Minnehaha County, who, without due process of law or compensation, threatened to deprive them, and each of them, of their property. What I have said, I think, should apply with equal force to all property in the City of Sioux Falls, attempted to be assessed by the Board of Commissioners for the maintenance of this ditch under the name of a new ditch. The responsibility for the maintenance of this ditch, for the repair of the break from the river into the ditch, and the change of the head gates, and the cleaning out of the ditch, and the repair and reconstruction of the spillway, was, and is, upon the two drainage districts responsible for their construction and maintenance, and the amount expended, some $250,000.00, which, with interest, now amounts to $300,000.00 or more, is a charge upon those districts to be assessed and made a lien upon the property within the districts, assessed in the proportion and collected in the manner,
133 provided by the statutes of the State of South Dakota for the maintenance of drainage ditches.

There is another and further suggestion. I am of the opinion that this reconstruction of the old spillway without change of location, the repair of the break from the river into the ditch, the cleaning of the ditch, the change of the head gates where the flood waters are taken from the river, everything that was done under this pretended establishment of a new ditch, could not be viewed in the same light or as serving the same purpose as the construction of the original
134 ditches, because the thing that caused the Board of Commissioners to take any action with reference to the condition that then existed was the danger that existed because of the conduct of the water down through these two drainage ditches to and through this spillway. The danger that was threatened was not that the agricultural lands would not be drained, but that immense damage was threatened, that the course of the river was to be diverted to this cut-off, that great areas of land were threatened to be cut away by this river one hundred feet deep, that the water supply of the City was threatened to be taken away because of this drainage ditch and this imperfect spillway. Because the water was to be taken from the river and all of the benefits of the river for several miles, through and around the City of Sioux Falls would be destroyed. The power of the

Northern States Power Company would be destroyed by taking the water from the river. If it had not been for those conditions, for these threatened dangers, no action would have been taken, the ditches would have continued to function as they had functioned before. If the spillway had been properly constructed originally, and if it had not proven inadequate, there would have been no cause for any action by the Board in the year 1916. Every consideration that impelled action by the Board was some phase of the threatened danger by reason of the inadequate and imperfect construction and [maintainence] of these two ditches. Neither of these considera-
135 tions that influenced the action of the Board had anything to do with draining agricultural lands.

It may be said that to remedy these wrongs constituted a public use, as referred to in the Constitution of the State of South Dakota. Admitting that that is true, we are confronted with the proposition that there has been no legislation conforming with the provisions of the Constitution, authorizing the Legislature to provide for the establishment of drainage ditch districts, and the naming of officers with the powers therein referred to. If, therefore, any claim were made that the Commissioners were acting under this authority, independent of the provision of law with reference to the drainage of agricultural lands, the answer is that the provision of the Constitution is not self-executing, and that no legislation has been provided carrying this provision of the Constitution into effect.

You may prepare proper orders in each case granting plaintiff an injunction as to all property located in the city of Sioux Falls and all Property not within the old Drainage District No. 1 and Drainage District No. 2. Provide an exception in behalf of the plaintiffs to the order of the Court denying the plea of the unconstitutionality of the drainage statute as applied to agricultural lands and the defendants a general exception to each order.

Yours truly,

JAS. D. ELLIOTT
U. S. District Judge.

Endorsed: Filed in the District Court on Feb. 23, 1922, at 4:15 P. M.

137 (Decree, March 2, 1922.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, St. Paul, Minneapolis and Omaha Railway Company, Plaintiff,

No. 100 vs. In Equity.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

and

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, and W. G. Porter, Intervening Defendants.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.; that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of the County of Minnehaha in the State of South Dakota,

138 Their agents, servants, employees, attorneys and successors in office, and each and every of them, be and are hereby forever restrained and enjoined from making any apportionment of benefits upon the plaintiff, herein, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, or upon any property belonging to the plaintiff (other than such property of the plaintiff as may have heretofore been assessed for the original construction of Drainage Ditch No. 1, or of Drainage Ditch No. 2, of Minnehaha County, South Dakota)

for the construction of a spillway, dams, retaining gates, ditches and for all other work done, or that may hereafter be done by or under the supervision of the Board of County Commissioners of the County of Minnehaha, South Dakota, in the matter of construction, or re-construction, repair, or maintenance of Drainage Ditch No. 1, and Drainage Ditch No. 2, or of said ditches under the designation of "Drainage Ditches No. 1 and No. 2" or as "Drainage Ditch No. 1 and 2", of Minnehaha County, South Dakota and that they and each of them are hereby perpetually restrained and enjoined from making any assessments on said property, or upon any parcel or portion thereof for the cost of the construction, reconstruction, repair, or maintenance of the said spillway, dams, retaining gates, ditches and other work heretofore done, or which may be hereafter done upon the said drainage ditches above referred to, or any of them, and from in any manner including any of the property of the plaintiff, the Chicago, St. Paul, Minneapolis and Omaha Railway Company (other than the property originally assessed for the construction of Drainage Ditch No. 1, or of Drainage Ditch No. 2) within the territory benefited by said drainage ditches, or either of them.

It is further ordered, adjudged and decreed that the defendant, Fred E. Ward as Auditor of the said County of Minnehaha, South Dakota, his agents, servants, employees, attorneys and successors in office, and each and every of them, be and are hereby forever restrained and enjoined from making any such apportionment of benefits, or from making, or levying any such assessment upon the plaintiff, the
139 Chicago, St. Paul, Minneapolis & Omaha Railway Company, or upon any of its property (other than that originally assessed for the construction of said Drainage Ditch No. 1 and said Drainage Ditch No. 2) and from certifying any such assessment to the County Treasurer of the said County of Minnehaha, South Dakota.

It is further ordered, adjudged and decreed that the defendant J. O. Anderson, as Treasurer of the County of Minnehaha, South Dakota, his agents, servants, employees, attorneys, and successors in office, and each and every of them, are hereby forever restrained and enjoined from filing any such assessment and from collecting any such assessment against the property of the plaintiff, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, (other than the property heretofore assessed for the original construction of the said Drainage Ditch No. 1 or of said Drainage Ditch No. 2).

It is further ordered, adjudged and decreed that this decree be and is hereby declared to be without prejudice to any of the rights of the plaintiff, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, to object to any apportionment of benefits for the construction of said spillway, dams, retaining gates, ditches and other work heretofore done, or that may hereafter be done by the Board of County Commissioners of Minnehaha County, South Dakota, in the matter of the construction or re-construction, repair, or maintenance of Drainage Ditch No. 1 or of Drainage Ditch No. 2, or of the Drainage Ditches No. 1 and No. 2, or of Drainage Ditch No. 1 and 2, of Minnehaha County, South Dakota, upon any of the property of the plaintiff which may heretofore have been assessed for the original construction of said Drainage Ditch No. 1 or of said Drainage Ditch No. 2, and without prejudice to any and all rights of the plaintiff to contest any such apportionment of benefits, or any assessment which may be
140 made under any such apportionment of benefits, or any act of the Board of County Commissioners of said County of Minnehaha in the construction of said spillway, dams, retaining gates, ditches and other work heretofore done, or which may be hereafter done by or under the supervision of the Board of County Commissioners of said Minnehaha County, South Dakota, in the matter of the construction or re-construction, repair, or maintenance of said Drainage Ditch No. 1, or of said Drainage Ditch No. 2, or of said Drainage Ditches No. 1 and No. 2 or of said drainage Ditch No. 1 and 2, and, that so far as this decree is concerned, the rights of the plaintiff, the Chicago, St. Paul, Minneapolis & Omaha Railway Company with respect to the making of any apportionment of benefits, or the levying of any assessment against any of its property heretofore assessed for the original construction of said Drainage Ditch No. 1, or of said Drainage Ditch No. 2, are expressly saved and reserved and shall remain the same as if this suit had not been instituted or this decree entered herein.

It is further ordered, adjudged and decreed that the plaintiff herein, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, have and recover against the defendants herein, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota and against the intervening defendants herein, Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux

Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt,
141 South Dakota, Dakota Trust and Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter, its costs and disbursements herein taxed and allowed in the sum of .... Dollars (the amount thereof to be inserted herein by the Clerk of the Court after the costs shall have been taxed by him).

Done in open Court, at Sioux Falls, in said Southern Division of the District of South Dakota, on the 2 day of March 1922.

By the Court:

JAS. D. ELLIOTT,

(Seal of Court) Judge.

Attest:

Jerry Carleton,
Clerk.

To the entry of the foregoing decree the plaintiffs, the defendants and the intervening defendants duly and severally excepted, which exceptions are allowed by the court.

Dated March 2nd, 1922.

JAS. D. ELLIOTT, Judge.

142 Endorsed: Filed in the District Court on Mar. 2, 1922, at 4:15 P. M.

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143 (Assignment of Errors.)

And now, on this 25" day of August, A. D. 1922, come the defendants, by their Solicitors, Elbert O. Jones and L. E. Waggoner, and the intervening defendants, by their Solicitor, **Norman B. Bartlett, and say that the decree entered in the** above entitled cause on the 2nd day of March, A. D. 1922, is erroneous and unjust to the defendants.

First:

Because plaintiff's bill of complaint herein does not set forth any matter of equity entitling the plaintiff to the relief prayed for and it affirmatively appears from said
144 bill of complaint that the plaintiff has a plain, adequate and complete remedy at law.

Second:

Because the bill of complaint does not set forth any matters of equity in addition to the pretended constitutional question, or any special circumstances to bring the case under some recognized head of equity jurisdiction, and it is necessary to allege and prove some special circumstances in addition to the constitutional question, and thereby bring the case under some recognized head of equity jurisdiction, in order that this Court shall have jurisdiction of said matters.

Third:

Because the bill of complaint fails to set forth facts sufficient from which this Court can infer or presume that there will result a multiplicity of suits, irreparable injury, or a cloud cast upon the title of its property, and it is necessary to specifically allege facts from which this Court can infer that either a multiplicity of suits, irreparable injury or a cloud will be cast upon the title of its property as a direct result of the action that plaintiff is attempting to enjoin, and such allegations must be specific allegations of fact, and not conclusions.

Fourth:

Because it affirmatively appears from the face of plaintiff's bill of complaint, and the record herein, that there is no jurisdictional amount in controversy in this case at this time, and can be none, and that, therefore, this action is prematurely brought, for the reason that no assessment, levy or tax has been, in fact, made, assessed, equalized, fixed or levied against the property of the plaintiff, or at all.

Fifth:

Because it affirmatively appears from plaintiff's bill
145 of complaint, and the record herein, that the State Tribunal having jurisdiction of said drainage ditch proceedings, was enjoined by this proceeding before such State Tribunal had had an opportunity to perform its statutory duty to determine, equalize, assess, fix or levy the amount of benefit, assessment or tax, if any, chargeable against the

property of the plaintiff, and for this Court to maintain jurisdiction before such State Tribunal had performed its full statutory duty, determined, equalized, assessed and fixed the amount of benefit, assessment or tax, was a usurpation of the authority invested in the State Tribunal, and an attempt to substitute this Court for such State Tribunal; and for the further reason that there is no provision of law giving this Court original jurisdiction over said matters.

Sixth:

Because the allegations of plaintiff's bill of complaint herein involve and present for litigation the determination of facts and matters controlled and governed by the drainage statutes of South Dakota, which, by their terms, create and provide a special tribunal with exclusive original jurisdiction to try and determine the questions presented in said bill of complaint, which determinations of said State Tribunal are final and conclusive upon this Court in this action, for the reason that this Court has no original jurisdiction by a bill in equity, to direct, reject, or control the proceedings and determinations of that tribunal, and thereby take away from that tribunal the power of discretion, and the exercise of its judgment in arriving at a proper determination of the matters before it.

Seventh:

Because until the tribunal created by the drainage statutes of South Dakota has exercised its judgment and discretion in the determination of questions of fact properly before
146 it, and the necessary steps of procedure have been taken, and it has finally determined, equalized and fixed the proposed tax or assessment, if any, against the plaintiff's property, this Court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, for the reason that until such proposed assessment, tax or servitude has been equalized and fixed and assessed, this action is premature.

Eighth:

Because the undisputed evidence shows that on or about December 4, 1920, an equity suit was instituted in the State Circuit Court, within and for Minnehaha County, South Dakota, the same being a court of general jurisdiction and having jurisdiction over the subject matter therein presented, by one Oluf O. Gilseth, being a person belonging to the same class of persons as the plaintiff herein, whose lands were affected by the construction of Drainage Ditch No. 1 and 2, and

against whose lands the proportion of benefits for the construction of said ditch had been proportioned at the same time, upon the same basis, and in like manner and under the same law as the proportion of benefits to the land of this plaintiff, which said action was brought by said Oluf O. Gilseth for himself, and as a representative of the class to which he and this plaintiff belong, and which action was brought against the defendants herein, and was instituted, tried and determined with notice to and knowledge by, approval, acquiescence and consent of this plaintiff, its officers, agents and attorneys, and in which said case the same facts were alleged and relied upon in the bill of complaint of the said Oluf O. Gilseth as are alleged and relied upon by the plaintiff herein in its bill of complaint, and which bill of complaint prayed for the same relief, and which said action came on for trial, in which trial this plaintiff was entitled to be
147 heard, on the 31st day of January, 1921, and thereafter said State Court entered its judgment and decree dismissing said action upon its merits, and denying the plaintiff the right to an injunction against these defendants, which said judgment and decree is now in full force and effect, and which determination is binding upon this plaintiff, and is, therefore, a bar to this action, for the reason that all matters presented by plaintiff's bill of complaint herein are res adjudicata.

Ninth:

Because the uncontradicted evidence in this case shows that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, and upon which the drainage ditch designated as Drainage Ditch No. 1 and 2, was ordered established and constructed, and the notice of hearing said petition given pursuant to law, and the resolution of the Board upon the hearing of said petition establishing said ditch, all contained a description of plaintiff's property, and alleged that the same was affected thereby, and said resolution determined that plaintiff's property so described was affected by said Drainage Ditch No. 1 and 2, which determination, unappealed from, is now final and conclusive upon this plaintiff, and this Court, and, therefore, this Court was unwarranted in determining and decreeing that plaintiff's property is not affected by Drainage Ditch No. 1 and 2, no extrinsic fraud being alleged in plaintiff's bill of complaint.

Tenth:

Because the undisputed evidence in this case shows that the plaintiff's property is receiving some benefit, and that it has not exhausted its statutory remedy for an equalization of

such benefits, and its only complaint is that too many units of benefit have been apportioned against its property; and, therefore, this Court has no jurisdiction under its gen-
148 eral equity powers to correct an unequal or unjust assessment, since the statute prescribes a method for reviewing or correcting unequal or unjust assessments.

Eleventh:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was a new project, with plaintiff's property included therein, which finding and judgment of said Tribunal are binding upon this plaintiff and upon this Court, and can not be attacked in this collateral action, for the reason that said Tribunal is, by the drainage law of the State of South Dakota, given jurisdiction to determine the nature, kind and character of the proposed drainage, and the description of and the amount of property affected by said drainage project, and having made said findings and judgment, and this plaintiff not having appealed therefrom, said plaintiff is now bound thereby.

Twelfth:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was conducive to the public health, convenience and welfare of the territory described in the petition of the City of Sioux Falls, F. L. Blackman and others, and was necessary and practicable for draining agricultural lands, which findings and judgment of said Tribunal are now binding upon this plaintiff and
149 upon this Court, and cannot be attacked in this collateral action, for the reason that, by the drainage law of the State of South Dakota, the Board of County Commissioners are given authority to determine whether or not a proposed drainage ditch will or will not be conducive to the public health, convenience and welfare of the territory described in the petition therefor, or necessary and practicable for draining agricultural lands; and having found in the affirmative in both instances, and the plaintiff herein not having

appealed from such determination, the same is now binding upon this plaintiff and upon this Court.

Thirteenth:

Because no facts have been alleged in plaintiff's bill of complaint constituting extrinsic fraud on the part of the Board of County Commissioners of Minnehaha County, South Dakota, or any one else, in filing the petition of the City of Sioux Falls, F. L. Blackman and others, or in the allegations contained therein, or the resolution or other proceedings on, and prior to, or in the establishment of said drainage ditch designated as "Drainage Ditch No. 1 and 2", on October 3, 1916; and there is no evidence in the record of any extrinsic fraud on behalf of the Board of County Commissioners, or anyone else, in any of said proceedings, and, therefore, the determination of the facts found by said Board in said resolution of October 3, 1916, are now binding and conclusive upon this plaintiff and upon this Court, and this Court has no right, authority, or jurisdiction to enter upon, attempt to decide, to decide or re-litigate such questions of fact as were previously determined by such special Tribunal.

Fourteenth:

Because the undisputed evidence in this case shows that more than five years have elapsed after this plaintiff
150 had actual knowledge and legal notice of the establishment and construction of Drainage Ditch No. 1 and 2, and during all of said time this plaintiff took no steps to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars ($250,000.00) thereon and plaintiff's bill of complaint wholly fails to make any distinct averments, and none of the evidence tends to excuse this unwarranted delay, and for these reasons this Court should not come to its relief.

Fifteenth:

Because the drainage statutes of South Dakota provide a fixed and determinable basis, method and rule of apportionment of benefits, and, pursuant thereto, the Board of County Commissioners of Minnehaha County, South Dakota, applied such fixed and determinable basis, method and rule of apportionment of benefits, which will probably produce approximately correct general results as to the benefits to plaintiff's property, as well as all other property in the drainage district, and, therefore, such apportionment is not arbitrary, and this Court cannot usurp the power of the Board to

equalize the proportion of benefits as provided by
151 said statutes.

Sixteenth:

Because the evidence wholly failed to show that there would result a multiplicity of suits, or irreparable injury, or a cloud cast upon the plaintiff's property, and also failed to show any circumstances to bring the case under some recognized head of equity jurisdiction, and the evidence does show that the plaintiff had a plain, adequate and complete remedy at law.

Seventeenth:

Because all the evidence now shows that there is no jurisdictional amount in controversy in this action, and that, therefore, this action was prematurely brought, in that the apportionment had not been equalized, and no tax had ever been assessed or levied against the plaintiff's property, or any other property, and that the amount of such tax, if any, and, therefore, the amount in controversy herein, has not been, and cannot be, determined until after such equalization and final assessment has been made, as provided by the law of South Dakota, and the uncontradicted evidence shows that said equalization of the apportionment of benefits was prevented by the temporary restraining order and the final decree in this case.

Eighteenth:

The Court erred in not adjudging and decreeing that on October 3, 1916, Drainage Ditch No. 1 and 2 was duly and legally established by the Board of County Commissioners of Minnehaha County, South Dakota, for a public purpose, including but not limited to the drainage of agricultural lands, for the reason, that the Constitution of the State of South Dakota and Section 8458 of the Revised Code of South Dakota, 1919, provide therefor.

Nineteenth:

The Court erred in not adjudging and decreeing that the proceedings taken by the Board of County Commissioners of Minnehaha County, South Dakota, upon the petition of the City of Sioux Falls, F. L. Blackman and others, filed with the County Auditor on August 3, 1916, and upon which Drainage Ditch No. 1 and 2 was established on October 3, 1916, constituted the establishment of an entirely new drainage pro-

ceeding, and gave the Board of County Commissioners jurisdiction to construct such drainage as a new project, for the reason that such petition prayed for the construction of a drainage ditch over the exact line of drainage ditches
152 previously abandoned, and contemplated a more comprehensive and perfect drainage system for the purpose of draining and benefitting additional property, in compliance with and as authorized by Sections 8458, 8476 and 8489 of the Revised Code of South Dakota, 1919, and the undisputed evidence shows the work done consisted of about eight miles of canalizing the river, doubling the capacity of the ditch and outlet, building dikes, dams and controlling works, and an adequate spillway or outlet to said ditch, at a total cost of over Two Hundred Fifty-five Thousand Dollars ($255,000.00), which was more than double the amount of the total assessments for old Drainage Ditch No. 1 and Drainage Ditch No. 2, which was the sum of One Hundred Twenty-seven Thousand, Seven Hundred Six and 10/100 Dollars ($127,706.10).

Twentieth:

The Court erred in not adjudging and decreeing that plaintiff's land was subject to assessment for benefits which it received, if any, under the establishment and construction of Drainage Ditch No. 1 and 2, without regard to whether its lands had been assessed and included within the assessment district of Drainage Ditch No. 1 and Drainage Ditch No. 2, or not, for the reason that Drainage Ditch No. 1 and 2, as established on October 3, 1916, was established as a new project upon due and legal notice to the plaintiff, and in the manner provided by the drainage statutes of South Dakota.

Twenty-First:

The Court erred in entering its decree herein in favor of the plaintiff and against the defendants, upon this plaintiff's bill of complaint and the amendment allowed thereto, for the reason that said plaintiff's offer to amend said bill of complaint came too late, and long after plaintiff's attention was called to the fact that its bill contained no allegation
153 of arbitrary acts by objection to the introduction of testimony during the trial, and after the entire case had been tried, argued and submitted, and briefs had been filed twenty days, which amendment injected an entirely new cause of action into the bill of complaint, and to overcome which, the Court refused to receive evidence showing or tending to show that plaintiff's property was receiving a substantial benefit, and that the apportionment was not arbitrary and

which amendment, when offered, did not conform to the facts established upon said trial, in that said proposed amendment assumed that the Board of County Commissioners were acting under jurisdiction obtained in the establishment of old Drainage Ditch No. 1 and Drainage Ditch No. 2, and not under the new drainage proceedings designated as "Drainage Ditch No. 1 and 2", as shown by the undisputed evidence; assumed that the equalization of the proportion of benefits had been had and assessment duly made thereon, whereas, all the evidence shows that merely a tentative fixing of the proportion of benefits had been made; assumed that the property of plaintiff had not been, and never could be, benefited by old Drainage Ditch No. 1 and Drainage Ditch No. 2 while the uncontradicted evidence shows a substantial benefit from the construction of Drainage Ditch No. 1 and 2, and that its property had been assessed and the assessment paid for benefits received by the construction of Drainage Ditch No. 1 and Drainage Ditch No. 2; assumed that the assessment for benefits had been made, while the uncontradicted evidence shows that no equalization or assessment of benefits had ever been made, and cannot be made until after the proportion of benefits has been equalized and finally fixed; assumed that the acts of the Board in making the so-called assessment were arbitrary, while the evidence shows that no assessment or equalization of benefit has ever been made; and further, said amendment does not attack the drainage law as arbitrary, or the unit provided by law as arbitrary but alleges that the acts of the Board in fixing the amount
154 of the benefits to plaintiff's property were arbitrary, speculative and unjust, whereas, all the evidence shows that the Board, with its Engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received by plaintiff's property, using the fixed and determinable basis, method and rule of apportionment provided by the drainage law of South Dakota, and the undisputed evidence further shows on behalf of both parties that some benefit was received by the plaintiff; assumed the amount of the assessment and made an issue as to the amount of benefit, if any, plaintiff received, which matter this Court has no jurisdiction to determine; assumed and made an issue of the inequality of the so-called assessment upon plaintiff's property, and other agricultural land, which issue is within the exclusive jurisdiction of the State Tribunal, and this Court in this action has no jurisdiction to try or determine the same.

Twenty-second:

The Court erred in not adjudging and decreeing that the plaintiff herein is not in a position to question the regularity of the proceedings in the establishment and construction of Drainage Ditch No. 1 and 2, as an independent drain-
155 age proceeding, as it, by its officers and agents, had actual knowledge and legal notice of the proceedings taken to establish said drainage; as it, through its officers and agents, saw the work in the course of construction, assisted in the work of construction thereof, by furnishing services and materials used therein, with knowledge that such services and materials were furnished therefor, and were being used in the construction of said drainage, and received compensation for said services and materials so furnished and used; as it, through its officers and agents, urged and encouraged the Board of County Commissioners to take the action and do the work which was done under such drainage proceedings for its benefit, and as it is now, and has been for more than three years last past, receiving protection and substantial benefits from said drainage construction, with the full knowledge that there was no manner of paying for such construction except by assessment upon the property benefited, included in which was plaintiff's property, all without protest against the doing of any such work, or the extent or manner thereof, until such work and drainage project had been substantially completed, and until this action was brought to restrain the making of an assessment to pay for the cost of said construction, and, therefore, the plaintiff is now estopped from questioning said proceedings and maintaining this action.

Twenty-third:

The judgment and decree herein is not supported by the evidence, and is contrary to law, in that it appears from the undisputed evidence that the outlet to old Drainage Ditch No. 1 was destroyed and abandoned and thereby said ditch abandoned and that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, fully complied with the requirements of the drainage statutes of South Dakota for the establishment of a new drainage, and that thereafter all the statutory requirements were duly and fully followed and pursued, and such proceedings were had that, pursuant to statute, on October 3, 1916, the Board of County Commissioners of Minnehaha County, upon due notice and hearing of said petition, ordered and adjudged the establishment of said drainage as a new project and drainage ditch, and desig-

nated it as "Drainage Ditch No. 1 and 2", and further adjudged and decreed that the construction thereof was for a public purpose, and was necessary and practicable for draining agricultural lands, and that the property of this plaintiff was included within the drainage area, and affected
156 thereby, which property was described in the petition, notice, and said resolution and judgment, which resolution and judgment was never appealed from by this plaintiff, or anyone, and is now in full force and effect, and has been for more than six years last past; that there is no evidence at all in the record that the plaintiff has been in any manner prevented from fully presenting its defense, if any, to the allegations and prayer contained in said petition of the City of Sioux Falls, F. L. Blackman, et al, or from fully trying all the issues therein presented, or that the jurisdiction of the Board of County Commissioners was imposed upon.

And it further appears from the undisputed evidence that an apportionment of benefits has been made for the payment of the costs of construction of said Drainage Ditch No. 1 and 2, and that the law provides, and the County Commissioners applied, after personal inspection, and exercising their best judgment, a fixed and determinable basis, method, and rule of apportionment of benefits, which will probably produce approximately correct general results as to the plaintiff's property, as well as all other property in the drainage district; and that no equalization of benefits or assessment has been had thereon, and that no legal charge or servitude has yet been placed upon the property of plaintiff, or anyone else, and that this action is premature.

Twenty-fourth:

The said decree is not sustained by the evidence, but is contrary thereto, in that it appears from the undisputed evidence that Drainage Ditch No. 1 and 2 was established as a new ditch by the Board of County Commissioners of Minnehaha County, South Dakota, on October 3, 1916, included in which drainage district was plaintiff's property, and of which proceedings this plaintiff had knowledge and legal notice for more than six years last past, and has never taken any
157 steps prior to the institution of this action, to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars ($250,000.00) thereon, and has wholly failed to establish any lawful excuse for said unwarranted delay; and that all steps taken by the Board of County Commissioners leading up to and the establishment of said Drainage Ditch No. 1 and 2, were war-

ranted in law, and said Board was lawfully acting under and in conformity with the Constitution and drainage statutes of the State of South Dakota; and that said drainage ditch was petitioned for, and lawfully established for a public use and purpose, and for the purpose of draining agricultural lands; that the apportionment of benefits, as made by the Board of County Commissioners, was made pursuant to and in conformity with the method and rule laid down by the drainage statutes of South Dakota, and after a personal inspection and deliberation by said Board, applied in conformity therewith in such a manner as will probably produce approximately correct general results as to the benefits enjoyed by plaintiff's property, as well as all other property in the drainage district and that plaintiff's property is enjoying substantially the amount of benefit apportioned to it.

Twenty-fifth:

For all the reasons and errors aforesaid, the Court erred in not entering and rendering a decree in favor of the defendants, and against the plaintiff, dismissing its bill of complaint, and denying the injunction herein, and in not entering its judgment and decree in accordance with the prayer of defendants' answers.

Wherefore, defendants pray that the judgment and decree of said Court be reversed, with directions to enter a decree in favor of the defendants and against the plaintiff, dismissing plaintiff's bill, as prayed for in defendants' answers.

ELBERT O. JONES and
L. E. WAGGONER
Solicitors for Defendants.

NORMAN B. BARTLETT
Solicitor for Intervening Defendants.

158 Endorsed: Filed in the District Court on Aug. 25, 1922, at 5 P. M.

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159 (Petition for appeal and allowance thereof.)

To The Honorable James D. Elliott, Judge of the United States District Court Within and for the Southern Division of the District of South Dakota:

The above named defendants and intervening defendants feeling themselves aggrieved by the decree made and entered in this case on the 2nd day of March, A. D. 1922, do hereby

appeal from said decree to the Circuit Court of Appeals, for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that their appeal be allowed, and that citation issue, as
160 provided by law, and that a transcript of the record, proceedings and papers, upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Paul, Minnesota, and your petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

ELBERT O. JONES and
L. E. WAGGONER
NORMAN B. BARTLETT
Solicitors for Defendants and Intervening Defendants.

The foregoing petition granted, and the appeal allowed upon giving bond, conditioned as required by law, in the sum of One Thousand and No/100 Dollars ($1,000.00).

JAS. D. ELLIOTT
Judge of the United States District Court within and for the Southern Division of the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25,1922, at 5 P. M.

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161 Bond On Appeal.

Know All Men By These Presents: That we, A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, as Principals, and the Southern Surety Company of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the Chicago, St. Paul, Minneapolis and Omaha Railway Company, appellee in the above cause, in the sum of One Thousand Dollars ($1,000.00) conditioned that, where-
162 as on the 2nd day of March, A. D. 1922, in the District Court of the United States, for the Southern Division of the District of South Dakota, in a suit pending in that court wherein the Chicago, St. Paul, Minneapolis and Omaha Railway Company was plaintiff and A. G. Risty, et al, were de-

fendants, and the Minnehaha National Bank of Sioux Falls, South Dakota, et al, were intervening defendants, numbered on the Equity Docket as 100, a decree was rendered against the said A. G. Risty et al, defendants, and the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, and the said A. G. Risty et al, defendants and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, having obtained an appeal to the Circuit Court of Appeals for the Eighth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation directed to the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals, for the Eighth Circuit, to be held in the City of St. Paul, in the State of Minnesota, on the 2nd day of May A. D. 1923, next.

Now, if the said A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

A. G. RISTY
Signing for all Defendants.

THE MINNEHAHA NATIONAL BANK OF SIOUX FALLS,
H. V. Harlan, V. P.
Signing for all Intervening Defendants.

SOUTHERN SURETY COMPANY OF DES MOINES, IA.
By C. T. Charnock,
Attorney-in-Fact, Surety.

(Southern Surety Company Corporate Seal)

163 State of South Dakota,
County of Minnehaha—ss.

On this 15th day of August, 1922, before me H. B. Charnock, a notary public in and for said County, and State, personally appeared C. T. Charnock, well known to me to be the Attorney-in-fact of the Southern Surety Company, a corporation that is described in and that executed the above and foregoing instrument and duly acknowledged to me that said corporation executed the same.

And I further certify that at the same time the said C. T. Charnock exhibited to me the original certificate of authority issued to said Company by the Commissioner of the State of South Dakota, and that the following is a true, perfect and complete copy thereof:

STATE OF SOUTH DAKOTA
DEPARTMENT OF INSURANCE,

Renewable Annually.

Office of the Commissioner
Company's Certificate of Authority.
No. 11050

Whereas, The Southern Surety Company, a corporation organized under the Laws of Iowa, has filed in this Office a sworn statement exhibiting its condition of business for the year ending December 31st, 1921, conformable to the requirements of the Laws of this State regulating the business of Insurance, and

Whereas, The said Company has filed in this office a duly certified copy of its charter, with certificate of organization, and has complied with all the requirements of the Insurance Laws aforesaid;

Now Therefore, I, W. N. Van Camp, Commissioner of Insurance of the State of South Dakota, pursuant to the provisions of said laws do hereby certify that the above
164 named Company is fully empowered through its authorized agents to transact its appropriate business of Accident and Health, Liability, Workmen's Compensation, Fidelity, Surety, Burglary, Theft, Plate Glass and Automobile Insurance in this State according to the Laws thereof, until the last day of February, 1923.

In Testimony Whereof, I have hereunto set my hand and official seal at Pierre, this First Day of March, A. D. 1922.

(Notarial Seal)

W. N. VAN CAMP,
Commissioner of Insurance.
By W. J. Madden,
Deputy Commissioner.

H. B. CHARNOCK,
Notary Public, South Dakota.

The foregoing bond is hereby approved.

JAS. D. ELLIOTT,
Judge of the United States District Court
Within and for the Southern Division of
the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25, 1922, at 5 P. M.

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166 (Praecipe for Transcript.)

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the Circuit Court of Appeals of the United States, for the Eighth Circuit, by including therein the following:

1. The Bill of Complaint, except the title and verification, and except the Exhibits thereto attached.

2. Order Allowing Intervention.

3. The following portions of Defendants' Answer, viz:

(a) Paragraphs "A", "B", "C", "D", and "F" of Defendants' Special Answer.

(b) Introduction and Paragraphs "First" to "Twenty-second" inclusive, of Defendants' General Answer; and

(c) Paragraphs "VIII", "IX", "XII", "XIV" and "XV" of Defendants' Affirmative Defense, together with the prayer.

4. The Statement of the Evidence Submitted, and Approved by the Court.

5. Order Permitting Amendment of Bill, and Exception taken to said Order.

6. Amendment to Bill.

167 7. The Opinion and Decree of the District Court.

8. Assignments of Error.

9. Petition for Appeal.

10. Order Allowing Appeal.

11. Bond upon Appeal, and Approval of same.

12. Notice of Deposit of Statement of Evidence with Clerk and Proof of Service thereof.

13. Approval of Court of the Statement of the Evidence.

14. Citation in Appeal, and Service thereof.

15. Praecipe and Clerk's Certificate.

Dated at Sioux Falls, South Dakota, this 23 day of September, A. D., 1922.

E. O. JONES
N. B. BARTLETT,
Solicitors for Appellants.

Endorsed: Filed in the District Court on Sept. 25, 1922.

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169 (Notice to plaintiff of lodgment of statement of evidence in District Clerk's office.)

To C. O. Baily, Solicitor for Chicago, St. Paul, Minneapolis & Omaha Railway Company, Plaintiff:

Please take notice that the Appellants have prepared a Statement of the evidence to be included in the record upon the appeal of the above entitled matter to the Circuit Court of Appeals, for the Eighth Circuit, and has lodged the same in the office of the Clerk of this Court for your examination, (a copy of which Statement is herewith served upon you).

You will further take notice that the Appellants will ask the Court, at the Government Building, in the City of Sioux Falls, in said District of South Dakota, at ten o'clock in the forenoon of the 5th day of October, A. D. 1922, or as soon thereafter as counsel can be heard, to approve said Statement.

Dated this 25 day of September, A. D. 1922.

E. O. JONES
N. B. BARTLETT
Solicitors for Appellants.

Service of the foregoing Notice this 23 day of September, A. D. 1922 is hereby acknowledged, also service of the Statement therein referred to.

. . . . . .

170 Solicitor for Chicago, St. Paul, Minneapolis & Omaha Railway Company, Plaintiff.

Endorsed: Filed in the District Court on Sept. 25, 1922.

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171 (Affidavit of service of notice to plaintiff of lodgment of statement of evidence.)

State of South Dakota,
County of Minnehaha—ss.

T. G. Owen, being first duly sworn, on oath deposes and says: That he is a citizen and elector of the County of Minnehaha and State of South Dakota; that upon this 25th day of September, A. D. 1922, he served the hereunto attached Notice of Filing the Praecipe in the above entitled matter, also Notice of lodgment of Statement with the Clerk, and Notice of time when the Court will be asked to approve said Statement, also a copy of the proposed Statement, upon C. O. Bailey, Solicitor for the plaintiff therein, at Sioux Falls, South Dakota, by delivering to and leaving with him true and correct copies of such Notice and said Statement.

T. G. OWEN.

Subscribed and sworn to before me this 25 day of September, A. D. 1922.

(Notarial Seal) J. H. BARTLETT,
Notary Public, South Dakota.

Endorsed: Filed in the District Court on Sept. 25, 1922.

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173 (Additional praecipe for transcript.)

The Clerk of this Court is hereby directed to incorporate into the transcript upon the appeal in the above entitled suit for the use of the Circuit Court of Appeals of the United States for the Eighth Circuit, the following portions of the record in addition to those indicated in the praecipe filed by the defendants, and the intervening defendants, to-wit:

1. The title of the bill of complaint.

2. Exhibit "B" to the bill of complaint.

174 3. Exhibit "C" to the bill of Complaint.

4. The following portions of the answer of the defendants, to-wit:

(a) The title.

(b) Paragraphs 1, 7 and 11 of defendant's affirmative defense.

(c) The following Exhibits to the answer of the defendants, to-wit: The petition of F. L. Blackman and others upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had and order for filing said petition, the resolution for survey under said petition, the resolution fixing line and width of the Ditch and time and place for hearing the petition of F. L. Blackman and others, the published notice of hearing said petition (said notice not being attached to the original answer but having been filed after the filing of the answer together with the stipulation that it might be considered as a part of the answer), and the resolution establishing Drainage Ditch No. 1 and 2, all of the said exhibits to be inserted as a part of said answer.

5. Plaintiff's Praecipe for additional portions of the record.

BAILEY & VOORHEES,
Solicitors for Plaintiff.

Endorsed: Filed in the District Court on Oct. 27, 1922, at 3 P. M.

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176 (Statement of Evidence.)

(Filed in U. S. District Court on January 25, 1923.)

The above entitled suit came on for hearing before the Court on December 15th, 1921, before the Honorable J. D. Elliott, Presiding Judge, plaintiff appearing by Mr. R. L. Kennedy and Mr. C. O. Bailey, its solicitors, defendants appearing by Mr. E. O. Jones, their solicitor, and the intervening defendants appearing by Messrs. Porter & Bartlett, their Solicitors, the following proceedings were had:

177 Evidence of Plaintiff.

F. E. WARD, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Stipulation.

"It is stipulated and agreed between all parties that the testimony received in these consolidated cases shall be considered as received in each case, so far as such testimony is pertinent to such case, and that such testimony apply only to that case."

Q. You may state your name?

The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set

aside, for the reasons that the said bills of complaint fail to state any matter of equity entitling the plaintiffs to the relief prayed for, nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this court has no jurisdiction over these matters, because plaintiff's bills of complaint herein do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this court can infer or presume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property, or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that the plaintiffs have a plain, adequate and complete remedy at law.

178 For the further reason that it affirmatively appears from the fact of the bills of complaint and record, that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits, assessment or tax chargeable against the property of the plaintiffs, if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multiplicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determinations of the state tribunal upon questions of fact before them, are conclusive upon this court in this action, this court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings. Motion denied, defendants and intervening defendants excepting.

179 The defendants and intervening defendants then objected to the introduction of any testimony for the reason and on the ground urged in the motions to dismiss. Objection overruled. The Defendants and intervening defendants excepting.

(Testimony of Witness F. E. Ward)

I am the auditor of Minnehaha County, South Dakota; drainage ditch records A and B and Commissioners records 5 and 6 are part of the records of Minnehaha County.

Plaintiff offered in evidence the following portions of Drainage Ditch Record A.

July 1, 1907.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioner respectfully represents: That he is a resident of the City of Sioux Falls in said County; that he is the owner of certain lands in the valley of the Big Sioux River north and west of the City of Sioux Falls in said County, viz: Blocks Three (3) and Thirty-one (31) of Meredith's First Addition to Sioux Falls, according to the recorded plat thereof; the Northwest Quarter of the South West Quarter of Section Eighteen (18), and the South West Quarter of the North West Quarter of said Section Eighteen (18), except the railroad right of way, all in Township One Hundred and One (101) North, of Range Forty Nine (49); also a certain
180 tract or parcel of land bounded and described as follows, to-wit:—Commencing at a point twenty-four (24) rods north of the southeast corner of the North-West quarter of Section Thirty Two (32), in Township One Hundred and Two (102) North, of Range Forty-Nine (49); running thence north ten (10) rods; thence west eighty (80) rods; thence south ten (10) rods; thence east eighty (80) rods to the place of beginning all of which lands will be affected by the drainage herein proposed;

Your petitioner further represents that it is necessary for the drainage of agricultural lands in said Big Sioux Valley between the dam of the Cascade Milling Company in the City of Sioux Falls and the City of Dell Rapids that the proposed drainage be established.

Your petitioner further represents that the establishment of such drainage will be conducive to the public health, convenience and welfare of the inhabitants of the City of Sioux Falls and of the inhabitants of the Big Sioux Valley between Sioux Falls and Dell Rapids that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in said valley and will prevent great damage to the buildings and their contents; and will pre-

vent great damage to the highways in said County, and also to the railroad tracks and rights of way of the Chicago, Milwaukee & St. Paul Railway Company and of the South Dakota Central Railway Company in said valley; and will prevent damage and destruction of many bridges and their approaches in said valley;

Your petitioner further represents that the general purpose of said proposed drainage is, among other things, to
181 prevent the annual or occasional flooding of lands in said valley caused by high water in said river, by providing a drain to carry off all the water of said river above its normal stage or above the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the center line of Section Five (5) in Township One Hundred and One (101) North of Range Forty Nine (49), and running thence southeasterly across said Section Five (5), Section Four (4) and the North Half of Section Nine (9), all in Township One Hundred and One (101) North of Range Forty Nine (49) and east of the buildings of the State Penitentiary to a terminal point on said river in the City of Sioux Falls near the center of Section Nine (9) in said Township, the length of which will be approximately one and three-fourths miles.

Your petitioner further represents that the territory likely to be affected thereby is that portion of the Townships of Dell Rapids, Sverdrup, Mapleton, Wayne and Sioux Falls and of the City of Sioux Falls in the immediate valley of the Big Sioux River subject to overflow from said river.

Dated July 1, 1907.

WILLIAM H. LYON
Petitioner.

State of South Dakota,
County of Minnehaha—ss.

Personally appeared William H. Lyon, who being first duly sworn, deposes and says; that he is the petitioner in the above entitled matter; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein

stated on information and belief, and as to those matters he believes it to be true.

WILLIAM H. LYON

Subscribed and sworn to before me, this 1st., day of July, 1907.

M. E. McDOUGAL,
Notary Public.

(Notarial Seal)

Petition for Drainage, Filed this 1st day of July, 1907.

C. E. HILL, County Auditor.
By H. W. Ward, Deputy.

Plaintiff offered and there was received in evidence pages 562 and 563 and the first two lines of 564 of Commissioners' Record 5, it being a resolution of the Board of County Commissioners fixing the route and width of the proposed ditch and the time and place of hearing the petition of W. H. Lyon for the proposed drainage ditch thereafter established as Drainage Ditch No. 1.

This resolution is not printed at length herein because it contains matter not deemed of importance. It established the line of Drainage Ditch No. 1 as follows: Commencing 58 feet west and 135 feet north of the southeast corner of Sec-
182 tion 29, Township 102, Range 49, thence south parallel to the adjacent highway 2085 feet to station No. 114; also commencing 674 feet north and about 35 degrees west of Station No. 114; thence southeasterly 674 feet to said Station 114, thence south and parallel to said highway 7700 feet to Station No. 37, thence south 45 degrees, east 3700 feet to Station Zero (0), thence south 59 degrees, 36', east to the Big Sioux River.

It also contains the following provisions: "Be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the width of said drainage ditch be and it is hereby fixed at 40 feet at the bottom thereof, with a side slope of one foot to one."

Plaintiff offered in evidence the following part of Commissioner's Record 5:

Sioux Falls, S. D., Dec. 31, 1907.

Pursuant to adjournment, at 10 o'clock A. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the County Court House.

Present:

Dist. No. 5: Thomas McKinnon, Chairman.

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson.

Dist. No. 3: Alfred Acheson.

183 Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. J. H. Gates, attorney for the Board in the matter of Drainage Ditch No. 1, filed and read a written opinion in regard to the legal propositions presented.

Further remarks were made by Messrs. Porter, Keith and Bates and by Mr. Blackman.

On motion, the Board adjourned to 2 o'clock P. M. Tuesday, December, 31, 1907.

184 Sioux Falls, S. D., Dec. 31, 1907.

Pursuant to adjournment, at 2 o'clock P. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the county court house.

Present:

Dist. No. 5: Thomas McKinnon, Chairman.

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson,

Dist. No. 3: Alfred Acheson.

Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. Howard offered the following resolution:

Resolution Establishing Drainage Ditch No. 1:

The matter of the petition of William H. Lyon for the establishment of a drainage ditch filed in the County Auditor's office of Minnehaha County, South Dakota, on July 1, 1907, the said drainage ditch having been heretofore described and named "Drainage Ditch No. 1", coming on to be heard by the Board of County Commissioners at a regularly adjourned meeting, on Monday, December 30, 1907, pursuant to notice heretofore given, and written objections thereto having been

filed by Martin Oien, et al, and by Joseph C. Carpenter, and by the Chicago, Milwaukee and St. Paul Railway Co. and the claims of said parties having been presented orally by their counsel, and William H. Lyon, F. S. Blackman, O. Benson and others having appeared in behalf of said petition, and said hearing having been adjourned to this 31st day of December, 1907, and this Board having fully heard and considered said petition and all matters in opposition to and in support of the same; Now Therefore

Be it Resolved by the Board of County Commissioners
185 of Minnehaha County, South Dakota, that said Drainage Ditch No. 1, is conducive to the public health, convenience and welfare, and is necessary and practicable for draining agricultural lands, and it is so found:

Be it further Resolved that said Drainage Ditch No. 1, be and is hereby established:

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land, or other property through which the same shall pass, and damages as compensation for the land taken for the route of such drainage.

Mr. Howard moved the adoption of said resolution, and that the vote be taken by districts. Mr. Harvey seconded the motion. Upon roll call,

Charles Harvey, Dist. No. 1 voted, Yes;

J. E. Johnson, Dist. No. 2 voted, No;

Alfred Acheson, Dist. No. 3 voted, No;

J. D. Howard, Dist. No. 4. voted, Yes;

Thomas McKinnon, Dist. No. 5 voted, Yes;

The Chairman declared the resolution adopted.

Plaintiff offered in evidence the following portions of Ditch Record A;

April 11, 1908.

Resolution Assessing Benefits.

Whereas, The Board of County Commissioners of Minnehaha County, South Dakota, has established Drainage Ditch No. 1, and has fixed the damages arising therefrom, and has been investigating and considering the proportion of bene-
186 fits that will accrue to the lands, tracts and lots within the drainage area of said Drainage Ditch; and

Whereas, in arriving at this determination of the proportion of benefits it has considered, not only the benefits which will accrue directly by virtue of the construction of said Drainage Ditch, but also the indirect benefits by virtue of such drainage being an outlet for connecting drains that may hereafter be constructed, and particularly is this so in reference to the lands within the drainage area lying north of a line running east and west through the center of Section Twenty Nine (29) Mapleton Township; and

Whereas, the number of acres set opposite each tract hereinafter described represents the actual number of acres of land within said tract that are benefitted, and excluding therefrom lands taken by said Drainage Ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said Drainage Ditch, the land taken by the drainage is excluded; and

Whereas, in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat of the County Auditor's Subdivision of the particular quarter section in which the land is located on file in the Register of Deeds office; and

Whereas, in the consideration of benefits said Board has assumed that the North-East Quarter of the North-East Quarter of the South-West Quarter of Section Thirty-Three (33) in Township One Hundred and Two (102) of Range Forty-Nine (49) West of the Fifth P. M., owned by the state of South Dakota, and containing ten acres is benefitted "one", and taking the same as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sverdrup, Mapleton, Sioux Falls and Wayne; the benefits to the County of Minnehaha; and the benefits to the several Railroad Companies hereinafter described, arising and accruing by the construction of Drainage Ditch No. 1, be, and they are hereby fixed and determined in the following proportions, viz:—

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
Esten E. Eggen	E½ of NE¼	31	102	49	5	.45
Thomas Paulson	E½ of SE¼	31	102	49	43	3.87

State of South Dakota	E½ of NE¼	32	102	49	72.9	9.11
Ellen Berg and Mary Schjodt	(Except right of way of South Dakota Central Ry. Co.) NW¼ of NE¼	32	102	49	35.88	4.48
J. E. Colton	(Except right of way of South Dakota Central Ry. Co.) SW¼ of NE¼	32	102	49	37.78	4.72
Esten E. Eggen	(Except right of way of South Dakota Central Ry. Co.) N½ of NW¼	32	102	49	66.25	8.28
Esten E. Eggen	SW¼ of NW¼	32	102	49	40.	5.
Esten E. Eggen	That part west of river of N½ of SW¼ of NW¼	32	102	49	6.	.63
Emmet D. Putnam	That part east of river of N½ of SE¼ of NW¼	32	102	49	13.	1.63
Ezra M. Shotwell	North 3 acres of S½ of SE¼ of NW¼	32	102	49	3.	.37
W. H. Lyon	South 5 acres of north 8 acres of S½ of SE¼ of NW¼	32	102	49	5.	.53
Thomas Paulson	S 2 acres of N½ of S½ of SE¼ of NW¼	32	102	49	2.	.25
Lars N. Brakke	S½ of S½ of SE¼ of NW¼	32	102	49	10.	1.25
Thomas Paulson	SW¼	32	102	49	152.	19.
State of South Dakota	NE¼ of SE¼	32	102	49	37.5	4.69

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
J. E. Colton	(Except right of way of South Dakota Central Ry. Co.) NW¼ of SE¼	32	102	49	37.98	4.75
Thomas S. Nolan	(Except right of way of South Dakota Central Ry. Co.) SW¼ of SE¼	32	102	49	38.01	4.75
Hans Ruvald	(Except right of way of South Dakota Central Ry. Co.) SE¼ of SE¼	32	102	49	36.89	4.62

(Here follows in form similar to the foregoing names of owners of property and descriptions of various tracts of property situated in townships 101, 102 and 103, ranges 49 and 50 in Minnehaha County, South Dakota, and in Berwick, Brookings, Brooks, Bunkers, Carpenters, Central Park, Englewood,

Harrisons, Lakeview, Lincoln Park, McClellan's Second, Meredith's First, Meredith's Second, Millard Park, North Boulevard, North Park, North Park Second, Sioux Falls Improvement Companys Summit, West Lawn and West Park Additions to Sioux Falls and to Olson's Addition to Renner. Following these descriptions were the names of the various railroad companies, the descriptions of their property and proportion of benefits as follows:

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Name of Owner.	Description	Acres.	Proportion of Benefits
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 28, 29, and 33, township 103, range 49, west 5th p. m.....	25.02	3.75
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4, 9, 16, 21, 28 and 33, township 102, range 49, west 5th p. m. Sioux Falls and Egan line....	72.50	15.41
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 5, 8, and 9, township 102, range 49 west 5th p. m. (Sioux Falls and Madison line)	17.30	2.60
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4 and 9, township 101, range 49, west 5th p. m.	17.05	5.12
South Dakota Central Railway Co.	Right of way as now laid out and located across sections 29 and 32, township 102, range 49 west 5th p. m.	11.06	3.32
South Dakota Central Railway Co.	Right of way as now laid out and located across sections 4, 5, and 9, township 101, range 49, west 5th p. m.....	17.72	5.32
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 18, Township 101, range 49, west of 5th p. m.	12.18	3.65

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Name of Owner	Description	Acres	Proportion of Benefits
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 13, Township 101, range 50, West 5th p. m.	16.88	5.06
Sverdrup Township.	Seven miles and 84 rods of laid out and established highways within the drainage area.		2.9

Mapleton Township.	Twelve miles and 52 rods of laid out and established highways within the drainage area.	7.73
Sioux Falls Township.	Two and onehalf miles of laid out and established highways within the drainage area.....	3.2
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.	.6
City of Sioux Falls	1⅛ miles of highways and dedicated streets within the drainage area	.9
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area	25.

Be It Further Resolved that Tuesday, the 5th day of May, 1908, at two o'clock P. M. at the office of the County Auditor of said County be and it is hereby fixed as the time and place for the equalization of such proportion of benefits, and that notice thereof be given, in accordance with the provisions of Sec. 6. of Chap. 134 of the Laws of 1907 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Weekly Argus-Leader, once in each week for two consecutive weekly issues, and one further publication in the Sioux Falls Daily Argus Leader, and by posting copies of such notice in at least three public places near the route of said Drainage Ditch, the said posting and the last of such publications to be made at least 10 days prior to the time of said hearing.

191 Adopted April 11, 1908 THOS. McKINNON,
Chairman.

Attested:
C. E. Hill,
County Auditor.

(Seal)

192 Filed in the office of the Auditor of Minnehaha County, S. D. this 8th day of April, 1908.

C. E. HILL
County Auditor.

Plaintiff offered in evidence pages 53 to 61 inclusive of Ditch Record A, being the record of notice of hearing upon the equalization of benefits with reference to Ditch No. 1. In this notice of hearing the same persons [—] and the same property is described as in the "resolution assessing benefits".

Plaintiff offered in evidence pages 260 to 268, inclusive, of Ditch Record A, the same being a record of the levying of the assessment for Drainage Ditch No. 1. In this assessment the same persons and the same property was assessed as is described in the "resolution assessing benefits." This record shows that the commissioners ascertained the entire cost of Drainage Ditch No. 1 to be the sum of $46,600.10.

Plaintiff offered in evidence pages 94 to 95 and a portion of page 96 of Ditch Record A, as follows:

April 10, 1908.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioners respectfully represent that they are all residents of the Township of Mapleton in said County, and that each of them is the owner of certain lands in said Township in the valley of the Big Sioux River as follows: The said Iver R. Peterson is the owner of the South Half of the South West Quarter of the North East Quarter of Section Seventeen (17) and the South Half of the East Thirteen (13) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said Bernt Mekvold is the owner of the South-West Quarter of the North West Quarter of Section Seventeen (17) and the West Twen-
193 ty-six and Two-Thirds (26 2/3) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said William O. Quincy is the owner of the West Half of the North West Quarter of Section Twenty (20); and that the said Iver I. Nelson is the owner of the East Half of the South West Quarter of Section Seventeen (17) and the North West Quarter of the South West Quarter of Section Seventeen (17), all in Mapleton Township, Minnehaha County, South Dakota, all of which lands will be affected by the drainage herein proposed;

Your petitioners further represent that it is necessary for the drainage of agricultural lands in said Big Sioux Valley from a point about four miles north of the south line of Sverdrup Township to a point about one and one-half miles north of the south line of Mapleton Township, that the proposed drainage be established;

Your petitioners further represent that the establishment of such drain will be conducive to the general health, convenience and welfare of the inhabitants of said territory, and

that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in said valley, and will prevent great damage to the buildings and their contents, and will prevent great damage to the highways in said territory, and also to the railroad tracks and the rights of way of the Chicago, Milwaukee and St. Paul Railway Company in said territory, and will prevent damage and destruction of many bridges and their approaches in said territory;

194 Your petitioners further represent that the general purpose of said proposed drainage is, among other things, to prevent the annual or occasional flooding of land in said territory caused by high water in said river by providing a drain to carry off all of the water of said river above its normal stage from about the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the south line of Section Five (5) of Mapleton Township, and running thence southeasterly adjacent to the right of way of the Madison line of the Chicago, Milwaukee and St. Paul Railway Company to the west line of the East Half of the North East Quarter of Section Eight (8) in Mapleton Township, running thence south about three miles to a point about forty (40) rods south of the north line of Section Twenty Nine (29) in Mapleton Township where the said line intersects Silver Creek, running thence southeasterly to the upper end of Drainage Ditch No. 1, as established by said Board;

Your petitioners further represent that, as a part of said plan of drainage, there should be constructed a dike along the south and southeasterly side of said Big Sioux River where the same flows through the North East Quarter of Section Thirty-two (32) in Sverdrup Township, such dike to be of the length of thirty (30) or forty (40) rods.

Your petitioners further represent that the territory likely to be affected thereby embraces Sections Sixteen (16), Seventeen (17), Eighteen (18), Twenty (20), Twenty-one (21), Twenty seven (27), Twenty Eight (28), Twenty Nine (29), Thirty-Two (32), Thirty Three (33) and Thirty Four (34) in Sverdrup Township, and Sections Three (3), Four (4) Five (5), Eight (8), Nine (9), Sixteen (16), Seventeen (17),

Nineteen (19), Twenty (20), Twenty One (21), Twenty Eight (28), and Twenty Nine (29) in Mapleton Township.

Dated April 9, 1908.

IVER R. PETERSON
IVER I. NELSON
BERNT MEKVOLD
W. O. QUINCY

Petitioners.

Filed in the office of the Auditor of Minnehaha County, S. D., this 10th day of April, 1908.

195

C. E. HILL,
County Auditor

Plaintiff offered in evidence page 113 of Ditch Record A, as follows:

January 8, 1909.

Further Petition.

To the Honorable Board of County Commissioners, of Minnehaha County, South Dakota:

The undersigned land owners in the valley north of Sioux Falls respectfully request, pursuant to the trip of inspection made by you on December 15, 1908, that in acting upon the petition of Iver R. Peterson and others for a drainage ditch in Mapleton Township you will cause the proposed drainage ditch to be extended further north and made a part of Ditch No. 1, also that as a part of said proposed drainage system, you will cause a ditch to be established on the west side of the Big Sioux River from a point above the Baltic dam southerly to a suitable place on the river in Section Eighteen (18) in Sverdrup Township, and that you will by a proper outlet on the east side of the river, provide for the taking care of the surplus water so dumped into the river at that point.

A. L. Berg
Ole J. Ustrud
C. T. Gunderson
O. G. Brende
John O. Aasen
P. M. Thompson
Ole O. Langness
H. G. Solem
T. A. Berven
Oluf Lyng
Mrs. Mary Lee
Mrs. Anne Larson by Agt.
K. Larson
J. H. Williamson
E. O. Fossum
John P. Risvold
Gunerius Thompson

Filed in the office of the Auditor of Minnehaha County,
196 S. D., this 8th day of January 1909.

C. E. HILL, County Auditor.

Plaintiff offered in evidence pages 121 to 123, inclusive, of Ditch Record A, as follows:

Resolution for Adjourned Hearing:

(Transcribed from Commissioners Record No. 6, Page 170-1-2-3)

On motion the following resolution was unanimously adopted:

Resolution:

Whereas, on April 10, 1908, Iver R. Peterson and others filed their petition with the County Auditor of Minnehaha County, South Dakota, for the establishment and construction of a certain drainage ditch in Mapleton Township in said County; and

Whereas, this Board did on June 12, 1908, adopt a resolution for the survey thereof; and

Whereas, Mr. S. B. Howe, County Surveyor, employed by this Board for making such survey, did on November 13, 1908, file his report thereof, together with maps and profiles, and

Whereas, this Board did on said last named date fix Friday, December 4, 1908, at the office of the County Auditor of said County as the time and place for the hearing of said petition, and did cause notice of said hearing to be given publication and posting, as required by law; and

197 Whereas, December 4, 1908, a petition was presented by A. L. Berg, and others for the extension of said ditch; and

Whereas, said matter has by successive adjournments been continued until April 9, 1909; and

Whereas, said engineer did on April 8, 1909 present his supplemental report of survey and plans and profiles; and

Whereas, this Board has inspected the route of said drainage ditch as described in said petition and as hereinafter described; and

Whereas, this Board deems it practicable, necessary and best that the route of said drainage ditch be varied from the

route described in said petition and its northerly terminal points be materially changed; therefore

Be it Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the line of said drainage ditch be and it is hereby changed from the route described in said petition to run as follows: the same being substantially as petitioned for up to the point where the same crosses the Madison branch of the Chicago, Milwaukee and St. Paul Railway Company, viz:

First Section.

Commencing at a point ten hundred forty-five (1045) feet north and fifty-eight (58) feet west of the Southeast corner of Section twenty-nine (29) in Township One Hundred and Two (102) North, Range Forty-nine (49); running thence north five hundred forty seven (547) feet; thence north 23° west thirty three hundred eighteen (3318) feet to a point fifty eight (58) feet west of the quarter quarter line in the North East Quarter (NE¼) of Section Twenty Nine (29), in said Township; thence north parallel with, and fifty-eight (58) feet west of said quarter quarter line through Section Twenty Nine (29), Twenty (20), Seventeen (17), and a
198 part of Section Eight (8) Twelve thousand nine hundred thirty five (12935) feet; thence north 50° East twenty seven hundred thirty two (2732) feet to a point thirty three (33) feet west of the west line of the right of way of the Chicago, Milwaukee and St. Paul Railway Company in the North West Quarter of Section Nine (9) in said Township; thence northerly parallel with and thirty three (33) feet west of the said right of way line nineteen thousand three hundred, sixty eight [19386] feet to a connection with a high water channel of the Big Sioux River in the South East Quarter of Section Twenty (20) in Township One Hundred and Three (103) North, Range Forty Nine (49).

Second Section:

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103) North, Range Forty Nine (49); running thence north 33° west thirty one hundred and fifty five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line of Section Seven (7) and Six (6) in said Township, and in Section Thirty One (31) in Township One Hundred and Four (104) North, Range Forty Nine

(49) to the center line running East and West through said Section Thirty One (31); thence northeasterly to the creek near the northeast corner of said Section Thirty One (31), the said line being the center line of said proposed drainage ditch; that the width of said drainage ditch be and it is hereby fixed at forty (40) feet at the bottom thereof with a side slope of one and one-half feet to one; and that the fall of said proposed drainage ditch be three (3) feet per mile from
199 north to south, and that the area required for right of way and dump space will be four (4) rods on each side of said line, except where it is adjacent to the right of way of the Chicago, Milwaukee and St. Paul Railway Company, and that the area required for right of way and dump space where said proposed line runs adjacent to the right of way of said Railway Company shall be two (2) rods on the easterly side of said line and six (6) rods on the westerly side of said line;

That in addition thereto the Big Sioux River be straightened in Section Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred Three (103) North, Range Forty Nine (49) in order to afford better means of communication between the lower end of Section Two (2) of said ditch and the upper end of Section One thereof;

Be It Further Resolved that this hearing be and it is hereby adjourned until Thursday May 6, 1909, at two o'clock P. M. at the office of the County Auditor of said County, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by the Laws of 1909, the same to be signed by the Chairman of this Board and attested by the County Auditor by publishing the same once in each week for two consecutive weeks in the Sioux Falls Daily Argus-Leader, and by posting copies of said notice in at least three public places near the route of said proposed drainage ditch as varied and extended, such posting to be made at least two weeks prior to the time of said hearing.

Adopted April 9, 1909.

THE BOARD OF COUNTY COMMISSIONERS MINNEHAHA COUNTY, SOUTH DAKOTA.
By Thos. McKinnon, Chairman.

200 Plaintiff offered in evidence pages 135 to 136 of Ditch Record A, as follows:

Resolution Establishing Drainage Ditch No. 2:

The matter of the petition of Iver R. Peterson and others for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on April 10, 1908, coming on to be heard by the Board of County Commissioners of said County at a regularly adjourned meeting on Thursday May 6, 1909, pursuant to notice heretofore given, and said Board having heard and considered said petition and all matters in support of the same and in opposition thereto; Now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said drainage ditch as extended and varied and as described and set forth in the resolution adopted by this Board on April 9, 1909, is conducive to the public health, convenience and welfare and is necessary and practicable for draining agricultural lands, and it is so found;

Be it Further Resolved that the said drainage ditch as described and set forth in the said resolution of April 9, 1909, be and it is hereby named and designated "Drainage Ditch No. 2";

Be it Further Resolved that the said Drainage Ditch No. 2 be and the same is hereby established;

Be it Further Resolved that in the construction of said drainage ditch the rights of flowage of Wm. G. Milne, the owner of the mill at or near Baltic, S. D., will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch, where the same joins with the creek near the northeast corner of Section Thirty One (31) in Dell Rapids Township that it will not diminish or interfere with such rights of
flowage and that a head gate or other protection will be
201 established if necessary, to prevent the waters of the
Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

Be it Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same be made a special order for Friday May 7, 1909, at nine o'clock A. M.,

On motion, the Board adjourned to May 7, 1909 at 9 o'clock A. M.

Plaintiff offered in evidence pages 48 to 60 inclusive of Ditch Record B, as follows:

October 7, 1910.

The Board having had under consideration for several days the matter of the preliminary Assessment of Proportion of Benefits which was being prepared by J. H. Gates, Attorney with the assistance of Engineer Wagner and the same being completed, on motion the following resolution was adopted:

Resolution Fixing Proportion of Benefits
Drainage Ditch No. 2.

Whereas the Board of County Commissioners of Minnehaha County, South Dakota, has established the Drainage Ditch No. 2, and has fixed the damages arising therefrom and has been investigating and considering the proportion of benefits that will accrue to the lands, tracts and lots within the drainage area of said drainage ditch; and

Whereas in arriving at this determination of the proportion of benefits it has considered not only the benefits which will accrue directly by virtue of the construction of said drainage ditch, but also the indirect benefits by virtue of such drainage being an outlet for connecting drains that may hereafter be constructed; and

Whereas said Board is of the opinion that the drainage area of Drainage Ditch No. 1 is benefitted by the establishment and construction of Drainage Ditch No. 2, and that both of said drainage ditches are mutually interdependent, and should virtually be considered as one drainage system; and

Whereas in the determination of the proportion of benefits herein fixed and determined upon the several premises embraced within the drainage area of Drainage Ditch No. 1 the proportion of benefits as finally fixed and equalized in the matter of said Drainage Ditch No. 1 have been taken into consideration; and

202 Whereas the number of acres set opposite each tract hereinafter described represent the actual number of acres of land within said tract that are benefitted, and excluding therefrom land taken by said drainage ditch, and excluding also lands embraced within laid out highways, and in fix-

ing the proportion of benefits to platted lots along said drainage ditch the area therefor taken by the drainage is excluded; and

Whereas in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat in the County Auditor's Subdivision of the particular quarter section in which the land is located, on file in the Register of Deeds' office of said County, and in the description of lands herein by reference to books and pages of deed records such references are to the deed records in the office of said Register of Deeds; and

Whereas, in the consideration of such proportion of benefits said board has assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section Twenty, in Township One Hundred Three North, Range Forty-nine, West Fifth P. M., owned by Martha R.
203 Roberts, and containing ten acres, be benefitted "One", and taking said tract as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sioux Falls, Wayne, Mapleton, Sverdrup and Dell Rapids; the benefits to the County of Minnehaha; and the benefits to the several railroad companies hereinafter described, arising and accruing by the establishment and construction of Drainage Ditch No. 2, be, and they are hereby fixed and determined in the following proportions, viz:

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefits.
E. S. Carter and S. C. Carter	W½ of NE¼	4	101	49	57.	.570
David Frank	N½ of NE¼ of NW¼	4	101	49	19.50	.244
M. H. Rylatt	W½ of NE¼ of NW¼	4	101	49	19.50	.244
David Frank	(Except right-of-way of C. M. & St. P. Ry. Co.) W½ of NW¼	4	101	49	70.60	.883
David Frank	SE¼ of NW¼	4	101	49	40.	.500
David Frank	(Except right-of-way of C. M. & St. P. Ry. Co) that part of SW¼ lying north and east of the center line of Drainage Ditch No. 1	4	101	49	131.58	1.644

David Frank	(Except right-of-way of C. M. & St. P. Ry Co and S. D. Central Ry. Co) that part of SW¼ lying south and west of the center line of Drainage Ditch No. 1	4	101	49	12.33	.154
Mary C. Brace	NW¼ of SE¼	4	101	49	30.	.375
Margaret Wuest	Tract 1 of SE¼	4	101	49	3.50	.044
Mary C. Brace	(Except tracts 1 and 2 SW¼ of SE¼	4	101	49	8.	.100
Hans Ruvald	(Except right of way of South Dakota Central Ry Co. NE¼ of NE¼	5	101	49	35.04	.438

204 (Here follows in form similar to the foregoing names of owners of property and descriptions of various tracts of property situated in townships 101, 102 and 103, ranges 49 and 50 in Minnehaha County, South Dakota, and in Berwick, Brooking, Brooks, Bunkers, Carpenters, Central Park, Englewood, Harrisons, Lakeview, Lincoln Park, McClellan's Second, Meredith's First, Meredith's Second, Millard Park, North Boulevard, North Park, North Park Second, Sioux Falls Improvement Companys Summit, West Lawn and West Park Additions to Sioux Falls and to Olson's Addition to Renner. Following these descriptions were the names of the various railroad companies, the descriptions of their property and proportion of benefits as follows:)

205

Name	Description	Acres	Proportion of Benefits.
Chicago, St. Paul, Minneapolis & Omaha R. R. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50, West 5th P. M., within the drainage area (1.5 miles)	18	20.320
South Dakota Central Railway Co.	Right-of-way as laid out and located across Sections 4, 5 and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49 West; 5th p. m. within the drainage area (2 6 miles)	20.80	59.980
Chicago, Milwaukee & St. Paul Railway Co.	Right-of-way as laid out and located across Sections 4 and 9, Township 101, Range 19, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29 and 33, Township 103,		

Range 49, and Section 32, Township 104, Range 49 West, 5th p. m. within the drainage area (the above being the Sioux Falls and Egan line); also across Sections 5, 8, and 9, Township 102, Range 49 West, 5th P. M., within the drainage area (being the Renner and Madison line) Total 14.5 miles	167.06	383.130

Be it further Resolved that Thursday, the 3rd day of November, 1910, at two o'clock P. M. at the office of the County Auditor of said County be, and it is hereby fixed as the time and place for the equalizing of said proportion of benefits, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909 of said State, such notice to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Daily Argus Leader once in each week for two consecutive weeks, and by posting copies of said notice in at least three (3) public places near the route of said drainage ditch, said posting and the last publication of said notice to be made at least ten (10) days prior to the time of said hearing.

Adopted October 7th, 1910.

THOMAS McKINNON, Chairman.

Attest:

(Seal) Henry Howe, County Auditor.

206 Filed in the office of the Auditor of Minnehaha County, S. D., this 7th day of October 1910.

HENRY HOWE,
County Auditor.

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207 Plaintiff offered in evidence pages 61 to 71, inclusive, of Ditch Record "B", being a record of the notice of hearing on the questioning of equalization of benefits of Ditch No. 2. This notice of hearing named the same persons and the same property specified in the resolution of the County Commissioners fixing the proportion of benefits of Ditch No. 2.

Plaintiff offered in evidence pages 153 to 165, inclusive, of Ditch Record "B", the same being a record of the assessment made by the County Commission-

ers for Drainage Ditch No. 2. This assessment named the same persons and the same property specified in the resolution fixing the proportion of benefits of Drainage Ditch No. 2 and the assessment was made as provided for in said resolution. This record shows that the Commissioners ascertained and determined the entire costs of Drainage Ditch No. 2 to be the sum of $81,106.11.

The foregoing exhibits with reference to Drainage Ditch No. 1 and Drainage Ditch No. 2 were received in evidence.

It is stipulated that filed herein as a part of the answer of the defendants are correct copies of the following records of the Board of Commissioners of Minnehaha County, with reference to Drainage Ditch No. 1 and 2, to-wit: the petition of F. L. Blackman and others upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had, the order for filing said petition, the resolution for survey under said petition, the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman and others, the published notice of hearing petition, (such notice not being attached to the answer, but having been filed after the filing of the answer with a stipulation that it might be considered as a part of the answer), and resolution establishing Drainage Ditch No. 1 and 2. Said exhibits were offered in evidence by plaintiff and received in evidence.

(The foregoing exhibits relating to Drainage Ditch No. 1 and 2 are printed herein as a portion of the answer of the defendants and are consequently not herewith reprinted.)

Plaintiff's exhibit "A" was identified by the witness F. E. Ward as one of the records of the office of the County Auditor of Minnehaha County, and was offered in evidence by plaintiff.

To the offer in evidence of plaintiff's exhibit "A" the defendants and intervening defendants objected as incompetent, irrelevant and immaterial to any issue in the case, the same not being pleaded in plaintiff's bill of complaint
208 and a part of their case. For the further reason that the apportionment made and set forth in plaintiff's bill of complaint affirmatively appears to be an apportionment made during the year 1921. Plaintiff's exhibit "A" was received in evidence subject to objection.

(Here follows in similar manner the names of owners, description of property and proportion of benefits to property in townships 101, 102, 103, and 104, range 49 in Minnehaha County, South Dakota, and to property in the town of Renner, and in Olson's Addition to Renner and to property in Berwick, Brookings, Brooks, Bunkers, Central Park, Englewood, Harrisons, Lincoln Park, McClellan's Second, Meredith's First, Meredith's Second, Millard Park, South Boulevard, North Park, North Park Second, Sioux Falls Improvement Company's, Summit, West Park, J. L. Phillips, Burlington, Morningside, Gales, Morse's, Millspaugh's, Daniels', Van Eps', Brookings and Edmunds, Braley's and Silver Park Additions to Sioux Falls. Then follows the proportion of benefits to the unplatted lands within the city of Sioux Falls and to the city of Sioux Falls, various townships and
209 railroad companies as follows:)

Unplatted Lands Situated in Sections 16, 21, and 22, Township 101, Range 49, Within the City of Sioux Falls.

Equitable Realty Company's Sub-division of Tract 1 of the Northwest Quarter of Section 16.

210

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Dakota Iron Store	Lot 2			1.145
Dakota Iron Store	Lot 3			1.145
Dakota Iron Store	Lot 4			0.480
International Harvester Co.	Lot 1			0.916
Dakota Iron Store	Lots 8 and 9			0.480
Equitable Realty Co.	Lot 5			1.375
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 6			1.833
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 7			1.833
Equitable Realty Co.	Lot 10			2.290

Equitable Realty Company's Sub-Division of Northeast Quarter of Northwest Quarter of Section 16.

Equitable Realty Co.	Lot 1			0.480
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 2			0.685
W. F. Hesse	Lot 3			1.375
Chicago, Milwaukee & St. Paul Ry. Co.	Depot Grounds on Southwest Quarter of Northwest Quarter, Section 16			2.062

Chicago, Milwaukee & St. Paul Ry. Co.	Tract 3 of Northwest Quarter, Section 16	0.685
Chicago, Milwaukee & St. Paul Ry. Co.	Tract 4 of Northwest Quarter Section 16	0.916
Edward Ellis	Tract 5 of Northwest Quarter, Section 16	0.229
Larabee Mills Co.	Lot 5 of Sioux Falls Light & Power Co.'s Sub-Division of the Northeast Quarter of Northwest Quarter, Section 16	2.00
Northern States Power Co.	Lot 4 of Sioux Falls Light & Power Co's Sub-Division of the Northeast Quarter of Northwest Quarter, Section 16,	2.00
Larabee Mills Co.,	Lot A, Tract 12 of Northwest Quarter, Section 16,	0.29

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Name of Owner	Description	Proportion of Benefit.
Northern States Power Co.,	Tracts 6 and 7 of Northeast Quarter, Section 16,	2.583
Watertown & Sioux Falls Ry. Co.	Benefit to Bridge and Trackage across Sioux River on Northwest Quarter, Section 16	4.583
Guy Strahon	Tract 21 of Southwest Quarter Section 16 (Except W. 30 ft.)	0.687
A. S. Held and John Schetzel	West 30 Feet of Tract 21 of Southwest Quarter, Section 16,	0.480
F. H. Hollister	Tract 23 of Southwest Quarter, Section 16,	0.687
Emerson-Brantingham Implement Co.	Tract 23 of Southwest Quarter, Section 16	0.480
Mary O. Brace	Tract 24 of Southwest Quarter, Section 16	0.720
Etta Esta Boyce and A. B. Fairbanks	Tract 25 of SW¼ of Sec. 18	2.062
J. M. Freese	Tract 4 of Southwest Quarter, Section 16	2.750
Sioux Falls Gas Co.	Tract 3 of Southwest Quarter, Section 16	4.478
Chicago, Rock Island & Pacific Ry. Co.	Tract 29 of Southwest Quarter, Section 16	3.437
Chicago, Rock Island & Pacific Ry Co.	Tracts 1 and 2, Southwest Quarter, Section 16	3.437
J. H. Donahoe	Tracts 13 and 15, Southeast Quarter, Section 16.	5.155

Northern States Power Co.	Tracts 15, 16, and 20, Southwest Quarter, Section 16	5.840
Illinois Central Ry. Co.	Depot Grounds on Southwest Quarter, Section 16,	3.895
Chicago, Rock Island & Pacific Ry. Co.	Lots A and B. Sub-Division Tract 17, Southwest Quarter, Section 16	0.480
S. H. Hurst and T. McKinnon	Lot C, Sub-Division Tract 17, Southwest Quarter, Section 16.	0.480
T. McKinnon	Lot D, Sub-Division Tract 17, Southwest Quarter, Section 16	0.343

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Name of Owner	Description	Proportion of Benefit.
S. H. Hurst	Lot E, Sub-Division Tract 17, Southwest Quarter, Section 16	0.229
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Depot Grounds on Southwest Quarter, Section 16.	4.583
Great Northern Ry. Co.	Depot Grounds on Southwest Quarter, Section 16.	3.437
Farley-Loetscher Co.	Lots D and C of Franklin Investment Co's Sub-Division of Part of Tract 3 of Southwest Quarter, Section 16.	1.145
Franklin Investment Co.	Lots A and B of Franklin Investment Co's Sub-division of Part of Tract 3 of Southwest Quarter, Section 16.	1.145
H. R. Dennis	East 132 Feet of Tract 14 of Southwest Quarter, Section 16.	1.145
Albert Larson and Geo. E. Larson	Except East 132 Feet, Tract 14 of Southwest Quarter, Section 16.	6.874
A. C. Schoeneman	Tract 8 of Southwest Quarter, Section 18	8.593
J. W. Tuthill	North 50 Feet of Tract 9 of Southwest Quarter, Section 16.	0.572
John C. Folger	Except North 50 Feet, Tract 9 of Southwest Quarter, Section 16.	1.145
John W. Tuthill Lumber Co.	Tract 12, Southwest Quarter, Section 16.	0.343
John W. Tuthill Lumber Co.	Tract 13, Southwest Quarter, Section 16.	2.750
John W. Tuthill Lumber Co.	Tract 7, Southwest Quarter, Section 16.	2.062
B. W. Harding	Tract 6, Southwest Quarter, Section 16.	0.687

A. J. Jordan	Tract 5, Southwest Quarter, Section 16.	2.062
John W. Tuthill Lumber Co.	Tract 7, Southeast Quarter, Section 16.	0.916
M. Margulies	Tract 8, Southeast Quarter, Section 16.	0.229
M. Margulies	Tract 10, Southeast Quarter, Section 16.	2.290
W. H. Lyon	All that part of Tract 2 of Southeast Quarter of Section 16 lying West of Franklin Avenue	1.375

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Description	Name of Owner	Proportion of Benefits.
Board of Education of the City of Sioux Falls.	All of Franklin Investment Co's Sub-Division of No. 1 of Part of Tract 2 of Southeast Quarter, Section 16.	1.853
J. H. Drake	Tract 1, Southeast Quarter, Section 16.	2.062
Girton-Adams Ice Co.	Tract 12, Southeast Quarter, Section 16.	2.290
Sioux Falls Gas Co.	Tract 3 of Northeast Quarter, Section 21.	1.375
E. H. Hyde	Tract 12 of Northeast Quarter, Section 21	0.916
Girton-Adams Ice Co.	Tract 4 of Northwest Quarter, Section 22.	0.572
Joe Tosini	Tract 2, of Northwest Quarter, Section 22.	1.375
Inez C. Van Eps.	Tract 1 of Northwest Quarter, Section 22.	2.062
Ed Bell.	Tract 1 of Northeast Quarter Section 22.	0.229

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Name of Owner	Description	Proportion of Benefit.
City of Sioux Falls	Parks, Water System, Highways and dedicated streets within the drainage area.	111.11
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area.	0.384
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.	0.072

Mapleton Township	Twelve miles and fifty-two rods of laid out and established highways within the drainage area.	10.468
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area.	21.252
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area.	2.323
Minnehaha County	Benefits arising from and to the safety and preservation of bridges within the drainage area.	25.555
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50 West of the 5th P. M., within the drainage area (1.5 miles)	15.263
Watertown & Sioux Falls Ry. Co.	Right-of-way as laid out and located across Sections 4, 5, and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49, West of the 5th P. M., within the drainage area (2.60 miles),	28.86
Chicago, Milwaukee & St. Paul Ry. Co.	Right-of-way as laid and located across Sections 4 and 9, Township 101, Range 49, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29, and 33, Township 103, Range 49, and Section 32, Township 104, Range 49, West of the 5th P. M., within the drainage area, (the above being the Sioux Falls and Egan line), also across Sections 5, 8 and 9, Township 103, Range 49, West of the 5th P. M., within the drainage area, (being the Renner and Madison line), total 14.5 miles	147.539

215

All such owners and all persons interested are hereby notified and summoned to show cause at the time and place

aforesaid why the proportion of benefits shall not be fixed, as stated, and the said determination of said Board made final.

Dated March 8, 1919.

A. G. RISTY
Chairman of the Board of County Commissioners of Minnehaha County, South Dakota.

Attest:
E. H. Shenkle
County Auditor

(Seal)

Filed in the office of the Auditor of Minnehaha County, S. D. this 8 day of March, 1919.

E. H. SKENKLE
216 County Auditor.

It is stipulated that attached to the bill of complaint herein is a true copy of the drainage ditch notice of hearing upon the question of equalization of apportionment of benefits of Drainage Ditch No. 1 and 2 on the 1st day of August, 1921, caused to be published by the Board of County Commissioners of Minnehaha County, South Dakota, said Drainage Ditch Notice being Marked "Exhibit C".

Exhibit "C" attached to the bill of complaint is offered in evidence by plaintiff and received in evidence.

(Exhibit "C" being printed herein as an exhibit to the bill of complaint, is not at this place reprinted.)

(Cross-Examination of witness F. E. Ward)

The proportion of benefits of Drainage Ditch No. 1 and 2 was not equalized upon the notice returnable April 25th, 1919, upon that date or at any other time. The proceeding was abandoned on account of errors in the published notice.

A. G. Risty called and sworn as a witness for the plaintiff testified as follows:

(Direct Examination)

My name is A. G. Risty; I am one of the defendants in this action and am and for nine years have been a member of the Board of County Commissioners of Minnehaha County, South Dakota; for about seven years I have been Chairman of the Board; in the spring of 1919 the County Commission-

ers passed a resolution apportioning the benefits for Drainage Ditch No. 1 and 2; notice of hearing upon the proposed equalization of such benefits was published; the plaintiff's Exhibit "A" is the notice I refer to; I was a member of the Board at the time of making that apportionment of benefits.

217 Q. Please state to the Court, Mr. Risty, in what manner and upon what basis you determined, in the resolution referred to, the proportion of benefits to the Chicago, Minneapolis, St. Paul & Omaha Railway?

Objected to by defendants as incompetent, irrelevant and immaterial, the record now showing that the exhibit referred to by counsel in his question, that the proceedings therein were abandoned and are not the proceedings upon which the present actions were instituted, or the present controversy before the court.

Counsel for plaintiff: I state to the Court this is offered solely for the purpose of showing to the court the attempted application by the County Commissioners of the law which we are questioning.

The evidence received subject to objection.

A. Well, in all those cases we tried to take into consideration the right of way, the value of the line as compared with adjacent lands and the benefits that might be derived from this drainage proposition as to the maintenance of the track and the bridges and so on.

In determining the apportionment of benefits as stated in Exhibit "A" to the Chicago, St. Paul, Minneapolis & Omaha Railway, 1.5 miles; to the Watertown & Sioux Falls Railway Company, 2.60 miles; and to the Chicago, Milwaukee & St. Paul Railway Company 14.5 miles; I don't think we computed on a mileage basis; we may have had that number of miles in mind, but we tried all the while to base it on a certain unit, as I remember it.

Q. Just how, Mr. Risty, did you compare the alleged benefits to the three railway companies mentioned, with the
218 unit of agricultural lands to which you have just referred?

A. How we determined the units for the railroads?

Q. How you compared the alleged benefit to the railroads with the unit you have referred to.

A. Well, we arrived at—I don't remember what value we passed on that unit at that time (referring to the agricultural unit). We had the value fixed of the agricultural

unit and the proportion of benefit that this drainage would be to that unit; when we came to the railroad question and other properties we took into consideration the benefits that they would derive and I might say we capitalized that—how much the average annual benefit would be to those properties, we might say to a certain piece of railroad, and having that amount fixed, we took the benefit that this unit of farm land was supposed to have and divided the benefits of the railroads—for instance we will say the unit of the farm land was $100; we would make the proportion of the benefit 25% or $20; then when we came to place a unit on other property after having exercised our judgment and made our investigation as to what those benefits might be, we arrived at a certain amount; we divided that by 25, the benefit of the farm unit and that gave us the number of units that we would assess up to that property or railroad, you might say if you wish; I am now testifying with reference to the procedure in 1919; we employed about the same procedure all the time.

Q. Mr. Risty, I call your attention to the fact that the units tentatively assessed to each railroad company in the drainage notice Exhibit "A" bears the same proportion to the mileage of said railway company in each case; with that in mind will you state to the court whether or not that attempted assessment was made by you upon a mileage basis?

A. The mileage basis—if it is the same number of
219 miles or if it is the same per mile for each company, then we must have estimated that the benefit was about the same and that gave the same number of units per mile.

In our attempted fixing of proportion of benefits which is in question in this lawsuit I don't think we used the mileage basis but I don't remember positively.

With reference to drainage Ditch No. 1 or reference to Ditch No. 1 and 2 no warrants to any great amount have been issued since the time of fixing this proportion of benefits in the spring of 1919; it might possibly be that the cleaning of the ditch was not paid at that time; I don't remember that would be the kind of work that has been paid for since if it wasn't paid for before that; we have done some work around the foot of the spillway and so on since the publication of this notice in April, 1919, but I don't remember what it cost.

Q. In what manner, Mr. Risty, did you determine the benefit to the unit of agricultural land in 1919?

A. We made an estimate of what that land was worth according to our judgment and how much more it would be

worth after it had the benefit of this drainage ditch, fair value, I don't remember we had any other basis to go on other than our own judgment as to the value of the land before the drainage and after the drainage.

We arrived at our determination with reference to the benefit of 111.11 units to the parks, water system, highways, and dedicated streets of the City of Sioux Falls without the drainage area in April, 1919, in just the same way as I stated to you that we arrived at the benefit to the railroads
220 and so on; what in our judgment we thought was the benefits; we fixed the amount that in our judgment we thought was the benefit. We fixed an amount that in our judgment we thought was right and proper and divided by the benefit to the agricultural unit to get the number of units in regard to this other property; we based that judgment upon the fact that some of us, most of us, are farmers or were farmers and we all know the price of land—was selling it at that time; with reference to parks, water system, highways, and streets of the City of Sioux Falls we based our determination upon the same facts as we used in regard to all other property; we estimated according to our judgment and our investigation what these properties had cost and what benefit they were to the public, what loss they would be at in case they were annually overflowed; to some extent we used the cost of the parks of the City of Sioux Falls; the cost of the water system of the City of Sioux Falls was talked of; we made our determination on the estimate of the cost and the benefit that those properties would derive; we never had a hearing; it might be more and it might be less we didn't get far enough to hear the other side; we made an estimate of the damages that might accrue in case the highways and streets of Sioux Falls were overflowed; we based that estimate on our best judgment; suppose you have a building down along the Sioux here and have it overflow; the basement filled with water; your own estimate on what damage it would be to you and it would vary probably a great deal from mine; neither one might be right. It is doubtful whether you and I would agree. I have stated the manner in which we compared the benefits to the parks and water system, streets and highways of the City of Sioux Falls with the agricultural unit; we took the public highway that would be annual,
221 ly overflowed; we had in mind as road builders what damages that would be to that road; in our judgment we fixed the damages to be what we thought were right and the number of units on that piece of property; then we pro-

ceeded as in all other cases, divided by the benefit to our original unit; to get the number of units we first attempted to determine what the benefit was and then divided it to get the proportion; it is possibly a fact that the unit as used by us in the measurements in the spring of 1919 represented approximately $80.00 or $85.00 in cost; we used at 10A. unit; I am not certain whether the unit was supposed to have been benefitted $80.00 to $85.00 or $7.00 to $8.00 per acre, that might be it, I don't remember.

Q. I now call your attention, Mr. Risty, to the drainage notice provided for hearing on the 1st day of August, 1921, upon the equalization of benefits of drainage ditch No. 1 and 2 and call your attention to the benefits to roads, railroads, etc. and ask you to state to the court in what manner and upon what basis you arrived at your determination with reference to the proportion of benefits to the Chicago, Rock Island & Pacific [Rr]., the Chicago St. Paul, Minneapolis & Omaha Ry., the Great Northern Ry., the Chicago, Milwaukee & St. Paul Ry., the City of Sioux Falls, and the Northern States Power Co., referring particularly to the benefits to the Hydro-Electric plant and water rights of the Northern States Power Co.

Mr. Bartlett: "That is objected to as incompetent, irrelevant and immaterial, not within the issues that can be tried by this Court in this collateral action, the same being a legislative matter and not subject to inquiry in this Court, it not having been alleged in plaintiff's bill of complaint herein that the Commissioners acted fraudulently or arbitrarily."

222 The Court: "Received, subject to objection."

A. As to the railroads and other property mentioned in this question we arrived in the manner stated before; we took into consideration the value of the right-of-way compared the right-of-way with adjacent lands and what protection from this water would benefit them and the savings it would be in upkeep of the railroad track, bridges, etc; in regard to the Hydro-Electric Co. [—] we took into consideration the overflow and high waters that would clog up their turbines and put them out of working order for some time, and we had in mind the great overflow of 1881 when it swept out the lumber yards down there and took out the mill at the foot of the falls, and in our estimation after having taken all those things into consideration which I wouldn't mention all now, we arrived at the conclusion that this water, the drainage proposition was of immense value to the Water Power Co. and we figured on that with a good deal of care and

then I think we arrived at the amount of $50,000.00; we compared the benefits which we arrived at to the Northern States Power Co. with the benefit to our 1A tract of agricultural land as I have stated before; the benefit to that unit we had said was $25.00; when we had estimated the benefits to the water power company was $50,000.00; I would not say positively that was the amount; we wanted to find out how many units that it represented and we divided it by 25 and that gave us the number of units that would be assessable to the water power company; I suppose there was no material increase in value of the railroad companies' rights-of-way and other property I have mentioned by the making of these two apportionments of benefit unless it might be increase in value with the value of other property increased at
223 that time, but the expenses to be paid were more; there were probably in the neighborhood of $250,000.00 of ditch warrants outstanding at the time we made this apportionment of benefits in 1919; I know there has been some issued since but I don't know how much; in estimating the benefits to various railroad companies in our last apportionment of benefits, we had about the same ideas as we did in 1919; we did not use the mileage basis or farm basis or street basis anywhere; we used the units.

Q. Just how did you use the units, that is what I am trying to find out?

A. When we find out what amount we have to raise—when we come to levy the assessment, the proportional benefits will be assessed to each unit—one unit may be 100%, another 150%, and some only 10%, others 25%; they won't all be alike, of course they are not benefitted alike; in arriving at our determination in 1921 of the last apportionment of benefits and the number of units of the benefit to the Chicago, Rock Island & Pacific [Rr.] Co. we took into consideration the damages that might be done to the railroad tracks with high water to the grades; and in regard to the bridges, bridges could be built smaller; wooden bridges generally have a duration of about ten years and if they could get along with smaller bridges or make grades instead of [tressel] works which would be a benefit to the company; we inquired minutely into those things but as I say haven't heard the other side; we might be away off; the hearing was not allowed and we didn't get any basis from you folks on that question; we determined that the benefit to the track of the Rock Island Ry. from the ditch was a certain specified amount in dollars and cents; I wouldn't say that we put those amounts on record; that is the way we arrived at our units; we took into consideration in de-

termining this benefit the fact that the Rock Island
224 might build a shorter bridge somewhere and that was part of the basis of our assessment of benefits; after arriving at the amount of dollars and cents benefit we proportioned it by dividing by the value of the unit; in determining the proportion of benefits to the Chicago, St. Paul, Minneapolis, & Omaha, the Great Northern, the Chicago, Milwaukee & St. Paul Railroad Companies we followed the same procedure; the basis for our determination of the benefits with reference to the highways, streets, water supply, water plant, Sherman Park and Phillips Park in the City of Sioux Falls was as I have stated to you before; it may seem [arbitrarily] but in regard to county highways for instance, we knew pretty well what it would take to keep them in good passable condition in seasons when there was any overflow and in seasons when there was no overflow; in regard to the streets and basements that have been flooded each year I made an estimate as to how much it would damage a basement if filled with water; same way to the streets, same way to the parks; If you had ever had a hearing those things would all have been adjusted. I wouldn't say absolutely that we did in 1921 the same as we did in 1919 with reference to the city; we had the same idea in mind when we gave it reconsiderations and wherever we saw we could improve, we did it to make a more equitable proportion; in my judgment and in the judgment of the commissioners the last proposition is better than the first one; I don't want to say we absolutely followed the methods of the first instance or we followed any particular practice in the last instance; it may be we did and possibly we didn't; in arriving at the determination that the benefit to the Hydro-Electric Co. plant of the Northern States Power Co. was about $50,000.00, we based our determination upon the following facts; in the first place we have a stream that tends to give a steady flow of water around the bend so that it will not go over the spill-
way; in one certain place about 3 miles northwest from
225 town outside of the ditch proper, the river broke through and would eventually have cut across the bottom and into the spillway and we dammed that up; then we took into consideration the high water backing up and filling up the gorge below their plant so that at certain times the water power would not be serviceable and that it would cost them fuel and other items to a great extent and then primarily, any water which overflowed would be apt to sweep out everything around that electric plant if they should have an overflow like 1881.

Q. You say there was danger of some ditch cutting through and diverting the water out of the river?

A. Yes sir.

Q. State whether or not that was the Ditch No. 1 or ditches Nos. 1 and 2 which were constructed by the Board of County Commissioners, the records of which have been placed in evidence here.

A. Those ditches were established and built before my time on the Board and that might possibly have been that it was cutting into Ditch No. 1 and making that immense excavation, but I would not say. But it was necessary to have it dammed up according to the orders of the hydro-electric engineer; the ditch I refer to must have been probably the terminus of ditch No. 1; the engineer gave orders it had to be dammed up absolutely.

Q. In just what manner did you arrive at the fact that this alleged benefit to the Northern States Power Company amounted in dollars and cents to approximately $50,000.00?

A. After taking those things into consideration, that was our best judgment. We might have itemized it and added it up; I don't remember that; but according to our best judgment that would be reasonable assessment upon the water power company.

We based that judgment upon these benefits I have
226 stated to you; giving them a uniform flow of water in dry seasons and protecting them from overflow when we had an overflow season; I have stated practically everything that was taken into consideration in determining that the Northern States Power Co. was benefitted $50,000.00. if I remember right.

Q. I call your attention, Mr. Risty, to the alleged benefit in your apportionment of 1921 to the Chicago, Milwaukee & St. Paul Railway; benefits to right-of-way, tracks, embankments, bridges and grades across sections 4, 9, 16, 21, 22, Township 101 Range 49, and across sections 4, 9, 16, 21, 28, 33 Township 102 Range 49, and across sections 5, 8, 17, 20, 28, 29, 33 in Township 103, Range 49, and ask you to tell the court what you took into consideration in determining that the Chicago, Milwaukee & St. Paul Ry. Co. was benefitted 1678.9 units.

A. We took into consideration what it would damage the tracks—what the damage would be if those tracks washed out and the expense to rebuild them, and with the assistance of a competent railroad engineer we arrived at those figures that we have given there.

We assumed that except for this spillway these tracks of the Chicago, Milwaukee & St. Paul Railway would wash out and

be under water for a certain period; I have seen the Milwaukee road under water 8 or 10 days at a time when they had to run their trains around to Pipestone on other railroads; I don't remember what proportion of its tracks we assumed would wash out; the distance used is about equal to the lands that overflow; those lands that overflowed and had the tracks on; of course it would overflow the tracks; I don't remember how many miles we estimated that to be; we tried to figure it out and our engineer worked it out and that was the number of miles; the tracks were on land subject to overflow, that is what determined the distance; with reference to the bridges of the Chicago, Milwaukee & St. Paul Railway in arriving at this benefit—I don't remember whether there is any more bridges on the Milwaukee; yes, there are two; we took
227 into consideration that by diverting the great volume of water from the river into these ditches, their bridges would be less subject to destruction by the ice gorges and by high water and that they could be made smaller when they come to build new ones because they would not have such high waters; the water would be divided between the river and the ditches; in arriving at that feature of the benefit in dollars and cents, we figured out with our engineer what it would cost to build and maintain bridges of the size they have now and what it might cost to build them smaller and their relief when they were subject to overflow and ice gorges; these were the elements we had in mind.

After the filing of the Blackman petition in 1916 when it was decided that the spillway was to be repaired we employed engineers to go ahead and investigate that and it took about a year and a half before all of the preliminaries were taken care of so that we went to actual excavation on the structure; we employed a competent engineer and he laid the plans and we let the contract to a contracting company here, they were to have a percentage for their work; they proceeded to sink that shaft and make the channel of the spilling basin; to put it all in shape that it is at the present time; on the river we straightened a number of bends, made cuts across bends and straightened out the river to facilitate the flow of the water; I think Ditch No. 2 was cleaned about as far as Renner; then the time arrived that the ditch warrants did not sell any longer and we had no means to complete the work; there always were control gates at the head of Ditch No. 2; we made no change at the head of Ditch No. 2 after the filing of the Blackman petition if you call the end of it up there near Bal-

tic where the ditch begins; it crosses the river at one certain place up there and if you have reference to where this lower
228 part is started, there we built a small dam of willows and earth to keep the water from coming out of the ditch entirely and doing damage that way; the route of the ditch was left the same as the route of Ditch No. 1 and Ditch No. 2, the old ditches; no changes were made in the initial point or terminal points of either ditch.

(Cross-Examination).

Prior to the attempt to fix the proportion of benefits in 1919, no topographical survey was made or thorough investigation upon which to base the assessments or fix the benefit. In order to save money we thought the old survey would answer; in making the proportional benefits we took the old figures and old survey to avoid expense; we didn't get far enough to make any assessment on any particular tract of land; the Board abandoned that attempt to fix the proportion of benefits because of an error in adopting three units instead of one; after that time the Board caused a full topographical survey to be made by Chenoweth & Rettinghouse of this city and a thorough investigation of the benefits that would accrue to the various properties within the drainage area; Mr. Rettinghouse reported and explained to us the conditions which he found generally throughout the drainage area and the property that was benefitted; in making that report he stated to us the various elements that he considered as benefits and submitted to us the facts upon which he based his conclusions; Mr. Rettinghouse as our engineer made the computation with reference to this apportionment of benefits and the plans and we talked it over and he was practically the one that planned how it should be done; he did all the figuring and the computations; before we adopted the resolution of June 10, 1921, we had been fully advised as to the topographical situation and the elements that went into the fixing the proportion of benefits against each of the various pieces of property that we deemed to be benefitted; the board made a personal investi-
229 gation of all the property within the drainage area and determined the benefits before we adopted this resolution; we selected as a unit an acre of land about three miles north of town in the district between the river and the ditch and visited that unit in company with Mr. Rettinghouse; we determined that in our judgment that unit was benefitted by the improvement 25%; in reaching that conclusion it seems to me we valued the unit without the drainage at $100 and with the drainage at $125.00; it being our judgment that the real benefit to that unit was the sum of

$25.00; after determining the value of this unit we proceeded to equalize and fix the proportion of benefits among the other property; the engineer accompanied us and had with him various figures and maps he had made showing these tracts, we referred to the map right along as we traveled; the Board proceeded to investigate the whole territory proposed to be assessed on this basis investigating first upon the east side of the river and then on the west side and then around the bend clear in through town; we looked over the railroad situation and other properties including the power plant, city streets, parks, and water system that in our judgment were affected; my judgment and the judgment of the board coincided almost entirely with the report of the engineer, Mr. Rettinghouse, with reference to these various proportions of benefit; after having made our investigation and having had the elements of benefit explained to us by the engineer, the board exercised its judgment and concluded that these properties were actually benefitted relatively or approximately as the engineer had reported them, we considered as a basis for making assessments on these various properties the acreage of the right-of-way within the drainage area; with reference to the Great Northern Railroad property, Mr. Rettinghouse gave us the facts as to the area within the various territories; he pointed out to us that certain bridges would be benefitted by reason of it, that certain bridges might be shortened
230 by reason of having the water by-passed through the ditch; all of these facts together with the betterment or saving in maintenance on the roadbed were considered by the Board in determining and fixing the proportion of benefit as against the Great Northern Railroad; in like manner the engineer explained the amount of acreage of right of way of the Chicago, Rock Island & Pacific within the drainage area would be protected and benefitted the same as the adjacent farm lands; he pointed out that there was a certain length of its track that would be affected in having its maintenance cheapened by the drainage and that certain of its bridges might be shortened and were protected by reason of this drainage ditch by-passing the portion of the water that would come down the river; those amounts were all taken into consideration and passed upon by the Board in determining the amount of benefit our judgment indicated the Chicago, Rock Island & Pacific received; the Chicago, Milwaukee & St. Paul Railway extends almost the full length of this ditch and adjacent to it; in some places the track is right along the ditch and in other places it runs pretty close to the ditch all the way; it might possibly be 80 rods away where the ditch crosses the river at Renner; he explained the amount that

this railroad benefitted upon the same proportion that the farm lands adjacent thereto; that the embankments, tracks and roadbeds were benefitted in the same manner by being made more substantial and requiring less upkeep; that there was a certain number of bridges that could be shortened and a certain bridge might be abandoned by reason of by-passing this water; these matters were all taken into consideration by the Board in determining the amount of benefit that we fixed against the railroad for its proportion and the amount of benefit was figured out by Mr. Rettinghouse for us in the manner in which I have testified on the basis of maintenance
231 and upkeep; the Chicago, Minneapolis & Omaha Railway extends directly across the project in two places and Mr. Rettinghouse explained to us that its right of way would benefit the same as adjacent land and that its roadbed was benefitted by being more easily maintained; that there were a certain number of bridges over the Sioux River and adjacent thereto that were protected by the drainage; that a certain number of trestles might be shortened or abandoned and that by reason of these benefits the railroad company was actually benefitted a certain amount and it was in our judgment; we took all these matters into consideration and exercised our judgment in determining the amount to be fixed as against these various properties.

Mr. Rettinghouse, as our adviser, explained to us the number of miles or blocks of streets in the city of Sioux Falls that were within the drainage area and would be benefitted by being protected and drained by this drainage; also the benefits that would accrue to the two city parks and to the Sioux Falls water system and the elements of such benefit; the Board took all these elements into consideration in exercising its judgment and determining the amount of proportional benefits which it fixed against the city of Sioux Falls.

At the same time, Mr. Rettinghouse explained to the Board and the Board considered the elements of benefit which would accrue to the Northern States Power Co. by reason of the drainage; we went through that very thoroughly; the facts that the dam was put in adjacent to the river near Schotz, about three miles north of the city of Sioux Falls and that the controlling works in the nature of wiers were put in at Thompson's about ten miles north of the city were considered as elements of benefit to the Northern States Power Co. by reason of holding the water in the river and permitting it to flow down and over its power plant; to by-pass the flood water

or a portion thereof through the ditch and save the
232 retarding effect of permitting that flood water to pass over the dams of the power company and pile upon and retard the whole power produced at the power plant also was considered an element of benefit; all of these matters were taken into consideration by the Board in determining the amount of benefit that should be fixed against the Northern States Power Co. The construction of this drainage project, several river cut-off channels, were put in up the river north of Sioux Falls, and in determining the Northern States Power Co. benefit the Board took into consideration the effect and influence of these cut-offs in hastening the flow of the flood water down the stream and shortening the time of floodage upon the power plant. All of these matters were taken into consideration by the board in exercising its judgment of the amount that should be fixed, in the first instance against the Northern States Power Company.

The work that the Board did upon this drainage project consisted of constructing the spillway, cleaning and widening and deepening the ditch between here and Renner, diking the ditch and putting in the dam at Schotz and controlling works at the Thompson Bridge, and putting in these numerous river cut-offs.

The Court: Where is the Thompson Bridge?

A. Up where the ditch ends and turns into the river, and crosses the river and goes up on the other side.

The Court: How far is the Thompson Bridge from Sioux Falls?

A. About 12 or 14 miles.

The Court: How far is Renner from Sioux Falls?

A. 8 miles.

Q. Do you know the approximate present width of the ditch as it extends from Sioux Falls to Renner, or
233 thereabouts?

A. No, I don't. That would be a mere guess.

Q. Isn't it in the neighborhood of 80 to 100 feet?

A. It probably is as far North as Renner.

Where we diked the ditch had taken the channel of the creek; there hadn't been dirt enough taken out to make a dike and when the floods came it backed up on the farm lands to the west of it; we diked there probably five or six feet high; and protecting those farm lands from overflow from

the ditch after that; the dam at Schotz covered the break in the bank of the river about 150 feet wide and had the effect of keeping the water from the river from flowing in the bayou that is tapped by the ditch.

After the attempted assessment made in 1919, some work was still to be done in cleaning a portion of the ditch from Renner to the railroad tracks; settlement for this work had not been fully made.

Q. And this dam at Schjodt's that has finally been made to stand was not in at that time?

A. No, it was not.

Q. And some repair work has been done on the spillway since that time, has it not?

A. Yes, the control work at the bridge at Thompson's was put in since that time, but at the initial point of the ditch we haven't made any change.

Exhibit "1" is a copy of a map of the territory affected by drainage ditch No. 1 and 2 submitted by Mr. Rettinghouse to the Board as a part of his report.

We had a map similar to this upon which the percentages were marked before us when we made the inspection of the drainage [—] before making the apportionment of benefits, on June 10th last.

Exhibit "1" offered in evidence by defendants and received in evidence.

234 Q. Mr. Risty, in applying and using this unit as explained by Mr. Rettinghouse to you, and as followed by the Board in fixing these apportionments of benefits of the various properties affected, you stated that you determined what the actual benefit to the unit selected was, and that its value was twenty-five dollars? A. Yes sir.

Q. Did you use that value of twenty-five dollars as the actual benefit to the unit in determining the apportionment of benefits which each of the various classes of lands aside from farm land should be assessed in this drainage proceedings?

A. We did. This was in regard to farm lands.

Q. And your engineer figured out the total benefit to each of these various pieces of property and divided that benefit by twenty-five, the value of the unit, to determine the number of units to be fixed against these various pieces of property?

A. Yes, that is the way we determined the number of units.

Q. That applies generally to all of the plaintiffs in these actions? A. Yes sir.

Q. Your understanding is that in determining the amount of the assessment upon this basis, that the total number of units are added together to determine the number of units, and the total cost of the ditch is computed and the total cost is divided by the number of units to get the actual assessed valuation of a unit? A. Yes sir.

F. E. WARD recalled on behalf of plaintiffs testified as follows:

The plaintiff's Exhibits "B" and "C" are part of the files and records of my office.

Exhibit "B" was offered in evidence by plaintiff and received in evidence. It is the resolution of the County
235 Commissioners of Minnehaha County, fixing the proportion of benefits on drainage ditch No. 1 and 2, dated June 10th, 1921; it is not printed here because it describes the same property, names the same persons, and fixes the same units as are described, named and fixed in Exhibit "C" printed as a part of the bill of complaint herein.

Exhibit "C" was offered in evidence by plaintiff and received in evidence. It is the same as Exhibit "C" printed herein as a part of the bill of complaint and for that reason is not reprinted here.

H. E. BARLOW, called and sworn on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am civil engineer of the Chicago, St. Paul, Minneapolis & Omaha Railway; the Sioux Falls-Mitchell branch of the Omaha enters the City of Sioux Falls from the west, crossing the big Sioux River and the bottoms approximately three miles west of the city. The line then swings somewhat to the south and enters the city on the southeastern corner again crossing the Big Sioux River and through the station grounds runs approximately north and south; the spillway is a couple of miles north of the line of the Omaha; in the west portion of the City of Sioux Falls there is a spur track known as the west side spur, which branches off from the main line a short distance west of the westerly course of the Big Sioux River, and runs approximately north and south for a distance of about a mile; the Omaha railroad has no agricultural lands

in the City of Sioux Falls other than its right of way and depot grounds or in the drainage district involved in this controversy; all of its property consists of its railroad right-of-way, station grounds and appurtenances and is used exclusively for railroad purposes.

I know Mr. Rettinghouse, the engineer of the County
236 Commissioners in this drainage ditch matter; I called upon him at his office in Sioux Falls and had an extended conversation with him during which he very kindly outlined the method by which he had arrived at the amount of benefits; this conversation was in February or March last; the information was given me by Mr. Rettinghouse but not in confidence; the method he used in arriving at the total benefits deals primarily with the question of bridges; at the point where the Omaha crosses the bottoms west of town, we have in addition to a hundred foot steel span over the main channel, an approach bridge approximately 233 feet long, and two other bridges east of the main river bridge, one 128 ft. and one somewhat shorter; in addition to these bridges we have a small one span pile bridge considerably west of these bridges which takes care of local drainage only and is not concerned in this question; Mr. Rettinghouse has figured that by reason of the diversion of a certain amount of flood waters of the Big Sioux River by means of the spillway constructed by the County authorities, the Omaha Railway would be justified in filling in certain of these approaches, particularly our bridges known as 129 and 130, aggregating 239 feet in length; these are the bridges a mile east of the main bridge over the river west of town about three miles out; he has figured that it would cost to rebuild these bridges about $25 a foot or $5975; he has assumed that it will be necessary to rebuild these wooden structures about once in ten years; he has therefore figured that the average annual expenditure would be one-tenth of $5975; he has capitalized this amount at 7% arriving at $8536; [he has capitalized this amount at 7% arriving at $8536;] then he has deducted the cost of filling these bridges and the riprap necessary to protect the dam; he has used this at $2000, which deducted from the $8536
makes a net of $6536 benefit on account of filling bridges
237 129 and 130; in a similar manner he has figured that we could fill the approaches to the two steel spans we have here in town, where the amount of pile bridging is 166 ft. going through the same proposition and capitalizing the annual expenditures and deducting the cost of filling he has arrived at $2930; these bridges which we have here in town are what are known as through bridges; the supports are

above the track, and Mr. Rettinghouse has figured that if the Omaha Company thought it desirable it might rebuild those bridges and substitute the deck built character construction which is a cheaper type construction, and by using shorter girders and necessitating two additional piers, this type of construction could be used, and he has planned that to reproduce these bridges as through structures would cost $45,500 and with the deck plate girder type would cost $25,500, making a difference of $20,000; then there is one other item which relates to the maintenance of the roadbed of the mile and ¾ length of track we have west of town in the district; this track has an embankment varying from 3 to 4 ft. to 10 or 12 ft; he has figured that on account of the diversion of a part of the flood waters, the embankment would be less, consequently the amount of labor that would have to be expended in keeping up the track would be less by an amount equal to $100 per year; he has capitalized this $100 at 7% arriving at $1400; in summarizing all of these items he arrived at the total benefit of $30,866; now the assessment of the Omaha is fixed at 839.45 units; if 1 unit is approximately $9.50, the total assessment would be $7975; the total amount of benefit divided by the total number of units would make an average value of about $36 for the unit; he has assessed us at approximately 25.8% of the total benefits; figuring the one unit as $9.50.

The situation at the west crossing is that we cross the valley approximately at right angles; the valley is quite wide at this point; the track is on an embankment and has
238 these 4 openings; three of them are at a distance of about ¼ of a mile; the land north of the track on the upstream side is cultivated to a considerable extent, not in the immediate vicinity of the bridges, but a short distance each way from the river the land is cultivated; in a time of normal high water this land is flooded and on account of the likelihood of holding this water an unnecessary length of time on this bottom land if we don't have considerable opening there through our embankment and taking into consideration the danger to the roadbed that might result if we closed the opening, it is my opinion that we would be unjustified in reducing the size of our openings or the length of them; in my opinion there are absolutely no benefits resulting to those bridges west of the city or to the railroad west of this city by virtue of this drainage ditch construction.

Referring to the bridge west of the depot in the City of Sioux Falls and taking up the question of the substitution of the belt girders for the trestles; the fact of the matter was

that the Omaha Company has no intention of making any changes in these bridges; the bridges are amply strong for the locomotives we are now running or which we anticipate we will run in the future; there is absolutely no reason for disturbing the bridges at all; furthermore, if we should decide ever to substitute the plate girders we could do so and still have the light iron at about the high water of 1881.

There is one other point that has not been covered and that is in regard to filling the pile approaches; there are short approaches at each end; the west approach is 62 or 63 feet; and the east approach is 103 ft; we have felt that we could fill both of these approaches whenever we got around to it and could at any time; as a matter of fact it would involve considerable expense and we have felt it would
239 be better economy to maintain that type of approach; as to the filling of those approaches the drainage ditch construction has no effect one way or the other.

I have figured up the acreage the right-of-way of the Omaha Railroad in the drainage district amounts to; we have 22 acres on the main line, 21.2 of which is on the west bottom and 5.89 acres on the west side spur previously described; these figures, include .8 of an acre in the vicinity of the bridge out here in the city and includes all the right-of-way within the drainage district sought to be assessed.

(Cross-Examination)

I have been in the business of civil engineering something over 22 years and have occupied my present position since the first of March 1920; it is a fact that water in flood seasons permitted to stand along side of the embankment which supports the tracks of the railway has a tendency to weaken that embankment and it necessarily requires a greater outlay of money to keep the bank in solid form; as a general proposition the more water standing there the more effect it has.

Q. Do you know when these bridges were built west of town?

A. I think our records disclose that they were built about 1880 or 1879, along in there.

Q. Then these extra full bridges were built at a time when all water was coming down the river?

A. Yes sir; the engineer building the bridges would naturally have in view that they would take care of all the water that came down the river; if the evidence should disclose in this case that from 1/3 to ½ of the water that comes down the river was diverted and does not pass under this bridge, it

would not be the reasonable conclusion that at least part of the bridge could be done away with; I don't know how much water stood out there last year north of those bridges on the uphill side of those embankments; I don't know how much water there was the year before or the year before that.

Q. You do not know any of the data, but you are willing to swear you got no benefit, notwithstanding the fact
240 that you do not know how much water stood there?

A. Yes, I am willing to say that.

I think it had no effect whatever; if only ½ of the water came down the river last year that previously went under the bridges there would have been no benefit to our embankment in the solidity of the same and in the cost of the maintenance of it; it would make no difference how much water comes down the river unless it should go over the track and begin to wash the bottom out; I stated as a general proposition that when the embankment stood in water it had a tendency to weaken it and make a higher cost of maintenance; this fact is not true at this place and our embankment would stand all amounts of water; there is a peculiar reason why it should.

It is not a fact that we cannot run over that bridge the same class or weight of engines that bring our trains from St. Paul and Minneapolis to Sioux Falls; that bridge would not have to be changed if we wanted to run the same class or weight of engines to Mitchell; my company has not put in any different trestles since this spillway has been constructed; I have been in Sioux Falls several times; I think I was here in 1919; I think I was here in 1917 or 1918, and went over the ditch matter at that time; our former chief engineer had at one time under consideration the question of the shortening of the bridge just east of here; my understanding is that the spillway is designed for 2000 second feet and could take an overload of 500 more, making a total of 2500.

241 (Redirect Examination)

The special reasons why water standing by this railroad embankment did not affect it is that this particular embankment is very wide and deep and very heavily overgrown with vegetation and sod; in the vicinity of the river course where any washing has ever taken place are thoroughly protected by rip-rap; for this reason I believe that water standing along this particular embankment would have no effect on it in so far as the labor that would have to be expended in maintaining the track is concerned; that is the answer that I would make to the claim of benefits made by Mr. Rettinghouse in

regard to saving $100 a year maintenance; my understanding is there has been no decrease in the force employed on the section since the construction of the spillway in 1918 and that would be the determining factor as to saving in maintenance account.

The reason why trains the same as come from St. Paul to Sioux Falls cannot be run to Mitchell is that we have other bridges between here and Mitchell which would not permit of the running of heavier locomotives; the bridge in Sioux Falls is restricted in our time card; we do not permit our heavier engines to go over it at the present time; as a matter of fact there is no reason why the heavy engines that operate down here cannot go over this particular bridge although it is restricted in our time card; there is no reason why the heavier engines should run any further than Sioux Falls if they cannot go clear through to Mitchell; Mr. Rettinghouse the engineer of the drainage district, was the former chief engineer of the Omaha road who had under consideration the question of changing the bridge at Sioux Falls.

C. GEELAN, called and sworn on behalf of the plaintiffs, testified as follows:

242 (Direct Examination)

I am road master of the Chicago, St. Paul, Minneapolis & Omaha Railway from Worthington to Mitchell and from Luverne to Doone, and I have been since August 15, 1905; prior to becoming roadmaster, I was section foreman and extra gang foreman; I was section foreman at Montrose; I started working for the Omaha in April, '80, and was employed by that road during 1881; I remember the flood waters of [1818]; I was in Sioux Falls when the water was the highest; I am familiar with that portion of the Omaha Railroad in the City of Sioux Falls and west of the City comprised in the area sought to be assessed for the construction of drainage in this drainage district No. 1 and 2, and have been familiar with it since 1908; there is very little noticeable difference in the water conditions along that line of the Omaha railroad subsequent to the construction of the new spillway in 1918; I realize that more water has come down and stood on the bottoms, but it spread out such a wide territory across the bottoms that it didn't raise it very much; I wouldn't say that there has been more water on the bottoms west of the city and north of the Omaha Railway track since the construction of the spillway than there was before, but to my knowledge there

is fully as much; I have seen the water conditions each year beginning with 1918 and have visited that part of the line and know how much water there was; the water that has collected in the field north of the track does not seem to have had any bad effect, that is, it doesn't seem to make any more particular work across the bottom; I can't say it has a bad effect one way or the other either before or after the construction of the spillway; the construction of the spillway and other works in Drainage Ditch No. 1 and 2 has made no apparent difference one way or the other as to the flood waters of the river

243 and as to the line of railroad of the Omaha west of the city and east of the river; I can't say that there is any particular noticeable difference in regard to the water conditions at the bridge in the city of Sioux Falls before and after the construction of the new spillway; I am familiar with the course of the river through the City of Sioux Falls and have seen it each year since I have been roadmaster; so far as effects the maintenance and operation of the railroad, the difference is very little; in fact so far as the operation of the railroad is concerned, it doesn't affect the river being a little high or low west of the depot; it never has had any effect before or after the construction of the spillway with the exception of one year, that was 1881; that was the year there was an ice gorge formed in the southeastern part of the city; that gorge held the water back and when the ice gorge broke there was a flood which flooded the track about the location of the present station; the Omaha has never been troubled with water at its station or at its bridge west of the station since 1881.

(Cross-Examination)

I have been familiar with this particular part of the river between here and Montrose since 1880; in my travels back and forth over this road from year to year I have never set any permanent structures to indicate the course of the water at any particular year; when I say that the water is the same now as 5 or 10 years ago, that is the best of my judgment; in 1881 it washed out the whole line; in 1907 the waves had cut down into the bank and there was some riprap put there for fear it might wash; the water caused us additional expense and maintenance that year; if the water should pile up in the same way as it did in 1907, it would not be necessary to put riprap in again.

244 Q. You say the [heighth] of this water has been practically the same every spring? Were you advised of the fact that from one-third to one-half of the water coming down the valley had been diverted from your railroad?

A. Yes sir.

Q. Still the [heighth] of the water remains about the same each spring as to your railroad track?

A. Not the same every spring.

The [heighth] of the water as to the railroad track varies with each season but is relatively the same; if there should be an increase of 30% to 50% of the amount of water coming down the Sioux River the effect upon the track would be very little, if any; it would not require any more riprap and would stand up just as well as it does now; we would not need any greater flood bridges than we have now; we did need them in 1881 but it was then fixed out there to take care of the flood water we have left the same amount of lineal feet of flood bridges since 1881 to take care of the flood waters ever since the spillway has been put in.

(Redirect Examination)

The riprap which was put in in 1907 was put in on the west spur which is possibly 400 ft. west of the main channel; it was on that branch or spur which runs north of the main line and the water has never since made any trouble; no other riprap has been put in.

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245 B. A. WAITE, called as a witness on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am B. A. Waite of Des Moines, Iowa; am assistant Engineer of the Chicago, Rock Island and Pacific Railway. I have been Assistant Engineer of the Dakota division coming into Sioux Falls frequently. I became connected with the line that runs into Sioux Falls in 1907; from then down to the present time I have been on this division, five or six years, and while I was working in Chicago and in Davenport I worked on this territory part of the time. Am a Civil Engineer, practicing that profession since 1892. Am familiar with the right of way and the bridges and railroad tracks of the Rock Island Railroad within this drainage district. I have here a map showing the property owned by the Chicago, Rock Island & Pacific Railway within the City limits of Sioux Falls, marked Rock Island Exhibit "1". That is a correct blue print representing the right of way, the property owned by the Rock Island Railroad within the City limits of the City of Sioux Falls. The red pencil mark outlines the property owned by the Rock Island Railway.

Rock Island Exhibit "1" is offered in evidence by the plaintiffs and received.

I have computed the number of acres of property owned by the Rock Island Railroad within Drainage Districts No. 1 and 2, and as far as I can tell it is about thirty acres (30) or a little less. There are two bridges on the Rock Island across the Big Sioux River, one two miles east of town and one just north of the depot. The Rock Island comes into Sioux Falls from the southeast, crossing the river the first time two miles southeast of the City. It then comes up the west side of the river into Sioux Falls. It then crosses the river again within the City limits at the foot of 9th Street; that is a spur
246 known as the Bismark spur. The trains do not cross this bridge. The Rock Island station is on the west side of the river on 10th Street. The Rock Island Railway Company has no property within this Drainage District that is used for agriculture and none of it has ever been so used. All of its property is used for railroad purposes, location of side tracks, industrial tracks, station grounds, roundhouse grounds and right of way of the main line. The Rock Island has no more property within the City of Sioux Falls or within this drainage area than is necessary for railroad purposes. The first half mile of the track from the east bridge toward the City is about eight feet above the average water of the Big Sioux River and is practically level with the adjoining ground near all the rest of the distance, and inside of the City limits it is above the level of the river about fifteen to twenty feet. That is true throughout the course of the line, except at the east end over the bottom where it is about eight feet above the river. Neither the track nor the embankment of the Rock Island has ever been reached by high water within my knowledge, and neither the track nor the right of way has ever been affected by high water from the Big Sioux River since I have known it. I have here a blue print of a cross section of the bridge about two miles southeast of town marked Rock Island Exhibit "2". I have checked the measurements over at this time and it is correct. There is in the center of this bridge a true span made of steel and then it has piled approaches. The approach on the east end is ninety-seven feet (97) and on the west end one hundred ninety feet (190), making a total bridge, including approaches, of four hundred nineteen feet (419). From the top of the tie to the bottom of the river is twenty feet.

Rock Island Exhibit "2" is offered in evidence and received.

247 I also have a cross section of the Bridge at 9th Street inside the City of Sioux Falls marked Rock Island Exhibit "3". This shows the construction of the bridge, with the exception of the pile portion, which has been re-built since that plat was made. The plat was made in 1913 and part of the piling on the east end has been filled in since then. It was filled in gradually, took several years from 1913 to 1915 and the land on either side of the bridge was filled in as we filled in the approach. The shore line has been filled out on either side of the approach so the approach was of no use there.

The exhibit is offered and received in evidence.

In regard to the bridge southeast of town, we have never had any trouble with that bridge from high water to my knowledge, either before or after the building of the spillway. As an engineer I would not dare to fill in any of the bridge or any of the approaches at the present time, because at the present the waterway is no more than would be required according to our way of figuring the waterway required. We figure the drainage area on Dunn's tables and a certain proportion of that is the waterway required according to the area drained, and under such computation we have no more waterway under this bridge than is required for the area drained. The approaches to this bridge have not been in any way affected by the building of the spillway and the spillway has had no effect upon the bridge that I know of.

In regard to the bridge in the city at 9th Street, I understand it is proposed by Mr. Rittenhouse to eliminate one section of that bridge, that is the south or east one hundred ten feet (110) steel span truss. The bridge now is three hundred seven (307) feet long. If that span was taken out the bridge would be one hundred ninety-seven (197) feet long. I
248 would not dare to cut that bridge down to one hundred ninety-seven feet. The bridge as it is now is about the same length as the other railroad bridges on this stream. I believe that they have two one hundred foot (100) spans, and if we eliminate one hundred ten (110) feet this bridge would be shorter than the other bridges. This bridge on 9th Street was raised by the Rock Island before I came here. This span that is contemplated to be eliminated by the drainage engineer is filled in about half way. There is no water under it at the present time, the current is under the other end of the bridge. This was caused by the building out of approaches and driveways, pushing out the shore line. The spillway has nothing to do with the filling of this river on either side. It has been

caused by the buildings being extended towards the river. There is at the present time a garage known as the Homan Garage directly west of this span in the bridge and extending out at least half of the length of the approach, so that a line from the warehouse on the east side of the bridge to the corner of the garage would strike the middle of this span. I would not consider that it was reasonable engineering to eliminate any of this bridge. Since I have known this property the water of the Big Sioux River has never been over any of the track in any place, and I have known it since 1907.

(Cross-Examination).

It is twenty feet (20) from the rails on the bridge two miles south of town to the bottom of the river. This bridge was built in 1886. Either this bridge or replacements of it. Since 1907 it has been in the same condition. I have never compared this with the Great Northern Bridge down the river. I have never observed this bridge at extreme high water. From the area of the waterway required I would say that none of the approaches to this bridge could be filled in. I asked Mr. Rittenhouse in regard to the watershed in this drain-
249 age area, and I think he said it was 4500 square miles. This was the whole watershed. I do not know the slope of the land from north to south per mile. I do not know the velocity of the water, but from our rules we could not reduce the length of the bridge. The steel span in the center is 127 feet with pile approaches. These piles are treated and should last 20 to 30 years. We do not know just how long creosote piling will last.

I said that one of the approaches to the bridge within the City had been filled in gradually along about 1914. It has not caused us any trouble since then. Where the filling is there was formerly a trestlework. Under the present condition of the river since 1914 it has not been necessary to have as much approach to the bridge as when it was constructed. The shore line that I spoke about from the Homan Garage to the warehouse, that is in a bend in the river. I do not know the difference in elevation of the two bridges and I do not know the velocity of the water at either one of them.

Q. And still upon this information that you don't seem to possess as to the fundamentals as to how much water this river carries, the slope of the land, or the difference in the [heighth] of the land, you still wish to be understood that it would not be safe, in your judgment, to shorten these bridges?

A. Yes sir.

I do not know what would be the effect on the bridge here in town if the amount of water flowing down the river should be increased thirty to fifty per cent. I think the one east of town would be all right, but I am not sure about the one here in town. The high water has never reached our embankment that I know of. I do not believe that the water has ever crossed our right of way. I do not remember of it. I have not been here very often for the last year, once be-
250 fore in the last six months, but have been here before. My headquarters are at Des Moines. I have been here at high water periods. I could not tell you just what year, but I have been connected with this end of the railroad intermittently. I could not remember the year that they had high water when I was here.

(Redirect Examination.)

In regard to the filling in of the piling on the bridge in the City known as the Bismark Spur, the land adjacent had been built out to the end of the piling so there was nothing but dead water that stood under it. The water could not flow under the piling on account of the land having been filled in on each side.

C. E. DEAN Called as Witness on Behalf of the Plaintiffs Testified as Follows:

(Direct Examination.)

I live in St. Paul and am a bridge foreman on the Chicago, Rock Island & Pacific. I am a bridge foreman upon the division running into Sioux Falls. I began work here in the fall of 1893 and left this division in 1913, so that from 1893 down to 1913 I have known this railroad running into the City of Sioux Falls, with the exception of the years 1905, and 1906, when I was with another railway. From 1893 to 1897 I was a bridgeman. From 1897 to 1905 I was bridge foreman, and from 1907 to 1912 I was master carpenter on this division. I was familiar with the two bridges on the Rock Island within this drainage district at the time I was here and down to 1913. I remember when the bridge across the Big Sioux at the foot of 9th Street in the City of Sioux Falls was raised. It was raised about four feet on the two spans, but the old approaches were left alone. That was just before or about the time of the breakup of the ice in the spring. We contemplated
. a flood. The report came that there was an ice gorge
251 up the river. We expected it to break loose and have heavy water. It had been a hard winter and the ice

was heavy, but it did not materialize. We had no trouble from it. The bridge was lowered a little after that, but not put back where it was originally. I think the permanent raise was about two and one-half feet and the ends dropped down to their original position. During the time that I was on the division we never had any trouble with the bridge southeast of town. I was here in 1907 when the spillway was put in, was master carpenter. I have never noticed any perceptible change in the condition of the water flowing under these two bridges before or after the building of the spillway. I have no record of high water marks myself. The building of the drainage ditch and the spillway has never benefitted these bridges in any way that I know of. From an engineering standpoint I cannot say but from a practical standpoint I would not fill in either of these bridges at the present time. I base my opinion upon the fact that the engineers as a rule do not give enough waterway. I have taken many an opening —for instance—four foot opening I put in once on the engineer's orders and afterwards had to be a seventy foot opening. During the time that I have known the Rock Island property within the City of Sioux Falls the railroad track has never been under water. The water has never been up on the embankments at any place to my knowledge.

(Cross-Examination.)

I was here in the high water of 1911. There was no damage that I know of. I have not been here at any other time of high water except in 1897. I have never made any definite measurements of the water in the river. I do not know the amount of watershed that the river and the ditch drain, I do not know the elevation of the land from our right of way north and I do not know how fast the water flows. I do not know the amount of water that comes down the river, or that comes down the drainage ditch. If the water was in-
252 creased fifty per cent I do not believe the bridges would stand it. The present bridges represent the same length of span that was here in 1893. Only the spans have all been renewed. There have been piers put in. The piles we are using now are creosoted piles. Piles not creosoted last about ten or twelve years, and this is true of hard wood culverts.

S. P. PERKINS, Called as a Witness on Behalf of the Plaintiffs Testified as Follows:

(Direct Examination.)

I am an inspector on the Rock Island Railroad. I have been connected with the bridge and building department as bridge

foreman and master carpenter. I was master carpenter on the division running into Sioux Falls from January 1, 1913, to June 1, 1920. During that time I was familiar with the two bridges on the Rock Island in the City of Sioux Falls. During that time there never was any high water that damaged or threatened to damage these two bridges in any way. The water has never been upon the embankment of the right of way of the Rock Island at any time to my knowledge. I have worked upon these bridges more or less. As a bridge man I would not think it safe or advisable as a railroading proposition to fill in any part of these two bridges. From my experience I have been obliged to put in several larger openings at different points where we have had similar openings. We have had to increase the length of the openings on account of high water, and I would not think it safe to close up any of these openings.

(Cross-Examination)

I do not know the number of acres of watershed drained by this ditch or by the Big Sioux River or the elevation of the land or the excessive or average rainfall for a year in this drainage district, and I do not know the capacity of the spillway to take care of the water from the ditch, but I want the court to understand that these spans could not be safely shortened. That is based upon the fact that several times I have had to make openings larger and that is the foundation of my testimony.

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253 A. F. PITCHER Called as a Witness on Behalf of the Plaintiffs testified as follows:

(Direct Examination).

I am general agent of the Rock Island Railroad at Sioux Falls. Have been here since June, 1890. I was the agent of the Rock Island until 1914 and since then the general agent. I have been familiar with the property of the Rock Island within this drainage district for thirty-one years. The Rock Island has no property within this drainage district that has ever been used for agriculture and none of it is used for agriculture at the present time. It is all used for railroad purposes, roundhouses, stations and railway tracks. It has no land that is not necessary for railroad purposes at the present time. The right of way and the rails upon the track in the city are about 20 feet above the water in the Big Sioux River at ordinary times. Two miles south of town, at what is known as the Cherry Creek bridge, they are about eight feet above

the water. The right of way has never had any water standing on it in the Big Sioux River since I have known it, that is since 1890. None of the roadbed of the railway has ever been washed by the Sioux River. There has never been any difficulty with the bridge southeast of town in handling floods. In regard to the bridge at the foot of 9th Street in the City, in 1897 there were rumors that an ice gorge had formed and as a precautionary measure we raised this bridge at the foot of 9th Street but we found out it was not necessary. The high water did not develop. The Big Sioux River has never been out of its banks here in the City of Sioux Falls since 1890.

(Cross-Examination).

I live in Sioux Falls and worked for the Rock Island Railroad Company in 1916, 1917 and 1918 and at that time knew about this new ditch going in. I saw the publications in the newspapers. I knew it was being constructed. I went over to the spillway and saw it in the course of construction. I know of no reason why the land of the Chicago, Rock
254 Island & Pacific Railway Company could not be used for agricultural purposes if not covered with the railroad tracks. It has agricultural land as a basis.

C. M. Bassett called and sworn on behalf of the plaintiff testified as follows:

(Direct Examination)

My name is C. M. Bassett; I live in Sioux City; I have been a civil engineer 24 years; I am assistant engineer of the Great Northern Railway Company; I have been in its engineering department 9 years; at the present time I have jurisdiction of the entire Sioux City Division, including all of Minnehaha County, South Dakota; I have been in charge of that Division since the spring of 1916; during that period of time I have made frequent trips to Sioux Falls, and over the lines throughout Minnehaha County; for two years 1916-17 I was in Sioux Falls practically all the time; since then I have been here practically every week. I am familiar with what is known as drainage ditch Number 1 and 2, and the spillway; I am also assistant engineer of the Watertown and Sioux Falls Railroad Company; its line is located along the ditch for about 3½ miles; every spring I have been to the spillway; then I have been over the entire line of the ditch and looked at the various head-works and retaining dams; the line of the Great Northern enters the city of Sioux Falls from a northeasterly direction at a point about a mile and a

half from the mouth of the spillway; that is the nearest point on the line of the Great Northern to the mouth of the spillway; the course of the line of the Great Northern as it goes through the city of Sioux Falls and around south of the City and down through Section 31 is as follows: We enter in a northeasterly direction and then through town we go practically north and south and then we swing southeasterly towards Yankton; Exhibit 1 is a plat I prepared or caused to be prepared, showing the location of the line of the Great Northern over the area referred to and the general location of a portion of drainage ditch Number 1 and 2 and the location of the bridges along the line of the Great Northern within the area referred to; the plan is drawn to scale, 1 mile to the inch.

255 Plaintiff offered in evidence, Great Northern Exhibit 1, which was received in evidence and is as follows:

(Here insert Great Northern Exhibit)

The acreage of the right of way and station grounds of the Great Northern Railway within the area in question, Sections, 16, 27 and 31, Township 101, Range 49, is 27.14; the acreage of the station grounds included in that is 6.09; tract 11 consisting of approximately one and one half acres is not included within the 27 and a fraction acres; tract 11 lies at the north end of our bridge 146 and on the west side of the main line; it is between the Omaha and Great Northern rights of way and the Milwaukee is on the north; it is just south of Tenth Street; it would be on Eleventh Street if it were extended out; it is an irregular tract; it was originally purchased for station grounds and is part of the station grounds of the Great Northern; it is bounded on the east by our grade; on the north, the Great Northern and Milwaukee connection; on the west the Omaha grade and on the south the river; the tracts of the various railway companies bounding it I would say are about ten feet above the natural surface of the ground; tract 11 has never been used for agricultural purposes; I would not consider it agricultural land; it is not accessible; it is bounded by the river and three railroad rights of way on there is no road into it; no one could get into it to farm it; it is not feasible for that purpose. I am familiar in a general way with the channel and banks of the Big Sioux River from a point near our bridge in the city of Sioux Falls; the North bridge down to and through Section 31; to the south of town the banks of the river are well defined; there is a deep channel there and the river is confined to that channel, through town there is a

greater chance; the channel is wider and the banks are
256 not so steep; as you go further north the channel again deepens and it is confined, the valley is narrowed considerably south of town; I am acquainted with Mr. Rettinghouse; I had a conversation with him in reference to the manner or basis upon which he based his opinion and report to the Board of County Commissioners with reference to the alleged benefit to the right of way, bridges, tracks and embankments of the Great Northern Railway from Drainage ditch No. 1 and 2 and the spillway in question; the first conversation with him was in early spring of this year; the last one was about ten days ago, I think it was last week; during the first conversation Mr. Rettinghouse stated that he had figured we could shorten our bridge and had figured out the cost of renewing those and the cost of filling and made deductions and based his figure on that amount capitalized at seven per cent, and divided by twenty-five per cent, was what our assessment came to—the number of units.

"Q. In your conversation approximately ten days ago, did he go more into detail with reference to the subject?

A. Yes sir.

Q. State the substance of that conversation.

Objected to as not binding upon the defendant commissioners.

Overruled.

A. We have two bridges within the area, and he stated bridge 150-7 that that bridge was about the right size, and bridge 146-0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures, and figured on the amount saved by the shortening of the bridge.

257 Counsel.

At this time, if the Court please, the defendants object and ask that the question be stricken, and objects to the testimony of this witness on behalf of the plaintiff company, and to the proposition of whether or not the plaintiffs are benefitted or not, or the extent thereof, by the drainage project, for the reason the same is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction in the said matter in these proceedings, and proceeded with the construction and repair of the ditch in question. For the further reason that this Court has no original jurisdiction of a

bill in equity to reject or control proceedings of the Board of County Commissioners of Minnehaha County in the construction or reconstruction and repair of this ditch. And that the plaintiffs have a plain adequate and complete remedy at law, by appeal from the equalization arising from the proceedings taken by the Board of County Commissioners. For the further reason, it calls for evidence of a fact, the determination of which is in the exclusive jurisdiction of the Board of County Commissioners, and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action, and with no allegation or proof of fraud or arbitrary action on the part of that tribunal. Is not within the issues of the case and not a proper subject of inquiry in these collateral proceedings, and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these proceedings attacking the question of whether or not they are or are not benefitted by the ditch proceedings?

258 The Court: Yes, the motion is denied. The testimony is received subject to objection.

Mr. Rettinghouse made no statement to me with reference to any other element of benefit to the Great Northern Railroad than the shortening of the north bridge within the city limits; basing my answer upon my knowledge of drainage ditch No. 1 and 2, the spillway, the location and construction of the tracks, bridges and embankments of the Great Northern Railroad Company, and my knowledge of the waters in the Big Sioux River; in my opinion no benefit results to such right of way tracks, bridges, embankments or station grounds from drainage ditch No. 1 and [—] including the spillway; no part of the right of way, tracks or bridges within the area in question to my knowledge have ever been flooded by the waters of the Big Sioux River; we have a plan drawn up for a new steel bridge at bridge 146 which provides for shortening of fifty feet of that bridge and putting in deck girders which are much lower and nearer the water; we considered that owing to the fact that we are lowering the steel we would have to provide practically the same opening we have there now; in planning to shorten the bridge fifty feet we did not take into consideration the existence of the drainage ditch; the present height of the track on this bridge above what I understand to be the high water mark of the Big Sioux River, according to our best record is eleven feet; if I were planning

to construct new the bridges in question on the Great Northern, or to rebuild them, in determining the sizes of the openings from an engineering standpoint, I would not take into consideration the existence of drainage ditch No. 1 and 2, because by observation has been that before the spillway went out in 1916, and the water conditions have been just the same; I consider there is great danger as the spillway is constructed now of its going out, and there is danger that they will have to close the ditch and turn the water back into the original channel; I would not take it into consideration even if the ditch and spillway were working at capacity; I don't think it takes enough water out of the river to make any
259 material difference; I would plan new openings without considering the ditch and considering the highest possible water in the river; I would consider it bad engineering to plan otherwise.

I observed the flood waters that entered the ditch coming out of the ditch north of Sioux Falls and re-entering the Big Sioux River; on the Watertown and Sioux Falls we are flooded every year just south of the city pumping plant at the top of the hill; the water comes out of the ditch and goes over our track; it has every year I have been here; we have probably over six inches over the top of our track; the water stands in there, sometimes for probably ten days on the Watertown and Sioux Falls line.

The length of the north bridge is 615 feet; I do not think it would be good engineering or safe for us to shorten that bridge more than fifty feet under any conditions; as I have stated, for some period of time we have contemplated the construction of a new bridge and of a different type, and shortening it fifty feet; as constructed at present the bridges are supported by a truss above, and in contemplating the new construction we had in mind what we called a deck girder, and that support is below the rail which makes a difference; our plan will be to lower it five or six feet due to the use of deck type girders instead of the truss now used; in planning this new bridge we did not take into consideration the possible effect of the drainage ditch.

(Cross-Examination)

When we lower five or six feet, the girders I have mentioned which are in the nature of I beams probably five feet thick, will still be underneath the track; the elevation of the track would remain the same as the bridge work is all underneath the track; from my observation I say that during the last five years the water from the south bridge and north to

the termination of our line in the city has remained
260 about the same; during this same time the water has been high enough up around the penitentiary where the Watertown track goes to flood its tracks some inches of water every year; the water that came over the Watertown & Sioux Falls came out of the ditch; I have been told and know approximately the amount of watershed in this drainage project; I couldn't say off hand how much it is; I haven't the figures with me; I do not know how much water really falls in the watershed when we have high water here; I know generally the topography of the country north of Sioux Falls through which this water is collected and conveyed by the river and ditch south; I have been pretty well all over it; I do not know the number of cubic feet of water the river carries per second when it is banked full at flood time, nor the whole capacity of the ditch and spillway; I was up there when they were building the spillway in 1917 and have been watching it; I didn't like the construction; I saw them repairing the ditch on north and throwing up embankments on either side; I am still of the opinion that the spillway isn't what it should be; I have seen it every year since then; I know of no reason why if the tracks were not upon the right of way and station grounds, those premises could not be used for agricultural purposes, except our station grounds which are right on top of rock; Section 31 and 27 could be used; Tract 11 I don't think has any soil to amount to anything on it; the bridge south of town is 304 feet long and takes care of the water; the bridge in town is 615; since I have been on the division there has been no new bridge put in; these bridges have been constructed for some years and before the spillway project was put in; I judge that they were put in to take care of the water that came down the Sioux River at the time; the water has come out of the ditch every year since the spillway was put in; north of the city at level siding
261 the water has come out of the ditch over the tracks of the Watertown & Sioux Falls Company right at the city pumping plant; it comes through the dikes in the ditch.

(Redirect Examination).

Along the right of way south of town we have an embankment about 1800 feet long; bridge 150-7; it is about 16 feet deep; side slopes approximately one and one half to one, approximately fifteen feet high; the toe is protected in some places with rip rap, and it is now overgrown with grass and weeds; that embankment is so constructed as to withstand any possible flood condition in this neighborhood.

THOMAS SIMPSON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination)

My name is Thomas Simpson; I have lived in Sioux Falls twenty-seven years; I am general agent of the Great Northern Railway Company at Sioux Falls, and have been its agent for twenty-seven years; I am familiar with the line of the Great Northern included within the area in question here in Section 16, 27 and 31; during such twenty-seven year period no part of the tracks, bridges or right of way of the Great Northern Railway within that area has been flooded; we have had no trouble during that period of time from high water; the station of the Great Northern is east of the river; I have lived on the west side of the river twenty-seven years; the depot has been located where it is now approximately fifteen years; during that time I have crossed the Big Sioux River several times a day and I have not observed any appreciable difference in the flow of the Big Sioux River before and after the construction of the spillway.

(Cross-Examination).

During the time referred to in my testimony the height of the river has fluctuated, but there has been no floods; the height during flood periods has been at about the same level; I do not know how much water the spillway takes care of or how much the river banks carry; I heard about it when they put in the spillway.

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262 ANDREW NELSON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination).

I am section foreman for the Chicago, Milwaukee & St. Paul Railway between Baltic and Renner. Renner is six miles and Baltic fourteen miles north of Sioux Falls. I have been section foreman there twenty-seven years and was foreman in 1916. There is a place on my section where the drainage ditch is just outside of the right of way. I think they diked it there four feet just outside of the right of way. From a point about four miles south of Baltic the ditch is on the west side of the railway, and from that point down to Renner it runs close to the track. The Ditch runs between the railroad and the river and the ditch and the river are both on the west side of the track. In 1916 at a point four miles south of Baltic the dam went out of the river and the river let the

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water in the ditch. The ditch couldn't carry the water and it went over the bank and washed the dike out, and a few miles further south it washed the track and let all the water out over the farms around. It flooded the farms around there and washed back on the track. This water came from the ditch. The ditch is constructed with a dike and the water broke through that dike. Before the water came out of the ditch there was no water east of the track. The water came into the ditch and went out of the ditch and washed all the track out and flooded the ground. The water in the ditch came from the river. I did not have any trouble with the water in 1919 and 1920. It came out of the ditch at several places, but not enough in those two years to hurt the track. In 1919 and 1920
263 the water came out and went up to the track and the ditch was full of water. It came to the bottom of the railroad track but didn't cut in much or wash. At the time the water came through and flowed up to the top of the bridge there was no water east of the railroad track. There was no flood water between the ditch and the river until the water ran out of the ditch. It ran out of the ditch and filled up between the river and the ditch too. It went over the dike on the west side of the ditch. The origin of that water was the river. In 1916 the water remained on the lands that were overflowed about ten days or two weeks. In 1919 and 1920 it stayed over two weeks. It stayed a little longer in 1920 than in 1916. The point at which the ditch protects the track is about a half mile south of the Thompson bridge. The ditch comes to the right of way at the Thompson bridge and runs nearly four miles down the track. The water comes in the ditch where that bridge is built. There has always been a bridge there. They built a cement bridge there a year ago. It is a highway bridge. At the point where I said it washed out we had to put in [riff raff]. We had to build a bridge there temporarily and afterwards we filled it with [riff raff] and it is [riff raff] now.

(Cross-Examination).

The water wall washed the track out the way the bridge is put in there. The water in 1916 washed out part of the track but not at the place where the bridge is. That was the year the old spillway went out and there was high water that year. I have no idea of the amount of rain or water that was carried by the river or the ditch in 1916, 1919 or 1920. In 1897 the track was washed out south of Renner. In 1916 the water did not cover the abutting lands before it went through the track, but it did not cover half as much ground as it did in 1897.

Then it covered all over the East side after it got through the track. If the dikes were raised a foot or two they would keep more water in than they do now; our track was not injured in 1920.

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264 NELS OLESON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am section foreman for the Chicago, Milwaukee & St. Paul Railway Company. I started in 1887 as a laborer. The most of the time I have been employed as section foreman I worked in the yard five miles south of Sioux Falls. I have been continuously living here and working for the railroad company since 1887 I have not noticed any injury to railroad property or to railroad property covered by waters from the Sioux River south of here during that time, and none in Sioux Falls. I do not know of any water doing any damage on J. L. Phillips' Addition and on the Millspaugh's Addition near the roundhouse, or east of the roundhouse, or north of the ice house. I do not know of any flood waters doing any damage to railroad property since I have been here. There are five tracks in the new yard in what they call Daniel's Addition and Millspaugh's Addition in the vicinity of the ice house east of the depot. I do not know of any damage being done there. There has been no interference with any of these tracks by the waters of the Sioux River since I have been here. There has never been any difficulty or damage on account of the flood waters at the roundhouse property.

(Cross-Examination).

The ice generally comes down in the spring and goes over on the east side and over the rocks there. There is a current through the east side of the channel of the river and it lifts the ice right around the roundhouse. The water comes close to the roundhouse but never does any harm. It does not come out to the banks by the ice house very much. I never saw water standing in the ditch alongside the track on the ice house side.

"Q. You don't know, Mr. Oleson, whether or not the amount of water that has been gathered into the Sioux
265 River and the ditch above Sioux Falls in the past five or ten years has increased or not, do you?

A. I couldn't tell you about that.

Q. And so if there is twice as much water coming down this valley as previously came down, you couldn't say that was true or not?

A. If the water raised five or ten feet I could tell.
Q. You don't know the actual amount of water?
A. No, I don't know nothing about that."

WILLIAM SHEA Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am general road master of the Chicago, Milwaukee & St. Paul Railway Company, and have been such about four years. Prior to that time I was district general road master and division road master. I have been in these divisions for the railroad since 1890. Prior to that time I was track laborer and section foreman and construction foreman. We have many miles of railroad built across river bottoms and creek bottoms where we have to maintain grades that will guaranty us that we can operate our railroad during high water. The Chicago, Milwaukee & St. Paul have many lines upon which heavy traffic is carried upon which they have tracks to maintain under such a situation. I have been over the line between here and Baltic and have noticed the material of which the grade is constructed. From what has been my experience and observation I would state that adjacent water standing alongside of and extending against the grades has no effect upon the maintenance of the grades or the stability of the track upon it, for the reason that we used our track embankment in many cases as the bulkhead to our reservoirs of water for engine supply. We do not hesitate to use our track bank for that purpose. We have many of them on our railroad and we do not notice that we have any bad results from it.
266 No additional expense of up-keep is occasioned by that situation on embankments twenty years old or over. We prepare our property for the purpose we are going to use it for by building up a track bank. In this particular instance, it would cost from $800 to $1,000 an acre for us to build up the track bank and make the line serviceable for our purpose, which in this case is about what that cost up there. I do not believe the farmers ever went to any expense worth mentioning in that community to prepare their properties that way. I didn't notice anything of the kind. The overflow upon this embankment or alongside the embankment would have no effect whatever upon the railroad bridge. If the flood remained two or three, or five days, upon the adjoining agricultural land I think it would ruin their crops.

(Cross-Examination)

It would cost $800 to $1,000 per acre to prepare our right of way for railroad purposes, and if the embankments would wash out it would cost something like that to replace it. It has not been our experience in washouts that the damage to the right of way of the railroad would be greater than it would be to the farm land. When the water goes over it generally breaks through the embankment and cuts out a short piece, or whatever is necessary to carry the overflow of water from one side of the track to the other. After the water would get over our track it would not take our entire roadbed out, just break through and make openings similar to the kind we have in other places known as arches. It would not necessarily take out our entire embankment. Yes, when this embankment is taken and is washed away it does hold up our traffic and cuts off our income during that time just the same as the farmers. It costs about twenty-five dollars a cubic yard to put the dirt back in a washout.

I am familiar with this branch of the railroad running north and going through the drainage district. I pass over it and inspect it in different ways three or four times a year. We have had no washouts for the last four years, other than that the water got up on the track in 1919 and 1920. This year it didn't come over the track but it got very close to it. We possibly delayed our traffic. I came over on this line in 1918.

WILLIAM E. WOODS Called and Sworn on Behalf of the Plaintiff Testified as Follows:

267 (Direct Examination)

I am assistant district engineer of the Chicago, Milwaukee & St. Paul Railway and have been in the employ of that company about thirty years in the engineering department. I am familiar with the lines of the Chicago, Milwaukee & St. Paul Railway described in the notice of assessment published in the Daily Argus Leader dated August 13, 1921. None of th land of the railway company is used for agricultural purposes. The width of the right of way is usually one hundred feet, being 50 feet on each side of the center line of the main track. We have a little piece of right of way in Sioux Falls 50 feet wide, being 25 feet on each side of center line. There is approximately 198 acres of right of way in the drainage district, none of which is agricultural land. I am acquainted with the lands described as Lots 13, 14 and 15, of Block 28 of

Millspaugh's Addition to Sioux Falls. That property is near the ice house property south and east of the town. It is used for new yard tracks. The main line lies between the trackage of this yard and the river. These tracks are lower than the main tracks. The main track was built in 1879. It has never been disturbed by high water. It remains in the same position as when originally constructed. Block 9 of Daniel's Addition to Sioux Falls is just east of Millspaugh's Addition and is used in the same manner. Lots 5, 6, 7, 8 and 9 in Block 25 of J. L. Phillips' Addition to Sioux Falls is used for roundhouse and ice tracks and turning table. This property is situated on the west bank of the Sioux River about 18 or 20 feet above the surface of the water.

268 (Cross-Examination)

The Chicago, Milwaukee & St. Paul Railway Company have 198 acres altogether in the drainage district. That includes what is known as the right of way of the north branch and also includes same going south. A very small portion of that 198 acres is taken up by the roundhouse grounds and the yard out near the ice house. The most of it is right of way. If there were no railroad through the most of it it could I presume be used for agricultural purposes.

A. G. HOLT, called and sworn on behalf of the plaintiff testified as follows:

(Direct Examination)

I am assistant chief engineer of the Chicago, Milwaukee & St. Paul Railway Company and have held that position about eight years. I am a civil engineer by profession and have been connected with the railroad company in a professional capacity about thirty years. I am familiar with and have made a study of the matter of locating lines of road. In turning the line of road from one point to another the character of the country generally determines or controls the location of the line. In locating a line of road through the Sioux Valley an engineer would necessarily have in mind as one of the elements the cost of construction. He would have in mind the height of embankment to be constructed and maintained on account of flood waters. That would be an important feature. In making a location it is a part of the duty of the locating engineer to find out the height of the flood waters of the various streams he crosses. The grade line is usually established with reference to the high water. The engineer gets as much information as he can in regard to the elevation that the

high water reaches in the valley. He gets the information partially from the people who live there and partly from his observation of high water marks as they are shown on trees and washes in the sides of the valley. He then deter-
269 mines largely the height of the grade from past experience as indicated by the information he has received. In determining the openings and bridges the engineer makes what is called a ravine section. That is a chart showing the elevation of the valley. Then on this chart he shows the elevation of the high water and from that he computes the size of the bridges and the openings, that will be required to carry that water. There are certain rules adopted by railway companies upon which these computations are made, and they are made a san engineering proposition. I have recently examined the territory put into the drainage district. In locating a new line of railroad through the Sioux Valley occupying the place where the Milwaukee railroad now has its track you would have to take into consideration the fact that the drainage ditch was there. You would have to provide a bridge to span it. In providing the openings in bridges and other provisions in the line for overflow of water I would not make any deductions on account of that ditch, because I would figure that at the time of the flood the entire valley would be covered with water and this ditch would be simply a wrinkle in the valley. When the flood waters were the highest they would cover the ditch up. I do not know the amount of cubic feet of water the river carries per second. I do not know the cubic feet of water per second the ditch carries, yet I think the ditch is a wrinkle.

(Cross-Examination)

In computing the spaces I have testified about which I would make for a bridge, I do not think the speed of the water in passing a given point would make any difference if you had a high water mark that was dependable. If subsequent to the time I had that high water mark something was done to increase the speed of the water in passing a certain point I would have to take that into consideration.

It is stipulated that the mileage of the Great Northern within the drainage district in question, to-wit: Sec-
270 tions 27, 16 and 31, is 3.04 miles.

It is stipulated that the mileage of the Rock Island Railroad within Minnehaha County is 4.3 miles and within the district sought to be assessed 3.5 miles.

THOMAS HARDIMON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination)

I have lived in the City of Sioux Falls since April, 1879. I am a member of the City Commission and am in charge of the roads, streets and highways of the City. I have been a City Commissioner of the City of Sioux Falls for nine years last October. Since 1879 my occupation has been constructing and road work a great deal of the time. Some of the time I have done bridge work on railroads. I was in Sioux Falls in 1881 at the time of the big flood. There was an ice gorge out on the south side right over where the bridge runs on the Coats farm. When it came through the City it took all the bridges but one and swept up the mills and lumber yard on the east side. The only thing left on the east side was the Omaha railroad bridge. With the exception of that flood which was caused by the ice gorge there has never been any high water since I have been here that has done any damage to the property of the City. The Coats farm is about two miles southeast of here. I think the west line of the farm is in the neighborhood of Eleventh or Twelfth Avenue. It is probably eighteen miles from the spillway following the course of the river around. I am familiar with the [photograph] of the channel of the river from Sherman Park down through the City. As you leave Sherman Park the most of the shore line is fairly level on one side. On the other side it is higher and goes up further from the river. For several miles there is a high plain on the right hand side as you go down the river. The banks on the left side are fairly high too in places.

271 From the time you leave Sherman Park until you get down below where the ice gorge formed in 1881 you have a very decided embankment on each side of the river. The river through the territory I have mentioned is much narrower than it is up above Sherman Park. The ice gorge at the Coats farm held all of the water that collected there, except what ran in the channel until the ice gave way. It gorged different places there. It kept creeping along there for probably two or three days before it came down here. The waters did not spread out on either bank of the river. There was no gorge close to the neighborhood where the Milwaukee roundhouse is now in 1881.

I was here when the Great Northern bridge was built that crosses the river about Seventh Avenue and worked on that bridge. During the past nine years my duties in regard to city property have been overseeing it and attending to it, and

also attending to the bridges across the river through the City and matters of that kind. From the experience which I have had during a residence of over forty years here I should say the results would be very unsafe of narrowing the bridges and lowering them in case of extra high water. This would be on account of the volume of water, and in case of ice gorges would leave it too narrow underneath. If a flood took one it would probably take all of them and form a gorge.

The east side of Sioux Falls is thickly built up with business places, wholesale places and residences, lumber yards, and institutions of that kind. The City pumping station and the City electric light station are situated half or three quarters of a mile north of First Street. The pumping station is south and west of the spillway. The electric light and water plant is south and west of the pumping station. The spillway runs to the north and east of our property. The water
272 plant and the electric light plant are a little north and west of the Penitentiary. I observed conditions of the water around the electric light and water stations during the years 1919 and 1920. I was up there on different occasions when there was any danger or any prospect of water. My official duties required me to be there and investigate those things from time to time. The water around the City electric light plant and pumping station was greater in 1920 than it was any year prior to that excepting 1881. I do not remember so much about it in 1919. We were up there quite a number of times in 1920. When we went in there the water was over the tracks of the two railroads there and there was also a flood down almost to Russell Street and from there down to Covell's Lake. The high water subsequent to 1881 has done no damage to speak of that I know to the City property in the City of Sioux Falls. The water went over Minnesota Avenue in 1920 but not enough to amount to anything. It took a few loads of cinders to patch it up. I never saw the water on the West Sioux Falls road, with the exception of 1881, any higher than it was in 1920. Each street there is two and one-half or three feet above natural ground. In 1920 it went up to just about where it could go over. Then the bridge there carried it down to Covell's Street bridge and it flowed away. Phillip's Park runs along the east bank of Covell's Lake and goes up very abruptly to the east, all except a little piece down at the First Street bridge. There is a little corner there that is a little low, but the balance of it runs up to the east and slopes quite sharply. It has some fruit trees and some other trees on it and has been terraced up in

the shape of a park. It is quite broken and is not agricultural land and is not used for agricultural purposes.

273 Sherman Park is very low and all timber and is in where the river bends around considerable. The west side runs quite flat but the east side goes up very abruptly. No part of Sherman Park is agricultural land. Sherman Park overflows pretty nearly every year. The bed of the stream forms a circle in the Park for probably three quarters of a mile. I do not know that the spillway and those ditches have ever been of any benefit to city property. It is pretty hard to state whether or not the spillway materially [effects] the flow of the water through the City, because when the water is high it overflows a lot which comes down in the spillway and almost directly east of the pumping station. Then it comes out through a little ravine and into Covell's Lake and finally into the river.

The City has a park known as Lien's Park near where the spillway empties into the river. It has practically put the park out of commission. The water practically keeps it covered and washed out considerable. There has been an attempt to rip rap or dam it up, but it has been of no avail. That condition did not exist prior to the establishing of the spillway.

In the City pumping station and electric light plant there are five wells, four of them are 25 to 50 feet in diameter. The last one is U shaped and is 16 feet. The furtherest one west is close to a mile west of the station. The City has a piece of ground that surrounds the well directly north of the pumping station. As I remember, there are about twelve acres in it. It is planted to young willow trees. Well No. 1 is located on this tract and well No. 2 is right close to it and directly west Then follow each well after that up to No. 5. It is probably 30 or 40 rods running east and west at right angles west of the road. The tract is enough as the population of the City increases from year to year for the establishment of
274 additional wells as the needs of the people require.
All of the property other than I have described, that is the three parks, the City pumping station and the electric light station, that is included in the assessment is the streets.

(Cross Examination)

There was high water in 1920.

"Q. Did you not testify in the case of Gilseth vs. County Commissioners, that if this ditch had not been reconstructed

and the river had been permitted to take its then course over the bluff it would have destroyed the waterworks of the City?
A. It might."

The water was high twice that year; in the first place when the spring rains came and the snow went off, and then along about the first of June there was a heavy rain in the neighborhood of Flandreau that reached us a few days afterwards.

"Q. And the water was so high that year that it contaminated the city wells and it was necessary for your department to place certain notices in the city papers, in which you informed the patrons of the water company that they should boil all water before using it?
A. The commissioner of water might have done that. Never anything of that kind came before the Board that I know anything about.
Q. As a matter of fact the water did come into the wells in 1920, surface water?
A. I don't know. I would not want to say one way or the other." The city owns a plat of land known as Sherman Park within the drainage area, it is owned and kept by the city for park purposes; it is practically overflowed every spring; I do not recall whether it was overflowed in the spring of 1921; I was not there that spring; the water does not need to get up but a little ways because the land is very low; the river forms the letter S just around it. Pos-
275 sibly anything that tends to divert a portion of the water that comes down the Sioux Valley and keeps it out of the river as it goes through Sherman Park would be a benefit to that park; there is none of the Covell's Lake Park, excepting a little piece of ground just by First Street Bridge, that would be overflowed; I do not think the water would cover one whole lot; we have 125 miles of street, and some of them cost more for up-keep and some of them cost less; I think the up-keep would be somewhere in the neighborhood of $100 per mile; in 1920 during the high water, the water came up on the [wides] of the West Sioux Falls road, but didn't cross it; the roadway is much higher than the surrounding ground;

"Q. That is true when Sherman Park floods, isn't it. The refuse from the river [funs] up on the banks and is left there, and a very healthy crop of mosquitos is produced?
A. There is a very good reason for that. Sherman Park is filled with little ravines and is very much shaded. It is

much better now than it was because many of the trees have been cut out.

Q. Directing your attention to the Park again, those conditions are true every time that it floods, that it causes an unsanitary condition there?

A. I presume it does to a certain extent."

We have abandoned Lien's Park on account of the water, which has practically cut out the park; it has been kept open, and there are some picnics held there, but it is practically abandoned; it is a little north and east of the Penitentiary, and just a little west of the spillway.

276 In my judgment it would be unsafe to change the lengths of the railroad bridges and other bridges across the Sioux River in town. The Omaha bridge is some wider than the Eighth Street bridge, I think. They have filled some of the trestles of the Omaha. It is not so wide as it was before. As the Eighth Street bridge now stands, I think it has always served its purpose of letting all of the water of the river pass underneath it. I do not know the amount of water that comes down the Sioux Valley. I know that the elevation of the land north of the spillway is about two and one-half to three feet to the mile from Thompson's bridge down to where it enters the present spillway. The amount of water shed varies very much. It would be pretty hard to tell the amount thereof.

(Redirect Examination)

The channel of the Big Sioux River that passes through the city has been infringed on very much in the past twenty-five years; Since I came here in 1879—the river covered much more territory then than it does now and was very flat. When we got a heavy rain the stream flowed out and later would narrow down to a smaller stream again. During the years 1919 and 1920 the water in the river has been the highest that I can recall, and especially up around the city water plant and electric light plant, than at any time prior to that, since 1881; there has been no damage by high water to the city property since 1881; the Cascade Mill dam was built I think in, 1878; they were finishing it in the spring I came here.

F. E. SPELLERBERG, called and sworn as a witness testified as follows:

(Direct Examination.)

I am and have been since March 1916, superintendent of parks of the city of Sioux Falls; only a very small part of

one end of Covell or Phillips park and about half of Sherman Park and about half of Lien Park are affected by
277 high water; Lien Park is situated a little east of the spillway; since the spillway was put in, the Board has taken out practically all the improvements at Lien Park that could be used at other parks and merely cut the grass and keep it available for use at such times as people can go in there when it is dry enough; we took out the improvements because we could use them at other places and they were practically of no use at Lien Park on account of flooded conditions from the river overflow from the spillway; the city has practically abandoned Lier Park as a park since the spillway was built; prior to the building of the spillway the city had started in to improve it; the spillway empties into the river above Lien Park and then flows down past it.

The high water does not affect Phillips Park to amount to anything; it overflows a small area at one end where the ditch overflows and comes down to Covell Lake; Phillips Park is practically all high ground bordering on Covell Lake with the exception of a small flat area at one end; it is rough land and cannot be used for agricultural purposes.

The lands of Sherman Park cannot be used for agricultural purposes; that park has overflowed every year except one since I have been here; it did not overflow in 1921; with the exception of that year it has overflowed every year for five years; in 1919 the overflowed condition started in the latter part of May and continued for two weeks into June and then dried up for a short time; the park was [useable] on the 20th of June and then overflowed once more in the middle of July; in 1920, we had practically no use of the lower part practically all season, the lower part of the park is on
278 the west side of the river; in the years 1919 and 1920 the river came up the highest it has been to my knowledge and the overflowed conditions continued longer those years than in any prior year.

(Cross-Examination).

"Q. The length of those periods would indicate to your mind that there was more water came down the Sioux Valley those years, would it not?

A. I am not sure I am competent to judge.

Q. You would naturally arrive at that conclusion?

A. I might.

Q. Anything that would tend to divert that water would be to the advantage—If a certain amount of water came down

the Sioux Valley and you could keep part of it or divert it from Sherman Park, it would shorten the period that Sherman Park would be covered with water would it not?

A. I would sooner not answer that. I don't know that I am competent.

Q. Say yes or no.

The Court: I don't think he can."

There are 52 or 53 acres in Sherman Park; only about 20 or 25 acres are on the lower level; if the land was not occupied for park purposes, it would not make a good pasture as there is not enough grass there; the land around there is used for pasture, but it is higher; the land north of the park is used somewhat for cultivated crops and they are taking their chances on it; the acre and a half or two acres at Phillips Park could be tilled or turned into pasture or produce hay after a fashion; they would have to wait until after the
279 flood had come down; it makes a late crop proposition.

O. S. THOMPSON, called and sworn as witness testified as follows:

(Direct Examination)

I reside in Sverdrup Township and was born there in 1875 and have resided there ever since; about 10 miles north of Sioux Falls; I own 503 acres in the Big Sioux River Valley where I live; within the drainage district there is close to 300 acres; I have farmed my land myself since 1897 and was residing there when ditch No. 2 and also ditch No. 1 was constructed; I think ditch No. 1 was constructed in 1909 and ditch No. 2 was constructed the following year; ditch No. 2 starts about 1 mile northwest of Baltic; it starts right in the river at a point about 16 miles north of the spillway near the penitentiary; from the point where ditch No. 2 starts to where it joins ditch No. 1 is about 11 1/2 miles; the length of ditch No. 1 is 3 1/2 miles; the width of ditch No. 1 at the top is about 90 feet; the top width of ditch No. 2 is 45 to 50 feet; it is possible that at the very north end it is down to forty feet; the average depth of ditch No. 2 is about 6 feet and of ditch No. 1 about 6 feet; the present spillway was finished in 1918; the old spillway was washed out in 1916; the present spillway is a little less than 12 feet in diameter; the intake of the spillway is the lower end of ditch No. 1 and is rip rapped, then there are two gates leading into a hole that goes down through the ground about 40 feet; the shaft is

perpendicular for about 40 feet; at the lower end of it a channel is run out towards the river towards the east sloping downwards so that it comes out just above the river level on the lower end; there was nothing that prevented all of the water that was gathered by these ditches No. 1 and No. 2 at the outlet or spillway to prevent all of the water going over the hill; since the new spillway was put in, I have lost more crops than I did before it was put in and after the
280 construction of ditches No. 1 and No. 2 my losses have been considerably more since the new spillway was put in than they were before it was put in and after the ditches were constructed.

Defendants were thereupon given permission by the Court to make the witness their witness for the purpose of identifying certain exhibits and he thereupon testified in behalf of defendants as follows:

Defendants' Exhibit 2 is a petition to the County Board asking for the establishment of what is known as Covell Lake cut-off. The first signature attached thereto is mine. I signed that, and I had that presented to the County Board for the purposes set forth in the petition. I own land in the vicinity of Drainage Ditch No. 1 & 2 that is affected by that ditch. I evidently furnished the bond designated as Defendant's Exhibit [—].

Defendants' Exhibits 2 and 3 were offered and received in evidence as part of defendants' case.

FRED H. REED, Called on Behalf of the Plaintiffs and Sworn Testified as follows:

(Direct Examination.)

(It is stipulated that Northern States Power Company is the successor in interest of the Sioux Falls Light & Power Company in and to the property involved in this action.)

My name is Fred H. Reed; I have lived in Sioux Falls
281 since 1899; my occupation before coming to Sioux Falls was farming; since coming to Sioux Falls I have been looking after farms, real estate and other properties; I was the Secretary of the Sioux Falls Light & Power Co., and of the Sioux Falls Improvement and Development Co's interest in certain properties in the vicinity of the Queen Bee Mill at one time; I had charge for Mr. E. W. Coughran and various of his associates of properties in the vicinity of the present hydro-electric plant of the Northern States

Power Co. for a long period of years and since about 1900; my office is in the Lacotah Building between 8th and 9th streets and between Phillips Avenue and the Big Sioux River on the east side of Phillips Avenue and the west bank of the river in Sioux Falls; it is in the rear of the building facing the river; at the time I came to Sioux Falls there were three dams across the river in the vicinity of the present power plant; the Cascade or upper dam, the Queen Bee dam, and what was known as the Bennett dam; the Cascade dam is the dam below 8th Street and is still in existence; the Sioux Falls Light and Power Co. was organized in 1907 and constructed the present hydro-electric plant of the Northern States Power Co., completing it in 1908; prior to the construction of that plant the Sioux Falls Light & Power Co., acquired in the spring of 1907 and operated the Cascade mill property; I first became associated with the property which is now the property of the Northern States Power Co. and the Queen Bee Mill property and the other ground in that immediate vicinity in 1900; I am familiar with the nature and character of the present real property interests of the
282 Northern States Power Co. including tracts 6 and 7 of the County Auditors subdivision of the Northeast of Section 16, township 101, Range 49, Lots B and C of Sioux Falls Light & Power Co's subdivision, tract 2 of the County Auditor's subdivision of the Northwest Quarter of said section 16, and also the property upon which the hydro-electric plant is now located; I don't know that there is any soil on that real property; it is rock, granite, come to the surface; that is true with reference to all of that tract of land in there; in my opinion it would not be possible for any part of that land to be used for agricultural purposes; the hydro-electric plant of the Sioux Falls Light & Power Co. now the Northern States Power Co., was operated partially under my supervision as one of its officers; I was familiar with its construction at that time; at the time of its construction the question of constructing it in such manner as to withstand all flood conditions of the Big Sioux River and prevent any damage to the property or its water power from flood conditions was discussed and taken into consideration; the hydro-electric plant was so designed under the instruction of our company as to guard against such flood conditions and was so constructed; at that time our engineers had data with reference to the flood waters of the Big Sioux River; no part of that property down there now owned by the Northern States Power Co. has been flooded since 1900; I have observed it every year since then; the largest flood that I recall, I think,

was prior to the year of 1907, the time the ditch was first constructed; at the time no part of this property was
283 flooded; the hydro-electric plant of the Northern States Power Co. is east and some south of the spillway if ditch No. 1 and 2 and north of the Cascade dam and the city of Dell Rapids is north of the spillway; I think the hydro-electric plant is about ½ mile from the mouth of the spillway; the foundation or lower part of the hyro-electric plant is made right in the solid rock; the rock was blasted out for a distance of something over 30 feet deep; that part would be solid ground and the part from the granite on up with cement, concrete; for the first story it is in granite; the dam was so constructed as to take care of the flood waters; I have observed from my office window the condition of the river at various times during all these years; I have not observed any appreciable difference in the volume of water flowing down the Big Sioux River since the construction of the spillway; the Lacotah building property is never flooded and the water never got into the basement.

(Cross Examination)

At the time I was connected with the company I was familiar with all the Northern States Power Co. equipment and machinery and with the three dams; the dam which the Northern States Power Co. now has is the same dam the original company put in; that was Queen Bee property at one time; the Bennett dam was below the Queen Bee property; it is not there now; it was about 16 feet in height and I think has all been blasted out; when the dam was taken out I think the tail race of the Northern States Power Co. was lowered; I suppose on a level with the river below the dam.
probably 16 feet; that would help the water get away
284 from the wheels of the plant and produce more power; I think the Sioux Falls Light & Power Co. had a seven foot flume; I don't know whether the Northern States Power Co. has changed the flume or not; the property north from the dam to the present hydro-electric plant of the Northern States Power Co. is mostly granite.

O. A. Rofelty Called on Behalf of the Plaintiff and Sworn testified as follows:

(Direct Examination)

My name is O. A. Rofelty; I live in Sioux Falls, South Dakota; I am Manager of the Northern States Power Co. and

have general charge of its business and the operation of its property including this district; I have been in that position since November 27, 1918; the plant consists of Hydro and steam plants for the generation of electric power; that is essential; it is quite necessary for us to have the steam plant to supply the demands for electricity in the city of Sioux Falls; the water plant has not sufficient capacity; in the past, during the year 1921, there has never been a day but when we kept the steam plant going all the time, not even an hour, day or night; it was necessary to do that in order to serve our customers; we operate the two plants together as one unit for generating and selling electricity when we have any water; it does not make a particle of difference in the operating expense of this plant such as labor and help whether the steam plant is required to produce a larger or smaller part of the load; I am familiar with all the ground or land owned by the Northern States Power Co. down there; I would describe it as a large pile of stone; it is not level; it is
285 piles of stone here and there, topsy turvy condition; the stone is what they call a red granite; there is not any soil on any of the Power Company's property there sufficient to be used for cultivation of crops of any kind.

(Cross Examination)

The capacity of our steam plant is about 5000 kilowatts; the rated capacity of our water plant, I believe, is 1400 to 1500 kilowatts; if the water is low or for any other reason we can't put the water over our turbines and have to produce this current with steam, it costs more money; what current we make by steam costs more than what we would make by water; there are times in the year when the water is not sufficient to produce any current; I have been manager down there since November 27, 1918; the company has not lowered the tail race since I have been there; we only cleaned it out; we never intended to lower it; I understand that our company succeeded to all the rights of the Sioux Falls Light & Power Co; Defendant's Exhibit "6" looks to me like a fair representation of the river and the location of our plant upon the river; I am unable to say positively whether the drop of our water from the top of our flash boards to our dam down the tail race was substantially as represented by this map or about 55 to 60 feet, but I think so; I think the size of our flume is about 7 feet; Exhibit "7" looks like a fairly good picture of our hydro-electric plant where the water enters the same by our flume, going through the turbines and discharging it into the tail race; I do not know of the lowering

of the bottom of the driving tube or the tube carrying the water from the turbines into the tail race; the only thing we did was to clean out the loose dirt and stone that had fallen into it; we concreted that block of stone on the east side of the river in 1920; we did that for the purpose
286 of keeping the flood waters from carrying down the loose rocks that had gathered up there; the gorge you have mentioned north of our power house was full of water in 1919 and 1920; at the time of high water our tail race was up more than when the water is low; that is natural; the water outside was not as high as our lower power room; the water to the north of our building was not higher than the openings into our tail race; the water at that time did not get high enough to cover the solid granite wall on top of which our company has thrown its loose stone; it was still out of the water; I do not know how deep the water was in the tail race, that is pretty hard to say because it is just a matter of guess; I imagine we have about 25 feet of cement in there; that runs down to almost the level of the falls between those two walls; I do not think the tail race extends over fourteen feet below the concrete; in 1919 the water went about 3 or 4 feet on the rocks which are now covered by cement; during that time our hydro-electric plant could and did run at full blast.

"Q. Do you know the height of the gorge of your tail race?

A. [Know], I could not answer that.

Q. About forty feet?

A. That is a pretty good guess I should say.

(Redirect Examination)

I should say the difference in cost per kilowatt an hour between generating electric current by steam and water power is possibly 2 mills per kilowatt.

J. WILLIAM LINK, called as a witness on behalf of plaintiff and sworn testified as follows:

287 (Direct Examination)

My name is J. William Link; I reside in Chicago; I am a hydro-electric engineer employed at the present time by the Byllsby Engineering & Managing Corporation; next February I will have been in its employ 12 years; my first experience in hydro-electric work was with the Missouri River Commission; I was with them for five years on the Missouri

River Work; subsequent to that I was for five years on the Metropolitan Water Works in Boston; following that I was with the Niagara Falls Power Company for 4 years, I think it was; and then with the former resident engineer of that company, who opened an office for himself and I took charge of his office for him for a year or 18 months; I then was
288 with the City of Columbus, Ohio, for two years; following that I was with the Long Soo Development Company of the St. Lawrence River for two years, and with the Passaic Valley Sewage Disposal Commission for three months; I then came with Byllsby & Co., and I have been with them ever since; I should say the experience I have outlined covers pretty well the field of hydro-electric engineering; I have had a good deal of experience in the designing and construction or superintendence of construction of hydro-electric plants and water plants, particularly plants for the generation of electric current; I have had experience in the installation and inspection of water wheels and water machinery; I have not had experience in the designing of water wheels; that is a specialty; I have installed that kind of work and written specifications for them and designed what kind of wheels should be installed, etc; since I have been with Byllsby interests I have had complete charge of their hydro-electric plants in the different parts of the country; these plants are scattered pretty well over the country; we have 5 plants in Minnesota in the vicinity of the twin cities and southwest of there; we have two plants in Wisconsin; we have two plants in California; a plant in Oregon and a plant in Montana, and the plant here in Sioux Falls; [I have examined the drainage ditch and its course;] I think that covers the water power plants pretty well; I have made a study of the hydro-electric plant in this city operated by the Northern States Power Co.; that was constructed before my connection with the Byllsby interests; the Byllsby interests constructed that plant before they acquired it, for other parties, the plant referred to being the hydro-electric plant in question here; I would call the construction of the plant very massive; I have investigated the stability of the dam, its capacity to withstand flood waters, and after examining
289 the whole plant, I should say that it is particularly well designed and constructed to withstand floods or anything of that nature; the massive walls I speak of are of concrete material; I have made a study of the flood conditions in the valley of the Big Sioux River; my sources of information have been government reports and the information I have gleaned from newspaper accounts and talks with various parties who have been on the ground and know the

floods; the nearest I can judge, according to the information I have obtained, the greatest flood that there is any record of in that valley was the flood of 1881; I think the design and construction of the plant down here would be sufficient to withstand the flood stages of 1881; I think it would do that if there were no spillway or drainage ditch because the plant was constructed before the spillway was, and so far as I can find out no account was taken of the spillway at all; independently of that, the nearest estimate that I could make of the probable volume of the flood of 1881, the dam would discharge that without even raising the water any higher than we carry it ordinarily; in my judgment, the company operating this plant would absolutely not be justified in the expenditure of any money for the construction of the drainage ditch and spillway that has been talked about here on the basis of benefits to the plant in any way; it is my opinion that there is no appreciable benefit to the plant of the construction of the improvement out there.

(Cross Examination)

"Q. Mr. Link, you made for the County Commissioners of this county a hydro survey at one time, of this territory, did you not?

A. I don't think I made a survey.

Q. You made a report to the Board? A. Yes.

Q. And the data you testified about? Your attorney asked you on what data you based your opinion and you said upon government reports.

A. And some survey data taken by the Board's engineer.

Q. And you made a report as to the feasibility of this drainage project did you not?

A. The feasibility? In what way do you mean? I don't quite get your idea.

Q. That it was feasible from an engineering as well as a financial standpoint?

290 A. It was feasible to build it, yes."

In that report I stated that the maximum flood liable to occur in the reaches of the Big Sioux River under consideration which has this ditch construction, will probably not exceed ten thousand second feet. This condition was probably approximately as it existed in 1881; and that the floods which occurred in the spring of the year 1916—the amount of water that came down the river and the ditch at that time did not exceed six thousand or six thousand five hundred cubic feet per second; it seems to me the amount of water that went through the old spillway in 1916 was 1400 cubic feet per sec-

ond; I am not sure; I recommended to the Board that the spillway be constructed to take care of approximately 2500 cubic feet per second; in my judgment the amount of water that was carried down the Sioux Valley during the freshet of 1916 was approximately 6000 feet per second; that was the spring that the spillway washed out; I do not know that you call the 1916 flood an ordinary flood; I have not been able to find any record of flood [states] in the river and I am not sufficiently familiar with the floods from year to year to know whether that flood would be considered an
291 ordinary flood or not; I would rather say that it was larger than the ordinary flood; that is if by the ordinary flood you mean the intensity of flood that occurs most frequently; the amount of water that came down the Sioux Valley in the year of 1881 is probably the maximum; I do not remember whether in that report I recommended to the Board that the opening which had occurred at what we have been calling Schotz, about 3 miles north of town, a dam be placed in there to keep the river in its old channel and to keep it from coming down through the ditch; I would recommend it; at the time I made this report I was employed by the Byllsby Co., Byllsby & Co. manage the Northern States Power Co., but it isn't the same company by any means, we do the managing for the Northern States Power Co.; I am familiar with the plant of the Northern States Power Co. and the improvements made since 1910; I was familiar with the construction of the old plant through the drawings and inspecting of the plant, etc.; defendant's Exhibit "7" was prepared before my time; in a general way I should say it substantially represents the plant here; it looks to me more like a picture plan than it does a working plan; it was signed by the chief engineer, so I presume probably it was one of the construction plans; I do not remember the distance between the bottom of our turbine and the outlet in our draft tube; but I would say in the vicinity of 18 or 20 feet; the Northern States Power Co. had to lower their tail race to take advantage of the head at the Bennett dam; we destroyed the Bennett dam and lowered our tail race to take in that head; that lowering gave us more head; the lowering of the tail race does not give us more power; the head we had before was sufficient to run the generators full capacity with the wheels flooded; the lowering of the tail race enables us to pull a larger load with less water; we got no more power out of the units than we got before; they have a certain fixed output; the increasing of that head only conserved water; it didn't increase the output of the plant at all; the higher the head the less water you use, but

if you have a machine in there with a fixed output, it
292 doesn't make any difference how much head you put on it, you can't get any more power out of it; it will burn up if you do; what I mean is that the lowering of our tail race, we could only turn out 6000 kilowatts from each unit, but we could get that 6000 from a smaller supply of water and consequently when the river is low we are able to get current longer than we could before; the capacity of the plant is fixed by the units in there; they could be run approximately 6000 kilowatts each; there are three units; the result of piled up water on our tail race is to lower the head but with those units not to produce less power; the head is the total fall; I don't think I have any positive information as to the length of time that the floods last here, but the general impression I have gotten from the data is that the maximum conditions only last for two or three days; the flood itself; the river in flood stage I imagine for a considerable longer period of time; I think I am familiar in a general way with the general topography near our plant; Exhibit "3" fairly represents the condition from the northwest corner of the plant toward the old falls for a short distance; Exhibit "4" I am unable to identify; defendants' Exhibits "8" and "9" fairly represent the condition at our tail race; if a dam were put in at Schotz up here which was outside of the drainage ditch project, which kept the river in its banks, permitting the water to flow around the city to our water plant instead of going through and coming into the spillway, it would benefit the Northern States Power Co. to the extent that it would not deprive them of what they
had a right to; I would not call it a benefit because we
293 have a right to that water; the benefit would be to give us the water that we have a right to here and which was taken away by the ditch; if there were controlling works placed in this ditch at Thompson's bridge some 12 miles up the river which maintained the level of the water in the river and will not permit the river water to go into the ditch until it reaches a certain height, which is flood condition, that would benefit the Northern States Power Co. in just the same way.

(Redirect Examination)

Q. From your examination of that region up there at the time you made the report as representative of H. M. Bylls-by, I wish you would tell the court what that ditch and improvement is with regard to lands down here in the city and particularly in regard to the region down about the Northern States Power Co. property; what is the proper term for it?

A. It acts as a flood water bypass; there is no drainage; by flood water bypass I mean that it takes flood waters out of the river and passes them around and back in again; it relieves flood water conditions a certain small extent in certain stages of the river; I would say that that ditch is not a drainage at all in this section down here; in my judgment the power plant of the Northern States Power Co. as now constructed would be sufficient to withstand a flood equal to the flood of 1881; as I stated before I would think it would pass such a flood without raising the water higher in the dam than we ordinarily carry by means of flash boards; those flash boards should be removed at times of floods; the Bennett dam was destroyed under my supervision; it was de-
294 stroyed to get advantage of more head water or unite that head with ours in one plant.

Q. Something was said here by another witness about the cleaning out of that tail race or some part of the same. I wish you would tell just what was done in that regard and why.

A. The construction superintendent without asking permission or without my knowledge, built the spoil right on top of the excavation, which was contrary to my intentions, and built it with practically a vertical face, and without very much arrangements of the stones; consequently the first flood that came down washed out some of the stone at the bottom of the piles and started the disintegration of the spoil, and subsequent floods I presume did more, and the elements helped it along, frost action, and a great deal of this spoil had fallen back into the tail race until it raised the level about 4 feet; this work that was done in 1920 was simply to clean that out, and in order to put it so it would not fall back again we moved it back on the west side about 10 feet from the edge of the ledge; on the east side we put a concrete facing on it because there we had used the top of the spoil bank which had been leveled off for an outdoor sub-station, and this was so close to the edge of the spoil bank that we had to make it sloping to hold the substation and some transmission line poles there, and we felt that without a concrete face it might slip in again so we put a concrete face on that side in order to prevent it; that was the reason for that work; the proposition was to restore the tail race.

295 (Recross Examination)

This bypass of the water I have mentioned would tend to relieve the Sioux River from the point where it took the water from the river to where it deposited it back in the river; it would relieve the river of the amount it carried.

Q. Doesn't that ditch up through there also drain agricultural lands?

A. As I saw it when I inspected it, I should say to very small extent as I understand drainage; there were only 3 or 4 inlets I could see where the farmers could take advantage of the drainage.

(Redirect Examination)

If I were designing a hydro-electric plant on the present site of the plant here today, knowing that the ditch and spillway had been constructed and are there as they are, as I know the ditch and its history, I would not take the ditch and spillway into consideration at all in the designing that plant, particularly with a view to resistance to floods or possible floods.

Q. Mr. Link, I would ask you to state whether or not the fact of this by pass upon the tail race of the Northern States Power Co. plant at a time of maximum flood would have any appreciable effect upon the output of that plant from its hydro-electric apparatus? A. Absolutely none.

Q. It can be maintained constant. A. Yes sir.

Q. I will ask you to state whether or not the effect of the straightening of the river in what I will term the upper reaches of the ditch, would have any effect on the constancy of the flow of the river at the Northern States Power Co. plant in different normal stages of the river.

296 A. As to whether the straightening would have any effect?

Q. Yes. A. I can't see how it would.

Q. I will ask you, Mr. Link, that if it is assumed you had a maximum flow of 10,000 second feet or more down this river, whether or not under those conditions the results in the river would be appreciably affected by the presence of this bypass ditch? A. I do not think so.

Rebuttal:

Q. I wish you would explain to the Court, Mr. Link, the character of the design and construction of the plant of the Northern States Power Company under consideration here with reference to the matter of obtaining a maximum efficiency of the turbines, or maximum output from the turbines, in relation to the amount of [ware] required.

A. The plant as originally constructed had a head of approximately 60 feet; there was another dam just below the present plant which backed the water up from that reservoir to our tail race, and controlled to a large extent the head; the machines that were installed in there were installed for a cer-

tain capacity at that head; the generators cannot pull any more load regardless of what the wheels may or may not do; the generators have a fixed capacity which we cannot exceed without burning them up; with the original head we could pull the full load out of the generators; since then the head has been increased by about 12 feet, by wrecking the dam below, excavating the tail race, by building draft tubes and extending draft tubes to the wheels; the result of that is not to increase the capacity of the plant because the generator capacity is fixed for the lower head, but it enables us in low water time to pull the full capacity out of the units with a smaller
297 quantity of water than we were able to do before; on account of the enlarging of the tail race and the wrecking of the dam below, flood waters will not rise as high at the plant as they did previously, and it is my opinion that even a maximum flood of the river, even without the drainage ditch would not raise the level about the original normal level, consequently even with a maximum flood we would probably get the original load of the plant.

The Court: Which is full capacity?

A. Full capacity; now any diversion of the water which would lower the flood level in the tail race under present conditions would not increase the capacity of the plant nor the amount of power we could get out of it; at flood times there is any abundance of water that we can put through the wheels, any amount of water they will take, sufficient water to produce the full output of the generators; so there is absolutely no benefit can accrue in diverting flood waters from the plant.

Q. Was this plant designed and constructed in your judgment so as to take care of flood conditions in the river?

A. The plant was designed to take care of maximum flood conditions. It was designed and constructed before the drainage ditch was constructed and was built to take care of any conditions regardless of any drainage.

A. G. RISTY, recalled and examined by the Court, testified as follows:

The northern end of this ditch No. 1 and 2 was one mile north of Baltic; the end of the ditch opens into the Sioux River; there are no artificial laterals; if there are heavy rains on the lands adjoining this ditch which runs north and south in a general direction that flood the lands on either side of it, it is the intent and purpose that the ditch shall take care of such flood waters.

298 Q. How will it get into the ditch?

A. It slightly slopes into the ditch?

Q. How could it get over the embankment without laterals?

A. There are pipes at certain places to let the water in through the embankment into the ditch, and that you can adjust running out into the farm lands; there are pipes here and there along the ditch to let waters in when the bottom lands overflow, and it has also been proven that these ditches drain the bottom lands, because there are farms all along and it has lowered the water in their wells to a very considerable extent since the ditch was dug, so it shows it drains the lands; they propose to have gates in the embankment so that when the pressure was from the inside it would close the gates and if the pressure came from the outside it would open them within this service pipe.

Q. Then the real purpose of this ditch as I understand it is to take the water from the Sioux River in flood times and conduct it down to the spillway and into the river at the mouth of the spillway.

A. And preventing the overflow to a great degree from spreading over the farm lands.

Q. And the purpose of the ditch, the effects that
299 the ditch is to perform, the thing that you intended when you were contracting was that it should be an [auxillary] to the river and relieve it of the surplus flood waters?

A. If the Court please, I was not on the Board when the ditch was constructed; only when we repaired the spillway, it has been my understanding always that it was to help carry off the flood waters.

Q. It is rather to take the water from the river at its maximum capacity and thus relieve the river of that water rather than to drain the lands along the sides; in other words, it is to keep them from being overflowed with this water?

A. That has always been my understanding.

Plaintiff rests.

Motion to Dismiss

At this time, Your Honor, at the close of the plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these actions and set aside the restraining order heretofore issued, for all the reasons and upon all the grounds urged in the motion made at the opening of these cases.

And for the further reason that the record now shows that notice of an opportunity to be heard upon the amount or proportion of benefits these plaintiffs have received and the amount or proportion of assessment that will be made against their property for such benefits, has been given to them and the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessments to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases, based upon their judgment of values and benefits con-
300 ferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred, by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason the record now shows the Board of County Commissioners of Minnehaha County, charged by the law of this State with the execution of the provisions of the drainage ditch law, has jurisdiction to proceed in respect to the property within said drainage area including the property of the plaintiffs in these actions, and if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs or otherwise, and the record does not indicate upon its face any gross departure from the requirements of the statute, therefore this Court cannot inquire into these collateral proceedings, and the same are not questions presenting a federal question.

The Court: The motion is denied pro forma.

The defendants, to maintain the issues on their part, called as a witness F. L. BLACKMAN, who being duly sworn testified in substance as follows: My name is F. L. Blackman. I resided in the city of Sioux Falls on July 15, 1916, and at that time had property within the drainage area of Drainage Ditch No. 1 & 2. Defendants' Exhibit 10 being a petition dated July 15, 1916, addressed to the Board of County Commissioners of Minnehaha County, South Dakota, signed by the City and others, the name of F. L. Blackman appearing thereon, was signed by me.

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301 GEORGE W. BURNSIDE, being called as a witness on behalf of the defendants, testified as follows:

"As mayor of the City of Sioux Falls, I signed defendants' Exhibit 10, being a petition addressed to the board of County Commissioners of Minnehaha County, dated July 15, 1916; at a special meeting of the city commission, they decided to ask the County Commissioners to protect the destruction of the drainage ditch in order to protect our water plant.

F. E. WARD, being recalled as a witness on behalf of the defendants, testified in substance as follows:

Defendants' Exhibits 10 to 32, inclusive, are records and files in my office as County Auditor of Minnehaha County, with reference to the establishment of Drainage Ditch No. 1 and 2. Defendants' Exhibit 10 is the petition of the City of Sioux Falls, F. L. Blackman, et al, for the establishment and construction of Drainage Ditch No. 1 and 2. Defendants' Exhibit 11 is the bond accompanying and filed with the petition. The material portion of said Bond, being defendant's exhibit 11 is as follows:

"Bond on Petition for Drainage.

Whereas, the parties whose names are signed hereto have prepared and executed and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition to reconstruct and improve drainage ditches Number 1 and 2, in Minnehaha County, South Dakota, and to construct a new spillway or outlet to the said drainage ditches numbered 1 and 2, and to pay therefor by an assessment upon the property, persons and corporations benefited thereby, a copy of which petition is hereto attached marked Exhibit "A" and made a part hereof.

302 Now, Therefore, we F. L. Blackman, E. D. Clark, W. Brady, Dan Donahoe, Den Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, as principals, and Inter State Surety Company as surety, do hereby undertake, promise and agree to and with the County of Minnehaha, of the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or in case the said petition is denied on appeal.

F. L. Blackman, E. D. Clark, W. Braley, Den Donahoe, Dan Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck,

Mary C. Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, Inter State Surety Company, by A. B. Fairbanks, Its Attorney in Fact.

This bond approved August 1, 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 12 is the order of the Board of County Commissioners for filing said petition and bond. Defendants' Exhibit 13 is a letter of transmittal of said petition with reference to Drainage Ditch No. 1 and 2, to the State Engineer at Pierre, the material portions of which are as follows:

"August 4, 1916.

Homer M. Derr, State Engineer,
Pierre, South Dakota.

Dear Sir:

I enclose herewith new drainage petition with reference to Drainage Ditches Numbers 1 and 2 and the spillway thereof, which have been ordered filed and transmitted to you. It is the especial wish of the County Commissioners that you view this drainage proposition with them at your earliest
303 convenience, as it is necessary that this improvement be made soon, so as to avoid further damage. The parties have agreed to abandon the Covell's Lake extension terminus, in case the drainage proposition is established in accordance with this petition, or a modification thereof.*****

Please give this matter your immediate attention, and advise as to when you can view this drainage proposition with the Commissioners.

Yours truly,

EOJ:M County Auditor."
Enc.

Defendants' Exhibit No. 14 are the minutes of the Board of County Commissioners of August 3, 1916, of adjournment from that date to August 14, 1916. Defendants' Exhibit 15 are the proceedings of the Board of County Commissioners, under date of August 14, 1916. Defendants' Exhibit 16 is the resolution of Board of County Commissioners for a survey of the territory to be drained by Drainage Ditch No. 1 and 2. Defendants' Exhibit 17 is the Surveyor's Report, the material portions of which are as follows:

"Report of Preliminary Survey of Said Proposed Drainage Ditch for the Territory now Partially Covered by Drainage Ditches Numbers 1 and 2, Sioux Falls, South Dakota.

To the Honorable Board of County Commissioners, Minnehaha County, South Dakota:

In accordance with the resolution of your Honorable Board dated August 14th, 1916, authorizing and directing a survey of the proposed drainage of the territory covered by drainage ditches numbers 1 and 2, as now established, and directing that the exact line or lines of said proposed drainage be established under the supervision of the State Engineer, I took up the work, and, as per your request, file here-
304 with a limited report of the survey of such territory showing the exact line of the proposed drainage ditch as follows, to-wit:

Section One

Commencing at a point 58 feet West and 1035 feet North of the Southeast Corner of Section 29, Township 102, Range 49, West of the 5th P. M., running thence South *****, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number one as now established and constructed.

Section Two.

Commencing at a point 1035 feet North and 58 feet West of the Southeast Corner of Section 29, Township 102, Range 49, the same being the commencement point of Section 1, hereinbefore described, running thence North *****.

Section Three.

Commencing at a point 1640 feet East of the center of Section 18, Township 103, Range 49, running thence North ******, the said line being the center line of said proposed drainage.

That in addition thereto, the Big Sioux River is to be straightened in Sections 17, 18 and 20, Township 103, North of Range 40, in order to afford better means of communication between the lower end of Section 3 of said ditch, and the upper end of Section 2 thereof, the same being intended to cover the exact location of drainage ditch number 2, as now established and constructed.

I further recommend that the Big Sioux River be straightened *****.

All of the above cut offs to have a bottom width of 60 feet, and side slopes of one and one-half to one. A right-of-way 100 feet in width and one-half each side of the above described center lines will be required. The plans and specifications for the proposed spillway on Section 9, of
305 Township 101, Range 49, will be furnished later.

Dated this 13 day of September, A. D. 1916.

Respectfully submitted, L. E. Stevens, Deputy State Surveyor. Filed in the office of the Auditor of Minnehaha County, S. D. this 13 day of September, 1916, Harry H. Howe, County Auditor, by E. H. Shenkle, Deputy.

Defendants' Exhibits 18 and 19 are the proceedings of the Board and the resolution of the Board fixing the exact line and width of Drainage Ditch No. 1 and 2, of September 13, 1916. Defendants' Exhibit 20 is the drainage ditch notice for Drainage Ditch No. 1 and 2. Defendants' Exhibit 21 is the affidavit of publication of drainage ditch notice, the material portion of which is as follows:

"Affidavit of Publication

C. L. Dotson, being first duly sworn, deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a Daily Newspaper of general circulation, printed and published in the City of Sioux Falls, in said County and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper and in charge of the advertising department thereof, and has personal knowledge of all facts stated in this affidavit, and that the notice and advertisement headed Drainage Ditch, a printed copy of which is hereunto attached, and made a part hereof, was printed and published in the said newspaper for ..... issues.

That the first publication of said notice in said newspaper aforesaid was on Saturday, the 16th day of September, A. D. 1916, and that the succeeding publications were
306 severally on Saturday, the 23rd day of September, A. D., on Saturday, the 30th day of September, A. D. 1916; that the fees charged for the printing and publication of said notice and advertisement in said newspaper, as aforesaid, were ..... dollars and ..... cents, and for this affidavit, Twenty-five cents, and that the said fees for the printing and publishing of said notice and advertisement

and for this affidavit, as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper, as provided in Session Laws of 1903, and amendments thereto. * * * * * Filed in the office of the Auditor of Minnehaha County, S. D., this 30th day of Sept. 1916 Harry H. Howe County Auditor.

The material portion of which certificate of posting Drainage Ditch notice is as follows:

'I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby certify that on the 21 day of September, A. D. 1916, I posted three copies of the annexed Notice in three public places near the route of the proposed drainage mentioned therein, as follows, to-wit: One on the bridge on North Minnesota Avenue crossing Drainage Ditch Number One, in the City of Sioux Falls; one on the bridge in Berwick's Addition to the City of Sioux Falls, crossing Drainage Ditch Number One near Fifth Avenue; and one on the bridge crossing Drainage Ditch Number One on Section 29 of Mapleton Township; that I also posted one of said copies at the South Front Door of the Court House in the City of Sioux Falls, all in Minnehaha County. * * * * * *

307 Filed in the office of the Auditor of Minnehaha County, S. D. this 23 day of Sept., 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 23 are the minutes of the Board of County Commissioners in relation to Drainage Ditch No. 1 and 2, of October 2 and 3, 1916, the material portions of which are as follows:

"October 2, 1916.

At the meeting in the County Court room, the Commissioners listened to arguments presented by those in favor of the drainage ditch, and the straightening of the Big Sioux River, and also to arguments against the straightening of said Big Sioux River, there being no objection to the establishment and construction of the main ditch project. The State Engineer, Homer Derr, recommended that the main

drainage ditch, as petitioned for, be established and constructed with proper controlling gates and a sufficient spillway.

Claims for damages were filed as follows:

Kittery Realty Company	$2000.00
Margaret Finnegan	1000.00
James L. Finnegan	8000.00

The whole afternoon was taken up in the discussion of the drainage project, and the suggested straightening of the Big Sioux River. At the hour of five o'clock P. M. an adjournment was taken until ten o'clock A. M. on Tuesday, October 3, 1916."

"October 3, 1916.

Pursuant to adjournment, the Board convened at ten o'clock A. M., and in company with the State Engineer, Homer Derr, visited the site of the proposed spillway and control gate, at the head thereof. The Board then returned to the Commissioners' Room, and held a conference with the State Engineer with reference to the proposed drainage. Mr. C. T.
308 Charnock then moved the adoption of the resolution establishing said drainage, and that the vote be taken by districts. Mr. J. E. Johnson seconded the motion. Upon roll call

A. G. Risty, District No. 1 voted yes.

J. E. Johnson, District No. 2 voted yes.

J. L. Fritz, District No. 3, voted yes.

C. T. Charnock, District No. 4, voted yes.

J. A. Jensen, District No. 5, voted yes.

The Chairman then declared the resolution adopted. The State Engineer was then requested to prepare and submit plans and specifications for the necessary spillway and control, or headgates, at his earliest convenience. * * * **

Mr. C. T. Charnock moved that the hearing on damages occasioned by the establishment of Drainage Ditch No. 1 and 2, be adjourned until Friday, October 6, 1916, at ten o'clock A. M., and be made a special order for that date. Motion seconded by J. A. Jensen, and carried unanimously."

Defendants' Exhibit 24 is the resolution of the Board of County Commissioners establishing Drainage Ditch No. 1 and 2 upon the petition of the City of Sioux Falls, F. L.

Blackman, et al. Defendants' Exhibit 26 are the minutes of the Board of County Commissioners for October 6, 1916. Defendants' Exhibit 27 is a resolution of the Board of County Commissioners of October 6, 1916, assessing damages as compensation for lands taken in the construction of Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch No. 1 and 2.

Resolution Assessing Damages.

Whereas, the matter of assessment of damages caused by the establishment and construction of Drainage Ditches No. 1 and 2, was, on Tuesday, October 3, 1916, at a regularly adjourned meeting of the Board, deferred to and made a special order for Friday, October 6, 1916, at ten o'clock A. M., and the Board having met on said last named date,
309 and having heard and considered the claims for damages, and having taken into consideration the fact that the principal portion of said drainage ditch has already been constructed, and assessments for damages therefor having already been made and paid in the original construction of said Drainage Ditches No. 1 and 2, and that the principal part of the work to be done consists of building a proper spillway, flood or control gates, cleaning, deepening and widening the channel of the said drainage ditches as now constructed, building levees and dikes where deemed advisable, and other improvements to said drainage system;

Now, Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the damages arising from the establishment of Drainage Ditch No. 1 and 2, including compensation for the lands to be taken for said drainage, be and they are assessed and awarded as follows, the same being in accordance with plats thereof, filed in connection with the original construction of Drainage Ditches No. 1 and 2:

To the Kittery Realty Company, for damages to Tract One (1), etc. * * * * *

Be It Further Resolved, that it is the judgment and determination of this Board that in consideration of the fact that damages were assessed and paid in the original construction of Drainage Ditch No. 1 and Drainage Ditch No. 2, for all damages sustained by each tract of land, or other property, through which the said drainage ditches and the present drainage ditch pass, as damages and compensation for the land taken by the route of such drainage, that no damages

will accrue, or should be paid, by reason of the establishment and construction of said Drainage Ditch No. 1 and 2, except as hereinbefore provided, and that the claims of Margaret Finnegan and James L. Finnegan for damages by rea-
310 son of the recommended straightening of the Big Sioux River, which straightening has not been considered and determined, be and the same are hereby disallowed, without passing upon the merits of said claims, in case it is determined to straighten said Big Sioux River, and said claims are refiled, and that no other damages will accrue to any person or property by reason of the establishment and construction of said Drainage Ditch, except as herein awarded.

Be It Further Resolved that a fund to be known as "Drainage Ditch No. 1 and 2 Fund", be and it is hereby established, and that the proceeds of any assessment, or assessments, hereafter to be made in this proceeding be and they are hereby pledged to such fund, and when such assessments are collected, it is ordered and directed that they be deposited to the credit of such fund, to be applied in the payment of the warrants to be issued on such fund, in the order of the registry of such warrants with the County Treasurer. It is ordered that the warrants to be issued on such fund draw six per cent., interest from date of issue. It is further ordered that, if any of the persons entitled to damages under this resolution will accept a warrant or warrants on such fund in lieu of money, then that warrants on such fund for the proper amounts be issued therefor to the persons entitled thereto, to be signed by the Chairman and countersigned by the Auditor, but if any person or persons will not accept a warrant upon such fund in payment of the damages herein awarded, then the Chairman of this Board, and the Auditor, are authorized to issue warrants on such fund, in such sums as may be found advisable, and to sell the same at not less than par, and out of the proceeds thereof, to pay the damages herein awarded, taking the receipts of the persons entitled thereto therefor. It is further ordered that all expenses in connection with said Drainage Ditch No. 1 and 2, hereafter to be incurred up to the time of the letting of the contract for the construction of said ditch, be paid by warrant upon such fund.

311 Be It Further Resolved that in case any person herein awarded damages will not accept the same, the Chairman of this Board is directed to tender him the amount thereof, and in case of his non-acceptance thereof, to deposit the

same in the Sioux Falls, South Dakota, to the credit of such person, and to give such person notice of such deposit.

Approved this 6 day of October, A. D. 1916, by the Board of County Commissioners of Minnehaha County, South Dakota.

By A. G. Risty, Chairman."

Attest:
County Auditor.

Defendants' Exhibit 28 are minutes of the Board of County Commissioners of December 16, 1916, relative to Drainage Ditch No. 1 and 2, passing a resolution fixing the exact line and width of drainage ditches straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, and fixing the time and place for hearing thereon, and defendants' Exhibit 29 in said resolution, the material portions of which are as follows:

"Resolution.

Whereas, on September 3, 1916, this Board, by resolution duly adopted, established Drainage Ditch No. 1 and 2, but expressly reserved for further 'consideration and determination the question of the straightening of the Big Sioux River at the several points recommended in said Engineer's report, without passing upon the merits thereof, for some later date when the straightening of the Big Sioux River will be given more complete consideration covering the points recommended and other points requested at the hearing': and

Whereas, the Engineer, L. E. Stevens, has filed his supplemental report with reference to the straightening of the Big Sioux River, recommending narrower ditches than previously recommended, and also recommending the ex-
312 tension of the straightening of said Big Sioux River, and thereby varying the route of said drainage, together with maps and profiles; and

Whereas, the Board has personally inspected the route of said proposed drainage, as described in said petition for Drainage Ditch No. 1 and 2, and as described in said Engineer's reports;

Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of the ditch straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, be and the

same is hereby fixed as described in said Engineer's original report, as amended by his supplemental report, and that the requisite right-of-way of said drainage ditch and dump space, be and the same is hereby fixed as described in said Engineer's report; and

Be It Further Resolved that it is deemed practicable and necessary to vary the route of said drainage occasioned by the proposed straightening of the said Big Sioux River, so that it will pass through other lands than those described in the original notice of hearing; and

Be It Further Resolved that the further consideration and hearing of said matter be adjourned to Saturday, the 30 day of December, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of said County, in the City of Sioux Falls, South Dakota, and the same is hereby fixed as the time and place for the hearing of the said petition with reference to the straightening of the said Big Sioux River, as recommended in the said Engineer's original and supplemental reports, and that notice thereof be given in accordance with the provisions of Section 4, 5, and 28, of Chapter 138 of the Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota. * * * * *

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313 Defendants' Exhibit 30 is a notice of hearing on the Sioux River cut-offs on Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch Notice.

Sioux River Cut-offs on Drainage Ditch 1 and 2.

Notice is hereby given that Saturday, December 30, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, filed August 3, 1916, for the establishment and construction of a drainage ditch pursuant to the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909, insofar as said petition refers to the straightening of the Big Sioux River, as prayed for in said petition, and as recommended by the Engineer's original and supplemental reports. The consideration whereof having been deferred for further consideration, when

Drainage Ditch No. 1 and 2 was established, and said meeting having been adjourned for that purpose. The exact line and width of said ditch was determined by the action of said Board on December 16, 1916, and in general terms is as follows: * * * * *

The tract of country likely to be affected by the establishment and construction of said proposed cut offs in the Big Sioux River is in general terms described as all of the lands and property affected by the construction of Drainage Ditch No. 1 and 2, as established by resolution in these proceedings under date of October 3, 1916, and of record in the office of the County Auditor of Minnehaha County, South Dakota.

314 The separate tracts of land through which said proposed drainage will pass, and part of which will be required therefor, and for dump space, and the names of the owners of said tracts, as appears from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, on August 3, 1916, that being the time of filing said petition, are as follows: * * * * *

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have, why the said drainage should not be established and constructed, and all persons deeming themselves damaged by said proposed drainage, or claiming compensation for the lands proposed to be taken for said drainage, are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 16 day of December, A. D., 1916.

BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY, SOUTH DAKOTA,
By A. G. Risty, Chairman."

Attest:
Harry H. Howe,
County Auditor.
(Seal)

Defendants' Exhibit 31 is the certificate of posting the aforesaid notice, the material portion of which is as follows:

"I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby specify that on the 20 day of December, A. D. 1916, I posted three copies of the annexed notice in three places near the route of the proposed drainage mentioned therein, as follows, to-wit:

One on the bridge over the Sioux River between Sections 29 and 32, in Mapleton Township; One on the bridge over the Sioux River on the North Half of Section 8, in Mapleton Township, and one on the bridge over the Sioux River between Sections 29 and 32, in Sverdrup Township; that I also posted one of said copies at the South Front Door of
315 the Court House in the City of Sioux Falls, South Dakota, all in Minnehaha County, South Dakota. * * * *

Defendants' Exhibit 32-A is the affidavit of publication of the aforesaid notice, the material portion of which is as follows:

"C. L. Dotson, being first duly sworn deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a daily newspaper of general circulation; printed and published in the City of Sioux Falls, in said County, and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper, and in charge of the advertising department thereof, and has personal knowledge of all the facts stated in this affidavit, and that the notice and advertisements headed Drainage Ditch Notice No. 1 and 2, a printed copy of which is hereunto attached and made a part hereof, was printed and published in said newspaper for ..... issues. That the first publication of said notice in said newspaper aforesaid, was on Wednesday the 20th day of December, A. D. 1916, and the succeeding publications were severally, on Wednesday, the 27 day of December, A. D. 1916. That the fees charged for the printing and publication of said notice and advertisement in said newspaper as aforesaid, were Ten Dollars and ....cents, and for this affidavit, Twenty-five Cents, and that the said fees for the printing and publishing of said notice and advertisement, and for this affidavit as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement, inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or

understanding for the division thereof has been made
316 with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper as provided in Session Laws of 1903, and amendments thereto. * * * *

The defendants' Exhibit 32 is the minutes of the Board of County Commissioners of August 10, 1917, adjourning said hearing until August 11, 1917, at which time the Board passed a resolution establishing said river cut-offs, a material portion of which resolution is as follows:

"Commissioners' Proceedings.

August 10, 1917.

Pursuant to resolution of July 27, 1917, adjourning and fixing the time of hearing upon the straightening of the Big Sioux River, under the petition upon which Drainage Ditch No. 1 and No. 2 was established, all members of the Board being present, and a delegation of farmers and property owners interested, Engineer L. E. Stevens having made and filed his report of the exact line and location of the several cut offs suggested and recommended, and the Board having heard the protests of those objecting thereto, and the petitioners in like manner having been heard, and the Board having heard the argument of counsel thereon, the further consideration thereof was adjourned to August 11, A. D. 1917, at two o'clock P. M."

"Commissioners' Proceedings.

August 11, 1917.

Pursuant to adjournment, The Board of County Commissioners convened at two o'clock P. M. All members of the Board being present, and after taking up and considering the project of straightening the Big Sioux River upon the petition for the establishment of Drainage Ditch No. 1 and 2, heretofore established, and the Board being fully advised
317 with reference thereto, it was moved by C. T. Charnock, and seconded by J. A. Jensen, that the following resolution be adopted:

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, pursuant to the resolution of this Board of October 3, 1916, establishing Drainage Ditch No. 1 and 2, and reserving the consideration and de-

termination of the question of the straightening of the Big Sioux River at several points recommended in the Engineer's report, that it is the determination of this Board that it will be conducive to the public health, convenience and welfare, and that it is necessary and practicable for the drainage of agricultural lands within the drainage area of said drainage ditch No. 1 and 2; that the hereinafter described ditches straightening the Big Sioux River be established and constructed as a part of the drainage system hereinbefore established, and designated as Drainage Ditch No. 1 and 2.

Be It Further Resolved that the said ditches straightening the said Big Sioux River be, and the same are hereby established, with a bottom width of 20 feet; and a depth of not to exceed the depth of the main channel of said Big Sioux River, with a right-of-way for ditch and dump space of 100 feet, one-half on each side of the center line along the lines of hereinafter and particularly described as follows * * * * *."

All of the foregoing Exhibits were offered and received in evidence.

Mr. Ward, as County Auditor of Minnehaha County, identified Defendants' Exhibits 2 and 3, and 33 to 42, both inclusive, as records and files of his office in relation to this drainage ditch proceeding, all of which were offered and received in evidence.

Defendants' Exhibit 2, being a petition signed by O. S. Thompson et al, to abandon the outlet of old Drainage Ditch No. 1 and for the establishment of a new outlet thereto, the material portion of which is as follows:

318 "To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

The undersigned petitioners respectfully represent that they are all residents of the County of Minnehaha, South Dakota, and that each of them is the owner of certain lands situated in said County, in the Valley of the Big Sioux River, all of which lands will be affected by the drainage herein mentioned and proposed.

Your petitioners further represent that it is necessary for the drainage of agricultural lands in the said Big Sioux River Valley, including all of the lands affected by Drainage Ditches No. 1 and 2, as the same have been established and constructed, that said ditches be repaired and put in proper con-

dition and that the same be cleaned, deepened and widened, and that the Levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary in order for said ditches to carry off the surplus water and properly drain the lands affected thereby;

That it is also necessary to permanently close said Ditch No. 1 above the present spillway, or outlet, thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, in Township 101, of Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a Southeasterly direction, and to extend said ditch from such point, running thence in a Southwesterly direction, through Covell's Lake in the City of Sioux Falls, across the Southeast quarter of Section 5, the East Half of the Southwest Quarter of Section 8, the West Half of Section 17, the East Half of the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, about 40 rods
319 north of the bridge across said river commonly known as the "12th Street Bridge", situated on the section line between said Section 18 and Section 19.

Your petitioners further represent that the proposed maintenance and repair of said drainage ditches No. 1 and 2, and the extension of said Ditch No. 1, are necessary for the reasons that the present spillway and outlet of said Ditch No. 1, as now constructed and used, is impracticable for the purpose for which it was intended, and if allowed to remain in its present condition, will probably cause large damage to the owners of property adjacent thereto and affected thereby; that it is impossible to put said spillway or outlet in a condition to carry off the surplus water and properly drain the lands affected by said drainage ditches, without causing great damage to the owners of property as aforesaid; that for these reasons it is necessary to establish and construct a new outlet for said drainage ditches, which can be done by establishing and constructing the extension herein proposed.

Your petitioners further represent that the proposed repair and maintenance of said Drainage Ditches No. 1 and 2, and the establishment and construction of said proposed extension of or outlet to Drainage Ditch No. 1 will be conducive to the general health, convenience and welfare of the City of Sioux Falls, and of the inhabitants of the Big Sioux River Valley between the Cities of Sioux Falls, and Dell Rapids, and will prevent the annual loss of many thousand acres of crops in said valley, and will prevent great damage

to the lands in said territory, and to the buildings, bridges, highways and other improvements thereon.

Your petitioners further represent that the territory likely to be affected by the proposed repairs to and maintenance of said drainage ditches, and the establishment and construction of the proposed extension to or outlet of said
320 drainage ditch No. 1 includes all of the lands in said Big Sioux River Valley that are affected by said Drainage Ditches No. 1 and 2, as the same have been established and constructed, and all of the lands in said valley between the cities of Sioux Falls and Dell Rapids that are subject to overflow by the Big Sioux River.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold."

Defendants' Exhibit 3, being the bond accompanying the petition of O. S. Thompson, the material portion of which is as follows:

"Whereas, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold have prepared and executed, and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition for drainage, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof;

Now, therefore, We, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold, as principals, and R. J. Huston and Iver R. Peterson, as sureties, do hereby undertake, promise and agree to and with the County of Minnehaha, in the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or the same is denied on appeal.

Dated at Sioux Falls, South Dakota, April 8th, 1916.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold, R. J. Huston, Iver R. Peterson.

I hereby approve the foregoing bond and the sureties thereto.

HARRY H. HOWE, County Auditor."

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321 Defendants' Exhibit 33, being the order for filing the petition of O. S. Thompson, et al, the material portions of which are as follows:

"Order for Filing Petition for Drainage.

Whereas, O. S. Thompson, and others, of the County of Minnehaha, South Dakota, have this day presented to this Board a petition for the drainage of lands in the Big Sioux River Valley, which lands have heretofore been drained by drainage ditches Nos. 1 and 2, as hereinbefore established and constructed, in which said petition is represented that it is necessary to permanently close said drainage ditch No. 1, above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast Quarter of Section 5, in Township 101, Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a Southeasterly direction, and to extend said ditch from such point running thence in a Southwesterly direction through Covell's Lake in the City of Sioux Falls, and across the Southeast Quarter of Section 5, the East Half and the Southwest Quarter of Section 8, the West Half of Section 17, the East Half and the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of said Section 18, about forty rods North of the bridge across said river, known as the Twelfth Street Bridge, situated on the Section line between Sections 18 and 19, all in said Township and Range, and said petition having been by this Board examined, and being found sufficient in form, and being accompanied by a proper bond, with sureties approved by the County Auditor;

Now, Therefore, It Is Ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that said petition be forthwith filed with the County Auditor, and a copy thereof be transmitted by said County Auditor
322 to the State Engineer."

Thereafter, on April 12, 1916, a copy of said petition was transmitted to the State Engineer at Pierre, South Dakota, and on May 3, 1916, a resolution was passed by the Board ordering a survey to be made for this proposed extension, and ordering the surveyor to report to the Board upon the length, size, width and depth of the ditch required for this proposed outlet. On May 24, 1916, the surveyor reported his survey, the exact line and width of the ditch, and the amount of right-of-way, together with the estimated cost of the same, and on June 9, 1916, the Board of County Commissioners, by resolution, fixed the exact line and width of

the proposed outlet of Drainage Ditch No. 1 and designated the time and place for hearing the same, and designated June 29, 1916, as the time of hearing thereon, and ordered notice to be given. On June 10, 1916, notice dated on that day was published and posted as required by law.

Defendants' Exhibit 42 is the resolution of the Board establishing a drainage ditch as an outlet of Drainage Ditch No. 1 and the abandonment of the old outlet of Drainage Ditch No. 1, and the repair of Drainage Ditch No. 1 and Drainage Ditch No. 2, the material portions of which are as follows:

"The matter of the petition of O. S. Thompson, and others, representing that it is necessary that drainage Ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, Township 101, Range 49, and that such ditch be extended from such point running thence in a Southwesterly direction through Covell's Lake, and terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in said Township, and that it is also necessary that drainage ditches No. 1 and 2 be repaired and put in proper condition, coming on to be heard by the Board
323 of County Commissioners at a meeting of said Board on Thursday, June 29, 1916, pursuant to notice theretofore given, and written objections thereto having been filed by the City of Sioux Falls, the South Dakota Central Railway Company and Catherine W. Peck, and others, and such objections having been presented orally by counsel for the various objectors, and the said petitioners having appeared personally and by counsel in support of said petitioner, and various parties having filed claims for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet, and said hearing having been adjourned to this 8th day of July, 1916, and this Board having fully heard and considered said petition and all matters, evidence and arguments presented in opposition to and in support of the same;

Now, Therefore, Be It Resolved that the repair and maintenance of said drainage ditches 1 and 2, and the establishment and construction of said proposed extension to or outlet of drainage Ditch No. 1 will be conducive to the public health, convenience and welfare, and it is necessary and practicable for draining agricultural lands, and it is so found.

Be It Further Resolved that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point on the West bank of Drainage Ditch No. 1, 1610 feet North and 58 feet West of the Southeast Corner of Section 5, Township 101, Range 49, where said drainage ditch swings Southeasterly from a Southerly direction, and that a new extension to or outlet of said drainage ditch, commencing at said point and running thence in a Southerly direction through Covell's Lake in the City of Sioux Falls, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in Township 101, Range 49, as described in the resolution adopted by the Board June 10, 1916, be constructed, and that such extension or outlet be and the same hereby is established.

324 Be It Further Resolved that drainage ditches No. 1 and 2 be repaired and put in proper condition, and that the same be cleaned, deepened and widened, and that the levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary, in order that said ditches may carry off the surplus water and properly drain the lands affected thereby, the amount and extent of such repairs to be determined by this Board after an inspection, and, if deemed necessary, a survey of said drainage ditches.

Be It Further Resolved that this Board proceed to consider the claims presented and filed by various persons for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet; that before the assessment of damages this Board personally inspected each tract of land or other property through which said extension or outlet will pass, and that the damages sustained by each tract of land or other property through which said extension will pass, and damages as compensation for the land taken for the route of such drainage be assessed by this Board at a regularly adjourned meeting.

Dated this 8th day of July, 1916."

* * * * * * * *

The material portion of the judgment in the case of Oluf O. Gilseth vs. A. G. Risty, and others, as County Commissioners of Minnehaha County, South Dakota, et al, Defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, Intervening Defendants, rendered by the Circuit Court of Minnehaha County, South Dakota, upon the

19th day of July, 1921, offered and received in evidence, is as follows:

"The Court having heard and considered the evidence introduced on behalf of the parties, and having heard the argument of counsel, and being fully advised in the premises, and having made and entered its decision in writing, con-
325 sisting of Findings of Fact and Conclusions of Law;

Now, Therefore, on motion of Messrs. E. O. Jones, R. H. Warren, and Porter & Bartlett, representing the defendants and interveners,

It is hereby Ordered, Adjudged and Decreed that the plaintiff's complaint herein be, and the same is hereby dismissed on its merits."

LEONARD BOYCE, being called as a witness in behalf of the defendants, testified in substance as follows: (Tr. p. 229).

My name is Leonard Boyce. I have lived in Sioux Falls for about fifteen years. In 1917 and 1918 I was connected with the Sioux Falls Construction Company, as Superintendent of the construction of the spillway on drainage Ditch No. 1 & 2, constructed by the County Board. As such Superintendent, I made arrangements with the Water Department of the City of Sioux Falls, by which it furnished water to be used in
326 the construction of the spillway on Drainage Ditch No. 1 & 2. The City put in a meter in front of the Penitentiary in a manhole where the main runs into the Penitentiary. We ran a line from there down to the spillway. They knew at the time they put the meter in, the purpose the water was to be used for. We used the water from that connection upon which they furnished the meter in the construction of the spillway. The City rendered bills from month to month, or from time to time for the water so used. These bills were presented to the County Board, and allowed, and warrants were drawn in favor of the City of Sioux Falls, or its water works department, for the amount of these bills, which warrants were delivered by me to the City.

As Superintendent of this work, I had certain steel reinforcing material delivered for that work. Some of it came in on the Milwaukee Railroad, and some on the Great Northern Railroad. There is a spur or sidetrack that extends to near the spillway North of the Penitentiary. I made arrangements with the officers or agents of the Chicago, Milwaukee & St. Paul Railway Company and the Great Northern Railway Company, in the City of Sioux Falls, to have this freight spot-

ted or delivered to us out near the end of this spur near the spillway, and such freight, several car loads, was in fact delivered to us on this spur near the spillway.

During the construction of this spillway in 1917 and 1918, electrical power was used in the work of construction. The Northern States Power Company furnished power or electricity used for power in such construction work. They had a power line that ran by or near the work of construction
327 of this spillway. The agents of the Northern States Power Company made the connections for us so that we used this electrical power which they furnished. They rendered us statements from time to time of the electricity which we used, which statements were presented to the Board of County Commissioners and by them audited and allowed. I think the warrants were drawn direct to these parties.

During the time that I was Superintendent of construction on the spillway on Ditch No. 1 & 2 I saw the City Commission up there looking over the work as it progressed. The whole Commission was together.

Cross-Examination.

My recollection is that they were up there in the Fall of 1917 when we were working on the West side of the bridge on the highway. Possibly October or November, 1917.

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328 C. T. CHARNOCK, being called as a witness on behalf of the defendants testified in substance as follows:

My name is C. T. Charnock, I am one of the defendant County Commissioners in these actions; have lived in Sioux Falls about twenty-five years, and am familiar with the value of farm land in the vicinity of Sioux Falls, also the value of City property in the City of Sioux Falls. I have been over and am familiar with all the lands within the area of Drainage Ditch No. 1 & 2. Prior to fixing the apportionment of benefits thereon on June 10, 1921, I accompanied the Board of County Commissioners in making a personal inspection of all of the lands within the drainage area. The Board selected and determined the benefit to the unit adopted, which unit is situated about three and one-half miles North of Sioux Falls. We placed a value upon this land without the ditch, and a value upon it with the ditch. The difference between these values was the sum of $25.00 which, in our judgment, was the real beneficial value to this unit produced by the construction of this drainage ditch. The Board applied that unit to all the

lands within the drainage area, and used the same method of determining the number of units of benefit to all of the lands affected. In applying this unit towards fixing the proportion of benefits to the Chicago, Milwaukee & St. Paul Railway Company, we first took into consideration the land belonging to the railroad company, the acreage, and we assessed that practically the same as abutting lands, and then we took into consideration the benefits to the grades and the culverts that could be done away with, and to tracks and bridges, etc. That was figured out by our Engineer. The amount or number of units was arrived at by figuring it out in dollars and cents, and then dividing the total amount by the benefit to the unit or twenty-five, thereby obtaining the number of units of benefit which was, in our judgment, received by this railroad company.

329 We pursued the same course in fixing the number of units of benefit to the Chicago, St. Paul, Minneapolis & Omaha Railroad Company; also to the Chicago, Rock Island & Pacific Railroad Company; also to the Great Northern Railroad Company. We used the same method in arriving at the proportion of benefits which, in our judgment, the Northern States Power Company received from this drainage ditch. In fixing the proportion of benefits to the Northern States Power Company there were a number of different elements taken into consideration. First, was the dam at Schjodt's. We put that in to control the water there in the river, and also controlling gates or wiers at Thompson's, and the cut-offs of the river. We also took into consideration the property here in Sioux Falls known as the hydro-electric plant. These benefits, were arrived at by the same process of figuring the total benefit and dividing the same by the value of the benefit to the unit. The number of units which were fixed against these various plaintiffs in these actions represented the judgment of the Board in fixing the proportion of benefits upon the showing that was made, and the computation of our Engineer. We adopted the same process in arriving at the number of units which were fixed against the City of Sioux Falls for benefits. We used the same process all the way through on all the property that was taken under the ditch here.

Cross-Examination.

The unit we used was one acre of agricultural land. In determining the benefit to the Northern States Power Company, the Board took into consideration the dam at Schjodt's, the purpose of which was to prevent the water from the Big Sioux

River, where the River had broken through into the ditch, from being diverted into the ditch. The Power Company was objecting to the ditch taking its power. The same con-
330 dition is true with reference to the controlling gates at Thompson's. The agricultural land had a value placed upon it, and was computed by the acre. I don't mean to say that all the land was assessed at one price. They vary in price according to benefit. Referring to the property of these plaintiffs, the method pursued was to figure the benefit in dollars and cents. The property now before the Court was not computed on the acreage plan. When we were making this assessment, we placed for everyone the same value on it.

We did not make any difference whether the property belonged to the City or individuals. In assessing the railroads, we took the land that the railroad companies owned into consideration first, then the railroad itself, and then the culverts and bridges. The acreage that the railroad companies owned was only one element taken into consideration, and it was all assessed upon the unit plan. We took in the mileage but mileage was not the only element taken into consideration. We did not use the valuation of the railroads, but we used the valuation of the benefits that we thought the railroads would receive from it. The Board went over the proposition with the Engineer, and he figured out the method to use and it was approved by the Board. We accepted his figures. The Engineer figured the proportion of bridges that could be saved by diverting the water through the spillway, and that was computed in dollars and cents, and divided by twenty-five, which made so many units. The whole system was figured on that plan. All of the different elements of benefit were figured up and added together. The Engineer showed us what benefits this would be, what it would amount to, and that is the way we handled it, by the $25.00 unit, the same as we did the farms. It was all figured out for us on paper. Then we took
331 the map and travelled over the entire system. The Engineer figured the savings to the bridges, the benefit to the road-bed, and the culverts and the land owned by the railroad. That was all taken in. Those are all the elements I remember.

Q. Now, Mr. Charnock, what was the basis upon which the streets of the City of Sioux Falls were figured on. What were the elements that entered into that?

A. If I remember right they were taken in about the same value as the property abutting.

Q. You mean that all of the streets within the drainage district were figured by the acreage and also other benefits?

A. We didn't figure the lots by the acre.
Q. I am not talking about lots, I am talking about streets?
A. When you get to the streets they are in where lots are laid out.
Q. I am asking about the city property or streets?

The Court: As I understand the witness, they did not consider that upon the acreage basis at all. Am I right?

The Witness: Yes sir.

Q. Upon what basis was the benefits figured?
A. It was figured on the valuation.
Q. Valuation? A. Yes.
Q. Upon the acreage valuation?
A. We figured if you kept the water off this lot you had benefitted it so many dollars.
Q. I am asking about the city streets.
A. I am telling you that we took the streets by the same value.
Q. And figured them in acre valuation?
A. No, not in acre valuation, lot valuation.
Q. Upon what basis?
332 A. I don't know as I can explain it so you can understand it.
Q. What benefits did you figure out that the city would derive to their streets from this spillway and ditch?
A. The drainage. Keeping the water off of them would be certainly a benefit to the streets as well as abutting property.
Q. Upon what basis, what theory?
A. I cannot tell you just how much.
Q. Upon what basis did you figure, for instance, Sherman Park?
A. I believe Sherman Park was run in by the acre.
Q. As agricultural land?
A. Somewhere near that.
Q. Was the streets that you just referred to also figured upon the basis of agricultural land?
A. Whenever they were on that, they were assessed along about the same as the property where the street was located.
Q. As agricultural land?
A. You wouldn't call city lots agricultural land?
Q. I am asking you what you done?
A. I am telling you we assessed the street along with the property where it laid.
Q. As agricultural land?
A. No, not as agricultural land.
Q. What about Phillips Park, how did you assess that?

A. There is only a portion of Phillips Park, I think, taken in. That is the north end.

Q. Upon what basis did you put that?

A. That was the same way.

Q. In fact, you assessed the city property, all of it, the same way you have described it here?

A. I think so.

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333 HERMAN RETTINGHOUSE, being called as a witness on behalf of the defendants, testified in substance as follows:

My name is Herman Rettinghouse. I am a civil engineer and reside in Sioux Falls. I graduated in 1881 and came to the United States in 1882, and in the following year engaged in engineering work; was employed by the Milwaukee, Mitchell and Western Railway, which is now a part of the Chicago & Northwestern system, as an assistant and gradually advanced into higher positions until 1893, at which time I engaged in private work in Ashland, Wisconsin, where I was city engineer for three years. Also was engineer for two railroads and in the fall of 1897 again engaged with the Chicago & Northwestern Railway as assistant engineer and was promoted to superintendent of bridges and building on the same road in 1900, in which capacity I served for five years; and from 1905 to 1907 was employed by the Wisconsin Central Railway Company as division engineer; had charge of the engineering construction work and maintenance of the entire road, and on January 1, 1907, again engaged with the Chicago and Northwestern as division engineer of the Northern Iowa and Sioux City Divisions, which position I held until the spring of 1913, when I was made division superintendent of the Iowa and Minnesota division of the Chicago & Northwestern. I remained there until November, 1913, and was then promoted to chief engineer of the Chicago, St. Paul, Minneapolis and Omaha, a part of the Chicago & Northwestern system. I retired from that service on March 1, 1920, at which time I was placed on the pension roll because of my impaired health. Since April 1, 1920, I have been a resident of Sioux Falls and have engaged in private practice as consulting engineer and senior member of the firm of Chenoweth & Rettinghouse, up to the present time. My first experience in public drainage work was in 1905 in a project which was affect-

334 ing the Wisconsin Central Railway and another similar project in Southern Wisconsin; January 1, 1907, while in the service of the Chicago & Northwestern as division engi-

neer in Iowa, which comprised practically the entire state covered by that railroad, the drainage work was very extensive. It was the principal part of my duties to make myself familiar with and handle the drainage problems which came up constantly. During this time we had from one hundred to one hundred fifty drainage problems of various magnitudes. When I became chief engineer of the Omaha Railway, we had a number of drainage problems in the states of Wisconsin, Minnesota, South Dakota and Nebraska. It was my duty as chief engineer to make myself familiar with them and to cover all the phases of the problems as to benefits, damages and the manner of assessing benefits and damages. In November, 1920, my firm was engaged by the Board of County Commissioners of Minnehaha County, to make a topographical survey of the district covered by Drainage Ditch No. 1 and 2 for the purpose of preparing a correct map and furnishing data to the Board as would enable it to place the proportional benefits on the land and interests affected. Defendant's Exhibit 1 is the map prepared by my firm, which shows the topography of the country adjacent to and affected by Drainage Ditch No. 1 and 2 of Minnehaha County. Drainage Ditch No. 1 and 2 at its initial point is not exactly in the Sioux River. A small creek connects with the Sioux River near the Southwest corner of Section 29, Township 104, Range 49. The initial point of that particular section which we term section No. 3 is located at that point, a matter of five or six hundred feet from the river proper. There are controlling works and gates there which enable the ditch to be closed off from the river or from the creek, or opened and at flood time part of the water taken out of the river. Section No. 3 is located along the lowest land west of the Sioux River. The
335 land is naturally down lower than the banks of the river proper, a great deal in some instances. The land west of the ditch gradually rises as you go away from the ditch until you get to the foothills. The surface water on the outside of this ditch can most assuredly get into the ditch. The ditch was constructed for the prime purpose of draining this section of the country and inlets have been made at various points, at roads and intervening points, to permit this surface water to drain into the ditch.

This third section terminates in connecting with the river on the east and west line of Section 18, Township 103, Range 49, about a thousand feet west of the east line of Section 18. This ditch connects with the river as stated and the river from that point to a point on the southeast quarter of Section 20 has been straightened at various points, being practically

canalized. At the point spoken of there is a bayou or an old portion of the river bed, which is partly filled up along the north, due to the fact that the river has been straightened to the west of it, and Section No. 2 connects with this bayou about eight hundred feet east of the river proper. The ditch then extends parallel to the Milwaukee railway to near the junction point of the South Dakota Central line. At that point it diverges to a distance of about sixteen or seventeen hundred feet, running practically that distance parallel and in a southerly direction until it intersects the old bed of Silver Creek. It then follows Silver Creek in a southeasterly direction, cutting out all bends in it until it reaches a point at or near the Section line between Section 28 and 29, and runs in a southerly direction about a thousand feet parallel to the Milwaukee railway again until it reaches a point about a quarter of a mile north of the city limits, from which point it runs in a southeasterly direction to its terminus in the spillway. Throughout Section 2 which is described, the ditch runs in the lowest part of the country east of the river and serves the purpose of a drainage ditch as well as for an overflow
336 from the river. It was put in for the dual purpose of serving as an overflow and as a drainage ditch. You will notice on the map that Silver Creek runs in a very circuitous route along the ditch and it terminates in this ditch, so that the waters of Silver Creek are more quickly disposed of than before and it therefore assists in draining the land adjacent to the ditch and Silver Creek and the same is true of the lands between the ditch and the river. The ditch assists in draining territory which is tributary to Silver Creek, which has its source north of the initial point of Section 2 of the ditch. The dam at Schjodts is about eight hundred feet from the former end of the lateral ditch constructed there. This dam is about thirteen hundred feet from the present cutoff channel of the Sioux River. There are two controlling works; the one mentioned composed of a gate at the initial point of Section 3. At the initial point of Section 2 there is a concrete bridge with a wier under the same which permits the water to rise to a certain point before it enters into the ditch and thereby is retained in the river proper. This was installed for the purpose of controlling the rise of the water in the river. In making of the survey of which I had charge, I made frequent trips over the territory in order to familiarize myself with all the elements that might come into consideration and particularly as to the relative benefits derived, bearing in mind that it was necessary to arrive at some certain basis so as to be

able to make the proper recommendations to the Board. In going over the territory, I came to the conclusion that at the location of this unit, it was about as good an illustration as could be found along the entire district, and I selected this unit for my recommendation to the Board. On Section 2 of this district, which terminates in the Sioux River, there are openings left at all necessary points to drain off the surface water and carry it into the ditch. After we had made our report
337 to the Board and I can best illustrate it by reading the sentence, "We also submit as an aid in your work of equalizing the benefits, a complete list of all the lands with the acreage of each parcel and proportionate benefits. We have made a thorough investigation and have minutely looked over all of the affected lands. In consideration of the proportion of benefits, we have selected a particular tract for a unit, one acre, more particularly described later, in the west half of the northwest quarter of Section 29, Township 102, Range 49". Together with that report we submitted a recommendation as to the proportional benefits and after the board had received this report, we made a trip over the entire district lasting several days. We had one of the maps with us and we viewed all the lands and all of the other points where other benefits were to be proportioned. The particular percentages of the different parcels of land came under consideration and were pointed out, and if a dispute arose as to whether or not it was the proper amount of percentage, it was corrected and agreed upon right there by the Board, so that at the conclusion of our inspection the Board was familiar with all of the facts of the situation as I was myself. We used this unit selected as one and compared the other real estate with it. It was decided by the Board that the acre in question was worth one hundred dollars prior to the improvements and that it was worth one hundred twenty-five dollars subsequent to the improvements. Therefore the actual value of benefit to the unit selected was twenty-five dollars. All the agricultural land was assessed in relation to this unit. Many of the lands were only 30 or 40% depending upon the amount of benefit derived, as compared with this unit, being one hundred per cent. There were other lands that were as high as three hundred and three hundred fifty per cent of this unit. I am familiar with the cost of construction and upkeep of highways. In ar-
riving at the benefit to the highways within the drain-
338 age area we estimated [—]. There is a certain amount [—] necessary [—] under flood conditions. That is to say, a road that is periodically flooded as against a road that never is flooded. The

difference in the estimated cost of maintenance was capitalized, or represented the interest on a certain sum of money, and we consider the capitalized portion as a real benefit. We then, after obtaining that result after making a great many calculations, taking into consideration the various locations, some of them benefitted more than others.

"We divided the amount arrived at by the value of the unit of $25, thereby obtaining the number of units as a proportional benefit for these roads. The sum we divided by the unit represented the capitalized value to that part of the highway; we applied the same method to the streets and highways of the City of Sioux Falls." We did not apply the acreage basis to the city property, excepting possibly the grounds where the water works are located. In applying the benefit to the unit and what the Board took into consideration as elements of benefit to the Milwaukee Railway Company, we took into consideration the fact that in the first place there were practically three elements. First was the right-of-way on the acreage basis, which was estimated in proportion to the adjacent lands. Second, that it was possible to shorten or abandon certain bridges. In order to determine the benefits derived therefrom is simply a mathematical proposition. It costs a certain amount of money each year in order to maintain a bridge, whether it is a pile bridge or a steel bridge. We know how long these structures will last. We figure the cost of a bridge and divide it by the number of years in order to get the amount that is necessary to be expended each year for replacement. Taking the amount in dollars and cents multiplied by the length of the bridge and divide that and capitalize that at 7%,
339 which is the usual rate of interest, and that determines the amount of benefit. This was the second element. The third element is the fact that by reason of the flooding of the territory in which railroads are located, washouts often occur. We obtained data and from my personal knowledge and experience I have a very good idea of what it costs to repair washouts periodically appearing and we estimated as close as possible how much it would amount to every year and capitalized that amount again.

Again as an additional element, a road-bed is solidified or made stronger by not being subject to floods. A road-bed that is constantly or for great lengths of time subjected to submersion is certainly weakened, and again, so far as humanly possible, we figured the amount of benefits in dollars and cents and after getting all of these results or capitalized amounts, we divided that by twenty-five as our measure and

determined the number of units of benefit. That system and general method and plan was used to determine the amount of benefits that each railroad received from these separate elements. There were three elements of benefit so far as the Northern States Power Company is concerned. One of them was the fact that through the construction of the wier at the initial point of section 2 and through the construction of the dam commonly known as Schjodt's dam and I believe some dike work done at other points, the power company was assured of a constant flow of water or a normal stage of water. The second element, that through the diversion of a part of the water of the Sioux River through this drainage ditch, which has been estimated at from twenty-six hundred to three thousand second feet, as against a total flood condition of six thousand feet, and all the way from 6000 to 10000 second feet, a benefit was created in that much water being taken away from the tail race and lowering the available head at
340 the power company's plant. In determining what proportion that would be, I was largely guided by the report made by Mr. Link, in which the results of his investigation were given and the amount of second feet of water in flood stages of the river at certain periods mentioned. I was also dependent upon the information and investigation made by Mr. Shenehon, who designed the spillway, and I came to the conclusion as a fair proportion of the waters diverted, we could assume one-third of the entire river from the end of section 2 in lowering the head of the hydro electric plant, through the flood waters; also the lay of the land opposite the hydro electric plant is such that all of the flood waters, after passing over the dam, must pass through the tail race. All these elements were considered in the determination of the benefits accruing to the Northern States Power Company.

Q. Just a moment, let me call your attention to certain cut-offs in the river. What if any?

A. I said there were three elements and I only mentioned two. The other is the straightening of the river which has been done to a large extent between the upper end of Section No. 2, at this point clear down to this point near the Watertown & Sioux Falls Railway. The velocity of the water was greatly increased of the waters flowing through the river, and it thereby shortened the flood period, in that the water passed through the river much quicker than it did before. The total amount of water that is collected in the initial point of these cutoffs is hastened down the river past the Northern States Power Company's Plant. The ditch takes one third out of the river. I have estimated it as closely as humanly possible

at one-third. It may be more. These were the elements we considered in apportioning the benefits to the hydro electric plant. Using these elements, we estimated the amount that would be saved by the power company through the fact
341 that the head was not lowered to that extent and capitalized that amount. The power company, by by-passing these flood waters, would have a constant aggregate output of hydro electric power and in season other than flood seasons the controlling works and dams keep all the water in the river that should be there and pass it around over the power company's turbines, insuring to them a constant flow even at a low stage of water in the river. (Tr. p. 285) The Great Northern had 2.4 acres of right-of-way which the Board considered benefited by reason of this ditch. They have one-fifth of a mile of track, two bridges protected, and 315 feet approximately of bridge that might be abandoned. The Chicago, Rock Island and Pacific has 12-1/8 acres of right-of-way that is benefited, one mile of track and two bridges benefited to be shortened, together approximately 230 feet. The Chicago, Milwaukee and St. Paul Railway has 172 acres of right-of-way, 14.2 miles of track, two bridges protected, one bridge shortened one hundred feet and one bridge of 176 feet abandoned, all benefited thereby. The Chicago, St. Paul, Minneapolis and Omaha has two and one-fourth miles of track, 27 acres of right-of-way, 405 lineal feet of bridges abandoned and two bridges protected.

342 These items I have mentioned, in my opinion, were benefitted by the construction of this ditch and the diverting of the water as I have testified. There were three elements in regard to the assessment of the city of Sioux Falls. First, the streets, estimated at about 14 miles of streets within the drainage district. They are benefited in the same manner as I have explained in regard to the county and town roads, although the benefits were more varied on account of the streets being built of different character. The second item was the parks. We figured that from the diversion of the flood, the annual maintenance of the parks was reduced, that is to say there was less work to maintain the grounds as compared with the ground that was flooded. Another item was the benefit to the water works. It seems to be a fact that through the placing of the spillway the life of the water works was saved, insofar as productiveness of the wells is concerned. Another item is that during flood conditions, the water works were unproductive. We have estimated a certain number of days each year that the water works were out of commission. These wells

were flooded by surface water and made them unsanitary and unfit for drinking purposes. We figured the amount that that would bring and capitalized the amount same as the capitalization of the streets and parks and divided that amount by twenty-five in order to arrive at a certain number of units. From my experience and the facts and data that I have been able to gather, the benefits that I have mentioned are direct benefits to the railroad companies and their properties by reason of the construction and maintenance of this ditch; and the benefits which I have outlined to the city and Northern States Power Company were direct benefits to them. After determining the amount of the units and actual amount of money necessary to be raised, that amount is divided by the number of actual units to produce the value of a unit; and by that process we reduce the actual value of the unit down proportionately to each party affected.

343 Q. You reduced the valuation down proportionately to each property affected whether it was railroad or ranch property? A. All treated alike.

Q. And that, in the final analysis will be the assessed benefit after being equalized? A. It will.

Q. Calling your attention to the fact that the river continues around the city for some miles beyond the outlet of the spillway, what is the effect of by-passing this water upon adjacent lands, starting at the city limits on the north around this city until the ditch dumps the water back into the river. Is that a benefit or not?

A. It constitutes a direct benefit.

Q. The same benefit as to lands farther up the river?

A. Yes.

Cross-Examination,

By Mr. Campbell:

When I speak of the ditch diverting something like three thousand feet of water, I have reference to the discharge capacity of the ditch at its lower end; I couldn't tell what proportion of the water came out of the river during the flood stage; I should think a majority of the water came out of the river; I don't know the capacity of the ditch at its upper end; we haven't figured that; the ditch does not divert water from the river at any other point than that; I do not know what the amount is that is diverted there; the wier that I speak of down here that controls the flood of the river is constructed to keep the water from going into the ditch at normal stage; if the ditch were not there, the waters would go down the river just the same. The second element that I said I took into consideration, that is, the diversion of the flood of the

water would lower the tail race of the Northern States Power Company at flood times to the extent of the water that was diverted; I couldn't tell you how much that would be; I couldn't tell you how many kilowatt hours of output the plant would gain by reason of that diversion; that is a matter in hydro-electric engineering that I have not attempted to qualify; the value of that increased head would be measured by the value of the increased output from the hydro-electric plant; this answer is based upon the assumption that it is cheaper to produce electric current from a hydro-electric plant than from a steam plant.

344 By Mr. Grantham:

I didn't know I determined the capacity of the stream; we have several cross sections taken at various points of the ditch and the river as well; I couldn't tell you whether I have a cross-section of the ditch at about the point where the ditch that runs to the spillway is fed by the river; we have taken cross sections of every half mile; the ditch is not uniform all the way; I have no idea at all of the size of the stream; in testifying here that the ditch carries one-third of the water, I was basing my conclusion upon the investigations made; I determined on my survey the high water mark; the [heighth] above the banks of the stream of the high water varies at various points; the dotted line here on the map shows the high water line; at an elevation of 1438, the [heighth] of the high water line is about ten feet above the banks of the river, at that point. I would have to go over the whole map with you and show you every point. It absolutely shows on the map; the water at that point would be about 8000 feet wide on the surface, that is not giving a proper picture of the thing; it is impossible for anyone to tell you off-hand just what the average depth of water would be there without showing cross sections at every point. I have no idea, unless I get down and work on it. We made a topographical survey of the valley.

Q. How did you determine the capacity or amount of water carried if you didn't know the amount of water in the stream? A. I was not engaged for that purpose.

Q. You don't know as a matter of fact the amount of water that is carried down the stream in flood time?

A. I do not. I have already testified as to the source of my information as to the amount of water that came down the Sioux Valley in flood times.

345 Cross-Examination.

By Mr. Bailey for the Omaha Railway Company:

Two Omaha bridges can be abandoned. I believe they are called Bridge P 129 and P 130, West of town and east of the river.

The defendants rest.

Endorsed: Filed in the District Court on Jan. 25, 1923 at 2 P. M.

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346 (Approval of statement of evidence by District Judge.)

The above named appellants having presented and filed in this Court their statement of the evidence in the above entitled cause, and the above named respondents having filed their objections thereto and asking that part of said statement be stricken and said respondents' statement of said evidence be substituted in lieu thereof, and the appellants having filed their objections to said substituted statement of said respondents, and said differences having been submitted to the above named court, and said statement having been made up and completed in conformity with the directions of said
347 Court,

Now Therefore, It Is Ordered that said statement so made in conformity with the order of this Court and hereto attached be and the same is hereby approved as a true and complete statement of the evidence in this cause.

By the Court:

JAS. D. ELLIOTT, Judge.

Attest:

(Seal of Court) Jerry Carleton, Clerk.

Endorsed: Filed in the District Court on Jan. 25, 1923, at 2. P. M.

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348 (Clerk's Certificate to Transcript.)

United States of America,
Southern Division,
District of South Dakota—ss.

I, Jerry Carleton, Clerk of the District Court of the United States of America, in and for the District of South Dakota, do

hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Eighth Circuit, that the foregoing, consisting of 347 pages, numbered consecutively from 1 to 347, inclusive, is a true and complete transcript of all of the record, process, pleadings, orders and final decree as enumerated in the Praecipe of the parties appellant and the Praecipe of the party appellee to this cause filed herein, directing the Clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original Citation, together with the affidavit of service thereof, and in addition thereto a copy of said Praecipes and all written opinions of the Court filed in said cause.

Seal
U. S. Dist. Court,
Dist. of South Dakota.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, in the said District, this 15th day of March, A. D. 1923.

JERRY CARLETON, Clerk.

Filed Mar. 20, 1923. E. E. Koch, Clerk.

234 And thereafter the following poceedings were had in said cause in the Circuit Court of Appeals, viz:

United States Circuit Court of Appeals, Eighth Circuit.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6314. vs.
Chicago, St. Paul, Minneapolis and Omaha Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

(Excerpt from Brief for Appellee filed on December 7, 1923, as called for in the Praecipe of Appellants.)

It is alleged by the defendants and Appellants in their answer, and Appellee admits it to be a fact, that Drainage Ditch No. 1 and 2 was a new and independent proposition and not a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and cannot be considered as a proposition for the repair of the original ditches. It is a project which must stand or fall upon its own footing.

(Order of Submission.)

Memorandum of Clerk:

On the 17th day of December, 1923, this cause, together with causes Nos. 6312, 6313, 6315, 6316 and 6317, was submitted to the United States Circuit Court of Appeals for the Eighth Circuit and a full copy of the order of submission having been included in the transcript taken for the Supreme
235 Court of the United States on appeal and an application for writ of certiorari in cause No. 6312, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee, the same is omitted from the transcript in this cause, No. 6314.

(Opinion.)

Memorandum of Clerk:

On the 18th day of March, 1924, an opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in causes Nos. 6312 to 6317, inclusive, and a full copy

of the opinion having been included in the transcript taken for the Supreme Court of the United States on appeal and an application for writ of certiorari in cause No. 6312, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee, the same is omitted from the transcript in this cause, No. 6314.

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236 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1923.

Tuesday, March 18, 1924.

A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., intervening defendants, Appellants,

No. 6314. vs.

Chicago, St. Paul, Minneapolis and Omaha Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby affirmed with costs; and that the Chicago, St. Paul, Minneapolis and Omaha Railway Company have and recover against A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota et al., intervening defendants, the sum of Twenty Dollars for its costs herein and have execution therefor.

March 18, 1924.

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237 (Petition for Appeal to Supreme Court, U. S., Assignment of Errors and Allowance of Appeal.)

(Petition for Appeal and Allowance thereof.)

To the Honorable Presiding Justice, or any of the Judges of the Circuit Court of Appeals of the United States, for the Eighth Circuit:

Now comes the above named appellants, by their solicitors, and complain that in the record and proceedings, and also in the rendition of the Decree of the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Louis, in the State of Missouri, in the above styled and numbered cause, on the 18th day of March, A. D., 1924, affirming the Decree of the United States District Court, for the District of South Dakota, Southern Division, in said cause, manifest error has intervened, to the great damage of the petitioners. In substance, said errors are these:

1. Appellee was given said relief by collateral attack, by means of a Bill of Equity, when it had an adequate remedy at law which it could pursue, at its election, either in the Courts of the State of South Dakota, or in the Federal Court.

2. It was given the relief aforesaid, despite the fact that the record shows without dispute that the appellants, the Board of County Commissioners, in establishing the said new project, and in attempting to obtain said contribution from appellee, acted strictly in accord with the statutes of the State of South Dakota governing the establishment of such new project.

3. Appellee got said relief, though, in addition to the fact that the said Board had in fact thus complied with said statutes of the State of South Dakota, it was the settled law of said State at the time the Circuit Court of Appeals
238 acted as aforesaid, that the doings of said Board with reference to the aforesaid project were in compliance with the statutes of South Dakota, as construed by the highest court of that State. It was further settled at said time by the highest court of the State of South Dakota, that the very project at bar was the formation of a new drainage district, or ditch. And the Circuit Court of Appeals erred in disregarding the interpretation of the applicable statutes of the State of South Dakota as formulated by the highest court of that State, and substituting its own interpretation for that of said highest court of that State.

4. The Circuit Court of Appeals erred in granting the relief which it did grant and affirm, because neither the pleadings nor the evidence warranted such relief, or any relief, and because its finding that appellee was entitled to the relief which it obtained, is contrary to the pleadings and to the evidence, and contrary to and unwarranted by the law.

5. Said Circuit Court of Appeals erred also for the reasons set out in the assignments of error filed herewith.

The appellee invoked the jurisdiction of said United States District Court, as set out in its bill of complaint, on the ground that it, the appellee, was a citizen of the State of Wisconsin; that the appellants were citizens of the State of South Dakota, and that more than $3,000.00, besides costs, was actually in controversy. It did not invoke the jurisdiction solely on the aforesaid grounds, but, in addition, asserted in its bill of complaint that appellants were not proceeding in accordanc with the requirements of the applicable statutes of the State of South Dakota; that if it were assumed they were acting in compliance with said statutes, such statutes themselves were unconstitutional and void, and violative of the Constitution of the United States, and amendments thereto, and that the action of appellants was depriv-
239 ing appellee of its property without due process of law, in violation of said Constitution and amendments thereto.

Therefore, your appellants and petitioners say that this cause and matter is not one in which the decision of the said Circuit Court of Appeals of the United States is made final, and say further that the controversy between appellants and appellee involves an actual controversy over more than One Thousand Dollars, besides costs.

Wherfore, petitioners pray for an allowance of the appeal, to the end that the cause may be carried to the Supreme Court of the United States, and petitioners pray for a supersedeas of said judgment, and such other process as is required to perfect the appeal prayed for, to the end that the errors therein may be corrected.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Solicitors for Appellants.

Appeal and supersedeas allowed, and bond fixed at the sum of One Thousand and no/100 Dollars ($1000.00), conditioned as the law provides, this 31st day of May, A. D., 1924.

WM. S. KENYON,
Judge of the Circuit Court of Appeals of the United States for the Eighth Circuit.

Assignments of Error.

Now on this 31 day of May, 1924, comes A. G. Risty et al. as County Commissioners, etc. et al., Appellants, by their solicitors, Benj. I. Salinger, Elbert O. Jones and Norman B. Bartlett and in connection with their petition for appeal to the Supreme Court of the United States say that in the findings, judgment and decree entered in the above cause on the 18th day of March, 1924, manifest error has intervened,
240 to the injury, wrong and prejudice of this appellant, and the same is erroneous and unjust to appellant;

1. Because the Circuit Court of Appeals failed to follow the construction of the South Dakota Constitution and statutes as pronounced by the highest court of the state and did its own construing of said state law and based its affirmance of the decree of the District Court on a construction on its own part, which is in conflict with the construction of the highest court of the state.

2. Because it was based on the reasoning that appellant Board had no authority to make an assessment except in aid of a drainage project to drain agricultural lands and that said Board had no authority in law to establish a drain except for the drainage of agricultural lands.

This is erroneous and the interpretation of the Constitution and statutes by the Circuit Court of Appeals is erroneous because it is and for a long time has been the settled law of South Dakota as declared by the highest court of the state in construing its said Constitution and statutes that a Board such as appellant Board is, is by such Constitution and statutes authorized to establish and construct a drain for a public purpose and that such public purpose included but was not limited to the drainage of agricultural lands, and that such authority existed as to such drainage as the very one at bar is, and it is undisputed in the evidence that one object of this project was to drain agricultural lands.

3. Because it is not only a fact that the highest court of the state has ruled in construing the Constitution and statutes of the state of South Dakota that the drainage ditch at bar was lawfully established and that the acts of appellant Board were lawful, but the record shows both facts without dispute; and the Circuit Court of Appeals' affirmance is despite such ruling and despite said state of the evidence.

241 4. Because the affirmance was based on an interpretation of the statutes of South Dakota by the Circuit Court of Appeals that such statutes did not permit or authorize appellant Board of County Commissioners to establish and construct a new drainage ditch over the line of two older ditches, which new project contained a materially larger area than the combined areas of such old ditches and called for cleaning out, widening, deepening and diking of the older ditches to double their former capacity—the construction of river cut-offs to accelerate the flow of water therein, and the installation of a new and larger spillway, all at a cost of more than double the cost of the original ditches; which interpretation was contrary to the interpretation given to such statutes by the highest court of the state of South Dakota in this very drainage project.

5. Because the statutes of South Dakota, as interpreted by the highest court of the state, permit and authorize the appellant Board to establish over the line of one or more old drainage ditches a new drainage project containing a materially larger drainage area than the combined area of such old ditches—with additional river cut-offs—new and larger spillway, and a cleaning out and deepening, widening and diking of the old ditches to double their former capacity, at an expense of more than double the cost of the original ditches; and the undisputed evidence in this case shows the proceedings of the appellant Board sufficient under such statutes to establish and construct such new drainage project and make an apportionment of benefits for the payment of the cost thereof, and did not warrant the finding and conclusion of said Circuit Court of Appeals that said proceedings were in fact for repair and maintenance only.

6. Because it is based on the holding and reasoning that appellant Board had acted without authority from and had not complied with the provisions of the statutes of South Dakota regulating the maintenance and repair of ditches already established. The appellees, City of Sioux Falls,
242 C. Milwaukee & St. P. Ry. Co., and the C. St. P. Minneapolis and Omaha Ry. Co., conceded that the pro-

ject at bar was the creation of a new ditch and a new project. That fact is established by the undisputed evidence as against all of the appellees. It is undisputed in the evidence that there was a full compliance with every statute dealing with the establishment of a new ditch. Therefore, the affirmance was given because there had been a failure to comply with statutes that had nothing whatever to do with the establishment of a new ditch or assessing for the cost of its construction. The court disregarded that the relevant statutes had been complied with and based its action wholly on the fact that statutes that had no application had not been complied with.

7. Because the appellant Board to whom had been delegated by the statutes of South Dakota the authority to determine the purpose and character of this drainage project had, after notice and hearing, determined that this drainage project, among other things, was for the benefit of the public health, welfare and convenience and was necessary and practicable for draining agricultural lands, from which determination no appeal was ever taken; and the highest court of the state of South Dakota has held in interpreting such statute that such determination is final, no appeal from the same ever having been taken.

8. Because the notice dated September 15, 1916 and the hearing held pursuant thereto on October 2, 1916 was a notice to and an opportunity to be heard by appellee on the formation of this new drainage project with an enlarged area subject to benefits and that appellee's property was included therein, and gave to it its day in court and its opportunity to contest the establishment of said drainage project, the legality thereof, the necessity therefor, the character and purpose thereof, and it having waived the same and defaulted therein and not having appealed from said determination, is bound thereby.

9. Because what was in effect done was to restrain legislative action on the part of the appellant Board acting
243 in a legislative capacity under delegation from the legislature of the state. The legislature itself could have by enactment of a statute done everything the Board did or was proposing to do, and it should be conceded that the legislature could not have been enjoined from enacting such a statute. The only difference is, that the Board was bound to give certain notices and hearings before any assessment could become a lien, and the Board did what it was bound to do.

10. Because appellee admitted in court and in its brief and argument that this "Drainage Ditch No. 1 and 2" was a new and independent project and not a continuation of or a proposition for the repair of old Drainage Ditch No. 1 and old Drainage Ditch No. 2, and the highest court of the state, in interpreting the statute of said state, has determnied that such statutes gave authority to the appellant Board to construct this very ditch and authority to construct a ditch for a public use or purpose and that corporate drainage districts therefor were not necessary.

11. Because the proceedings at bar were proceedings in rem, for the purposes of taxation, and dealing in this matter or any review of the same involves property rules, over which the courts of the state are the final authority, and both resident and non-resident property owners must, at least in the first instance, resort to and exhaust the remedies provided by the statute in the state tribunals for reviewing such controversies before they may enter either the state or the federal courts at all.

12. Because although where a resident of a state may enter the courts of a state, one who has diversity and a controversy involving more than $3,000.00 need not submit himself to those state courts but may at his election enter the federal courts, yet in a proceeding in rem like a drainage project the resident of the state must first submit to administrative review and may not enter the courts of
244 his state without first exhausting such administrative review, and the non-resident cannot disregard such administrative review and have his proceedings in rem reviewed in the first instance in the federal courts. The non-resident can enter the federal court only when the resident of the state can enter the state court.

13. Because the injunction was granted on the reasoning that one should not be compelled to appear at the hearing to equalize apportionments for the reason that it would be had before said Board and said Board had no authority whatever to act—that one should not be compelled to submit to a hearing before a mere trespasser. This disregards, first, that the mere assertion that the Board was without authority did not justify the failure to appear at said hearing, and, second, it disregards the decisions of the highest court of the state that the Board was acting on full authority, and, third, it appears by the undisputed evidence that they had full authority.

14. Because the hearing enjoined was one to be had for the purpose of equalizing a tentative estimate only which had been made by the appellant Board. This estimate was not final and additional acts by the Board were necessary after such hearing was held before any tax, assessment or servitude could become operative. Manifestly the holding of such hearing could not give rise to a multiplicity of suits as against this appellee, no matter how many suits might arise as to other parties. Manifestly the proposal to hold such hearing cast no cloud on title, because other acts by the Board were necessary before any amount that was finally fixed could become a tax, assessment or servitude upon its property, and there was no evidence at all that there would result irreparable injury to appellee. This is especially applicable to the appellee City of Sioux Falls and to the four railway company appellees, because even if an assessment had been made and a tax levied, it would have created no lien upon their property.

245 15. Because appellee made no case under any acknowledged head of equity jurisdiction and in the essence, based its claim for relief upon the assertion that it was threatened with exaction of an illegal tax. At any rate there could be no right to have equitable relief until such time, if ever, as the threatened tax was about to be collected by taking from appellee the title to the lands affected by the assessment. Up to that time nothing could happen more than to exact a sum of money for taxes which were illegal taxes, and for that wrong or threatened wrong the law provides an adequate remedy either in the state or federal courts.

16. Because if, as is [contentended] by the Circuit Court of Appeals, the appellants acted utterly without authority of law and were therefore naked trespassers, that fact gave appellee an adequate remedy at law in either the federal or state courts at their election, to-wit, to sue in trespass—hence appellee's bill in chancery should not have been entertained. If, on the other hand, the acts of the appellants were in all respects lawful, the appellee was not entitled to any remedy either at law or in equity.

17. Because, assuming that appellee could enter the federal court at all, it had at all times a plain, adequate and complete remedy at law in the premises in said courts by appealing from the establishment of the ditch to the circuit court of the state and thence removing the entire controversy involved, including the making of assesments, to the law side of the federal courts, where a trial de novo could be had. In-

stead appellee lodged a bill of complaint seeking an injunction.

And while it may be true appellee has waived its right to this appeal from the establishment of the ditch, that does not alter the fact that it had no right to enter a court of equity on the ground that though it had at one time the right to thus appeal to and have review in the federal court and a trial de novo there on the law side, by its default and waiver
246 it had voluntarily lost that right.

The right to enter chancery cannot be created by waiving or failing to exercise an adequate remedy at law.

Pasing that, the appellee had the right to appeal from the action of the appellant Board as to apportionment of benefits directly to the circuit court of the state and thereupon to remove this very controversy for review on the law side of the federal District Court and there have a trial de novo.

18. Because, assuming for the sake of argument that the District Court and the Circuit Court of Appeals had authority to pass upon the merits, both of them erred in finding for the appellee in that there is absolutely no evidence to support the contention of the appellee on the merits; that is to say, there is no evidence whatever that the appellant Board ever did anything whatsoever in the premises other than what it was authorized to do by the Constitution and statutes of the state of South Dakota. And in addition to this being the state of the evidence, the highest court of the state, construing said Constitution and statutes of the state, has ruled in a way that is binding upon said federal courts that in truth and in fact appellants acted on full authority and in every way in compliance with the requirements of said Constitution and statutes of the state of South Dakota.

19. Because appellee was not entitled to any relief for the reason that it was given legal notice by the notice dated September 15, 1916 of the proposed formation of this new drainage project containing an enlarged benefited area area with its property included therein, and that the same was about to be established and that appellee could at a hearing to be held on October 2, 1916, resist such new project, and appellee waived such hearing with full knowledge that it was
247 bound by all subsequent action of the appellant Board which necessarily followed in the premises; and in addition thereto appellee stood by and without any objection on its part to said proceedings, saw the expenditure of over a quarter million dollars, for the payment of which appellee

is charged with knowledge that the same must be made out of the property benefited, included in which class is appellee's, and in addition thereto, appellee actively aided and abetted said work as the same progressed and made no protest, and it is now estopped from questioning the legality of said proceedings.

Wherefore Appellants pray that the said findings, judgment and decree of the said Circuit Court of Appeals be reversed and that such further orders and proceedings be had as law and justice may require and that this case may be remanded and such relief given to appellants as may be their due.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 31, 1924.

(Bond on Appeal to Supreme Court, U. S.)

Know All Men By These Presents:

That we, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, as principals, and the Southern Surety Company, of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the Chicago, St. Paul, Minneapolis and Omaha Railway Company, (a corporation) Appellee, in the above cause, in the sum of One Thousand
248 Dollars ($1,000.00);

Conditioned that, whereas, on the 18th day of March, A. D., 1924, in the Circuit Court of Appeals of the United States, for the Eighth Judicial Circuit, in a suit pending in that Court upon appeal, wherein the Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation, was plaintiff and appellee, and A. G. Risty, et al., as County Commissioners, etc., et al., were defendants and appellants, numbered on the Docket as No. 6314, a Decree was rendered against the said A. G. Risty, et al., as County Commissioners, etc., et al., appellants, and the said A. G. Risty, et al., as County Commissioners, etc., et al., having obtained an appeal to the Supreme Court of the United States, and filed a copy thereof in the office of the Clerk of this Court, to reverse the said Decree, and a citation directed to the said appellee, citing and admonishing it to be and appear at a session

of the United States Supreme Court, to be held in the City of Washington, D. C.;

Now, if the said A. G. Risty, et al., as County Commissioners, etc., et al., shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

A. G. RISTY,
Signing for All the Appellants,
Principals.

(Seal) SOUTHERN SURETY COMPANY
OF DES MOINES, IA.,
By H. B. Charnock,
Attorney-in-Fact
Surety.

249 The foregoing bond is hereby approved.

May 31, 1924.

WM. S. KENYON,
Judge of the United States Circuit Court of Appeals, for the Eighth Circuit.

* * * * * * * *

(Certified copy of Power of Attorney issued to Mr. H. B. Charnock by the Southern Surety Company of Des Moines, Iowa, etc., attached to original Bond.)

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 31, 1924.

Citation

250 United States Circuit Court of Appeals Eighth Circuit

A. G. Risty et al, as County Commissioners, et al.,
Appellants,
No. 6314. vs.
Chicago, St. Paul, Minneapolis & Omaha Railway Company,
Appellee.

United States of America to Chicago, St. Paul, Minneapolis & Omaha Railway Company—Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Di-

vision, District if South Dakota, wherein the Chicago, St. Paul, Minneapolis & Omaha Railway Company is complainant and A. G. Risty et al. as County Commissioners et al. are defendants, and in which case the said defendants perfected an appeal to the Circuit Court of Appeals, Eighth Circuit, an appeal has been allowed to the said A. G. Risty et al. to the United States Supreme Court. You are hereby cited and admonished to be and appear in said court at Washington, D. C. sixty days after the date of the citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable William S. Kenyon, Judge of the United States Circuit Court of Appeals, Eighth Circuit, this 31st day of May, A. D. 1924.

WM. S. KENYON,
Judge of the United States Circuit Court of Appeals, Eighth Circuit.

Service of the within Citation this 2nd day of June, A. D., 1924, at Sioux Falls, South Dakota, is hereby acknowledged.

C. O. BAILEY and R. L. KENNEDY,
Counsel for Appellee.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No. 6314. A. G. Risty, et al., as County Commissioners, et al., Appellants, vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company. Citation on Appeal to Supreme Court, U. S., and acknowledgment of service. Filed Jun. 5, 1924, E. E. Koch, Clerk.

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251 (Praecipe for Transcript on Appeal to Supreme Court, U. S.)

The Clerk of the above named Court is hereby directed to prepare and certify a transcript of record in the above entitled case for the use of the Supreme Court of the United States by including therein the following:

1. The printed transcript of record filed in your court.

2. Appropriate reference to the hearing held at St. Louis in the Circuit Court of Appeals.

3. The opinion of the Circuit Court of Appeals in this cause except the title thereof.

4. The decree of the Circuit Court of Appeals, except the title thereof.

5. Petition for appeal and order allowing the same, except the title thereof.

6. Assignments of error.

7. The bond on appeal and approval, except the title, and the powers of attorney, verification and authentication which may be shown by sufficient memoranda.

8. That portion of appellee's brief and argument appearing on page 28 thereof which reads as follows: "It is alleged by the defendants and appellants in their answer, and appellee admits it to be a fact, that Drainage Ditch No. 1 and 2 was a new and independent proposition and not a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2 and cannot be considered as a proposition for the repair of the original ditches. It is a project which must stand or fall upon its own footing."

9. Citation in appeal and admission of service thereof.

10. Memoranda as to the praecipe filed.

252 11. Clerk's certificate.

Dated at Sioux Falls, South Dakota, this 3 day of June, 1924.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jun. 5, 1924.

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253 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of South Da-

kota, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, except the order of submission and opinion, had and filed in the United States Circuit Court of Appeals, omitting, however, the full captions, titles and endorsements in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the Praecipe of counsel for appellants, in a certain cause in said Circuit Court of Appeals wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Chicago, St. Paul, Minneapolis and Omaha Railway Company was Appellee, No. 6314, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this ninth day of June, A. D. 1924.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 30,418. U. S. Circuit Court Appeals, 8th Circuit. Term No. 453. A. G. Risty, et al., as county commissioners et al., appellants, vs. Chicago, Saint Paul, Minneapolis and Omaha Railway Company. Filed June 16th, 1924. File No. 30,418.

(30,419)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 454

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS, ET AL., APPELLANTS,

vs.

NORTHERN STATES POWER COMPANY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1923, of said Court, before the Honorable William S. Kenyon, Circuit Judge, and the Honorable Jacob Trieber and the Honorable David P. Dyer, District Judges.

Attest:

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twentieth day of March, A. D. 1923, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of South Dakota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Northern States Power Company was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (Affidavit of Service of Citation.)

In the District Court of the United States for the District of South Dakota, Southern Division.

Northern States Power Company, Plaintiff,
vs.
A. G. Risty, et al., Defendants,
and
Minnehaha National Bank et al, Intervening Defendants.

District Court of the United States
District of South Dakota—ss.

W. C. Welsh, being first duly sworn on oath, deposes and says: That he is a citizen and elector of the State of South Dakota. That he served the hereto attached citation in the above entitled cause upon the above named plaintiff on the 8th day of December, 1922, in the city of Sioux Falls, South Dakota, by then and there handing to and leaving with Harry Judge, its solicitor, a true copy of said citation.

W. C. WELSH.

Subscribed and sworn to before me this 8 day of December, 1922.

(Notarial Seal) DOUGLAS S. ELLIOTT,
Notary Public, South Dakota.

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2 Citation.

In the District Court of the United States, for the District of South Dakota, Southern Division.

Northern States Power Company, Plaintiff,
No. 101. vs. In Equity.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J.

O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial & Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter, Intervening Defendants.

United States of America to the above named Plaintiff, Northern States Power Company—Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Northern States Power Company is complainant and A. G. Risty et al., as County Commissioners of Minnehaha County, South
3 Dakota, are defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., are intervening defendants an appeal has been allowed the above named defendants and intervening defendants therein to the Circuit Court of Appeals, Eighth Judicial Circuit. You are hereby cited and admonished to be and appear at said Court at the City of St. Paul in the State of Minnesota sixty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable James D. Elliott, Judge of the United States District Court for the Southern Division, District of South Dakota, this 25 day of November, 1922.

JAS. D. ELLIOTT, Judge.

Service of the foregoing Citation, by receipt of copy, at Sioux Falls, South Dakota, is hereby admitted this ..... day of ....., A. D., 1922.

. . . . . .

Solicitor for Northern States Power Company, Plaintiff.

Endorsed: Filed in the District Court on Dec. 12, 1922 at 2 P. M.

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5 In the District Court of the United States of America, in and for the District of South Dakota, Southern Division.

Northern States Power Company, Plaintiff,
No. 101 S. Div. vs. In Equity.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris, Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants.

Be It Remembered, that on the 25th day of July, A. D. 1921, there was filed in the above entitled court, on behalf of the plaintiff, a Bill in Equity; which said Bill in Equity, excluding the verification and Exhibit A, is in words and figures the following, to-wit:

6 (Bill of Complaint.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Northern States Power Company, Plaintiff,
vs.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock as County Commissioners of Minnehaha County, South Dakota; Fred E. Ward as Auditor of Minnehaha County, South Dakota; and J. O. Anderson as Treasurer of Minnehaha County, South Dakota, Defendants.

The plaintiff, a corporation of the state of Minnesota and a resident and citizen of said state of Minnesota, brings this its bill of complaint against A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota,

Fred E. Ward, as auditor of Minnehaha County, and J. O. Anderson, as treasurer of Minnehaha County, South Dakota, residents and citizens of the state of South Dakota and of the southern division of the district of South Dakota, and respectfully shows unto the court:

I.

That the plaintiff is and was during all of the times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the state of Minnesota, having its principal place of business in the city of Minneapolis, in said state, and a resident and citizen of the said state of Minnesota within the meaning and intent of the laws conferring jurisdiction upon the district courts of the United States.

II.

7 That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, Fred E. Ward, and J. O. Anderson, are each of them residents and citizens of the state of South Dakota and of the southern division of the district of South Dakota within the meaning and intent of the laws conferring jurisdiction upon the district courts of the United States.

III.

That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, and C. T. Charnock are the duly elected, qualified and acting county commissioners of the county of Minnehaha, in the State of South Dakota and constitute the board of county commissioners of said county of Minnehaha; that the defendant, G. W. Tyler, is a duly elected and qualified commissioner of said county of Minnehaha, and claims to be the legal commissioner of said county in place of said Chris Olson; that the defendant, Fred E. Ward, is the duly elected, qualified and acting auditor of the said County of Minnehaha, and that the defendant, J. O. Anderson, is the duly elected, qualified and acting treasurer of the said county of Minnehaha.

IV.

That the Legislature of the State of South Dakota at the ninth session thereof enacted a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Con-

venience or Welfare", which purported act was approved by the Governor of the State of South Dakota on March 7, 1905, and which purported act is commonly known as Chapter 98 of the Session Laws of South Dakota of 1905; that
8 subsequently and at its tenth session the Legislature of the State of South Dakota re-enacted said Chapter 98 of the Session Laws of 1905 by enacting a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Convenience or Welfare or Whenever it Shall be Necessary or Practicable for Drainage of Agricultural Lands", which purported law was approved by the Governor of the State of South Dakota February 21, 1907, and which purported law is commonly known as Chapter 134 of the Session Laws of South Dakota of 1907; that by said Chapter 134 of the Session Laws of 1907 the Legislature of the State of South Dakota attempted to re-enact said purported law known as Chapter 98 of the Session Laws of 1905, together with amendments thereto; that subsequently the Legislature of the State of South Dakota at the Sixteenth Session thereof re-enacted said Chapter 134 of the Session Laws of 1907 with amendments thereto and that such re-enactment is contained in the South Dakota Revised Code 1919, as Sections 8458 to 8491 inclusive thereof; that at the second special session of the Legislature of the State of South Dakota, held in the year 1920, the Legislature of said state enacted a purported law entitled: "An Act, to Amend Sections 8464, 8471, 8472 and 8473 of the South Dakota Revised Code of 1919, Relating to Drainage and Declaring an Emergency", said purported law being Chapter 46 of the Laws of the Second Special Session of the Legislature of the State of South Dakota; that a copy of the purported law of the State of South Dakota known as Chapter 98 of the Session Laws of 1905 as amended and re-enacted as Chapter 134 of the Session Laws of 1907, and as amended and re-enacted as Sections 8458 to 8491 of the South Dakota Revised Code, 1919, and amended at
9 the second special session of 1920 is hereto attached, marked "Exhibit A", and made a part hereof.

V.

That prior to the year 1916 the Board of County Commissioners of the said County of Minnehaha established within said County a drainage ditch known as "Drainage Ditches No. 1 and No. 2", which drainage ditches were designed for the purpose of draining upwards of twenty thousand acres

of agricultural land situated in Townships 101, 102, 103 and 104 North, of Range 49, West of the Fifth Principal Meridian, in the said County of Minnehaha; that said drainage ditches were established pursuant to and under the provisions of said purported Law known as Chapter 134 of the Session Laws of South Dakota of 1907, and extended for a distance of several miles through said townships, and were fully completed prior to the year 1916; that an assessment for the cost of the construction of said drainage ditches No. 1 and No. 2 was made prior to the year 1916; that prior to said assessment the said board of county commissioners equalized the benefits to the lands so assessed and by such equalization of benefits established the area of the drainage district and determined the various properties benefitted by said drainage ditches No. 1 and No. 2; and that all matters connected with the assessment of the costs thereof were fully completed prior to the year 1916.

That none of the property of plaintiff described in the purported drainage ditch notice hereinafter referred to, of which "Exhibit C" is a copy, and none of its property or rights whatsoever was included in the property assessed as aforesaid for the construction of said drainage ditches No. 1 and No. 2; that in the equalization of benefits made by said Board of County Commissioners of the said County of Minnehaha prior to the making of said assessment no part of said property and none of plaintiff's property or rights whatsoever was included or found to be benefitted; that no property or rights whatsoever of the plaintiff are within the drainage district of said drainage ditches No. 1 and No. 2, and that the said defendants, the county commissioners of the said County of Minnehaha, have no power or jurisdiction to include within said drainage district any property or rights whatsoever of plaintiff or to find and determine that any such property or rights have been benefitted by the construction and maintenance of said drainage ditches No. 1 and No. 2, or to assess said property or rights for any sum or sums whatsoever.

VI.

That the land drained by said drainage ditches No. 1 and No. 2 is situated in the valley of the Big Sioux River north of the city limits of the city of Sioux Falls, which city is a municipality of upwards of twenty-five thousand inhabitants; that the Big Sioux River flows in a southerly direction through said townships 101, 102 and 103 north of said Range 49, West of the Fifth Principal Meridian, and that the City

of Sioux Falls is situated in said Township 101; that after entering said township 101 at the northern boundary line thereof the said Big Sioux River flows in a southerly direction to the vicinity of the southern boundary line of said township and then flows in an easterly direction for a distance of some miles and then in a northerly direction
11 through the said City of Sioux Falls and towards the north line of said township and then continues in an easterly direction until it passes out of said township over the eastern line thereof; that in its course in a northerly direction through the City of Sioux Falls the said Big Sioux River passes over a series of falls aggregating approximately ninety feet; that the city water supply of the said City of Sioux Falls is situated in a graveled bed extending over a considerable area in said townships 101 and 102 north of the city of Sioux Falls; that the South Dakota State Penitentiary is situated north of the said City of Sioux Falls, and that said penitentiary and the lands belonging thereto are situated in said townships 101 and 102.

VII.

That the Big Sioux River has its source in Lake Pelican adjoining the City of Watertown in the County of Codington and State of South Dakota, which City of Watertown is situated approximately one hundred miles north of the City of Sioux Falls; that from the said City of Watertown the said Big Sioux River flows in a generally southerly direction but with many crooks and bends through the counties of Codington, Hamlin, Brookings and Moody to the City of Sioux Falls, in the County of Minnehaha, and that the said Big Sioux River during its southward course drains a large area of territory both eastward and westward of its channel.

VIII.

That none of the property of plaintiff described in said purported drainage notice, of which "Exhibit C" is a copy, is agricultural land; that said property is and prior to the construction of said drainage ditches No. 1 and No. 2 was platted property located within the limits of the city of Sioux Falls, in said county of Minnehaha, and was then and ever since has been entirely used for other than agricultural purposes; that upon a portion of said property there is constructed, owned, and operated by plaintiff an electric light and power plant operated partially by water and partially by steam power; that plaintiff is the owner of a valuable water power and rights in and upon the said Big Sioux River, all of which were

acquired by it prior to the construction aforesaid of said drainage ditches No. 1 and No. 2, that plaintiff's said property and rights are not subject to overflow or in danger
12 of [damager] by overflow and are not benefitted by said drainage ditches No. 1 and No. 2, but on the contrary are damaged thereby, in that by virtue of the maintenance and operation of said ditches a portion of the normal flow of the Big Sioux River is at times diverted from the channel of said river and plaintiff is thereby deprived of its right to the use thereof, and that plaintiff has continually and repeatedly objected and protested against the maintenance and operation of said drainage ditches No. 1 and No. 2 in such manner as to divert or threaten to divert from the channel of the Big Sioux River any part of the normal flow of the waters of said River.

IX.

That as originally constructed said drainage ditches No. 1 and No. 2 emptied into the Big Sioux River through a ditch constructed across the land immediately north of the City of Sioux Falls, which ditch was between the City of Sioux Falls and the graveled bed from which said city obtained its water supply, and emptied into the Big Sioux River in the Northeast portion of the City of Sioux Falls and north of the series of falls situated upon said river along its course through the said City of Sioux Falls; that subsequent to the construction of said drainage ditches No. 1 and No. 2 and about the years 1915 and 1916, the volume of water passing through said drainage ditches caused the outlet of said drainage ditches into the Big Sioux River to wash out a channel upon the land through which said outlet was constructed to such an extent that there arose imminent danger that the course of the Big Sioux River would be changed so that all
13 of the water in the channel of said river would be diverted through said drainage ditches and the outlet thereof, and a new river channel formed by said ditches which would cause the water in said river to cease flowing through its proper and natural channels and over the series of falls in the City of Sioux Falls, and to flow instead through said drainage ditches and the outlet thereof into the Big Sioux River at a point north of the City of Sioux Falls; that such diversion of the channel of the said Big Sioux River threatened to cause enormous damage to property in the said City of Sioux Falls situated along the channel of said river, and to destroy plaintiff's said water power obtained from said river at the falls thereof, and also to destroy the munici-

pal water supply of the said City of Sioux Falls by draining the water from the gravel bed from which said municipal water supply is obtained.

X.

That the Board of County Commissioners of the said County of Minnehaha, for the purpose of repairing and maintaining said drainage ditches No. 1 and No. 2 in such manner as to avoid the threatened change in the channel of the Big Sioux River and to prevent the drainage of the gravel bed from which the City of Sioux Falls obtains its municipal water supply, and to prevent the injury to the property owners of the City of Sioux Falls and the destruction of the water power at the falls of the Big Sioux River in the City of Sioux Falls, which would be caused by the threatened change in the channel, of the Big Sioux River, caused to be constructed in the summer of the year 1916 various dams and gateways at various places along said drainage ditches No. 1 and No. 2, made changes in the
channel of the Big Sioux River along the course of said
14 drainage ditches and caused to be re-constructed the
spillway at the outlet of said drainage ditches into the Big Sioux River; that said construction work was done for the purpose of draining lands in addition to the lands theretofore found to be benefitted by and assessed for the cost of the installation and construction of said drainage ditches No. 1 and 2, but for the sole and only purpose of maintaining said drainage ditches No. 1 and No. 2 in such manner as to permit them to attempt to perform the function for which they were originally constructed without danger of damage to the property and rights theretofore threatened as hereinbefore pleaded.

XI.

That there has been expended by the Board of County Commissioners of said Minnehaha County upon the construction of ditches, dams, gate-ways and other work as aforesaid, and upon the reconstruction of said spillway upon the outlet of said Drainage Ditches No. 1 and No. 2 a sum in excess of Two Hundred Fifty-five Thousand ($255,000.00) for which said sum the said Board of County Commissioners has issued drainage warrants, and that there is due for principal and interest upon said warrants a sum, as plaintiff is informed and believes, in excess of three hundred thousand dollars ($300,000.00).

XII.

That before the construction of said spillway, dams, retaining gates, and other work, and straightening of the channel of the Big Sioux River, no petition therefor signed by one or more owners of land likely to be affected was ever made or presented to the Board of County Commissioners of the said County of Minnehaha, excepting that on or about the 3rd day of August, 1916, there was filed in the office of the County Auditor of the said County of Minnehaha a purported petition signed by F. L. Blackman and other persons, which said petition purported to be a petition "to reconstruct and improve Drainage Ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway and outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by assessment upon the property, persons and corporations benefitted thereby"; that drainage ditch No. 1 and 2 referred to in said purported drainage notice, of which "Exhibit C" is a copy, is a combination of and is the same as drainage Ditches No. 1 and No. 2 hereinbefore referred to; that the owners of some of the property included within the drainage area of drainage ditches No. 1 and No. 2 as theretofore established as aforesaid, objected to the repair of said ditches and to the assessment of their property for the cost of said repairs and of the maintenance of said ditches, and that on account of such objections and as a mere subterfuge and for the sole and only purpose of attempting to lay a foundation authorizing the Board of County Commissioners of said Minnehaha County to [charge] the boundaries of the drainage area or district of said drainage ditches No. 1 and No. 2, and to assess property not included within the area of said drainage ditches and not benefitted by said ditches No. 1 and No. 2, for the cost of the necessary repairs and maintenance of said ditches theretofore established, constructed and accepted, the then Board of County Commissioners of said County of Minnehaha, caused the said purported petition hereinbefore in this paragraph referred to, to be filed, and that said Board of County Commissioners acquired by the filing of said petition no power or jurisdiction under and by virtue of the drainage laws of the State of South Dakota hereinbefore referred to, to proceed in any manner to include any of the property or rights of plaintiff within the drainage area or district of said Ditches No. 1 and No. 2 or of said Ditch No. 1 and 2 and that said Board and the said defendants now constituting said Board never acquired and have no power or jurisdiction to determine that any of the property or rights of plaintiff are benefitted by said drainage ditch-

es No. 1 and 2, now attempted to be designated drainage ditch No. 1 and 2, or to assess said property or rights, or any portion thereof, for the cost of the necessary repairs and maintenance of said drainage ditches No. 1 and No. 2; that upon the filing of said purported petition the County Commissioners of said County of Minnehaha did not transmit a copy of the same to the State Engineer of the State of South Dakota; that the said Board of County Commissioners of the said County of Minnehaha did not inspect the proposed route of said drainage ditches and did not cause a survey of said drainage ditches to be made by a surveyor; that no survey of the same was ever made under the general supervision of the State Engineer of the State of South Dakota, or otherwise prior to the construction thereof; that no surveyor's report in writing was made to the said Board of County Commissioners; that no surveyor's report, or copy of any map or plan made or filed by said surveyor was furnished to the said State Engineer prior to the beginning of said work; that the said Board of County Commissioners of said Minnehaha County did not file with the said purported petition its determination of its costs, length and width of the drainage improvement furnished in said petition; that the said Board of County Commissioners did not fix a time and place for a hearing of said petition and did not give notice thereof in the manner provided by law; that none of the proceedings of the said Board of County Commissioners in the matter of the said drainage petition has been recorded and indexed in any book kept for that purpose in the office of the Auditor of said County of Minnehaha; that no drainage district for the
17 purpose of the construction of said spillway, dams, retaining gates, ditches and other work has ever been established other than the drainage district established as alleged in paragraph V hereof.

XIII.

That prior to the reconstruction of said spillway, dams, retaining gates, ditches and other work, the said Board of County Commissioners of Minnehaha County did not prepare plans and specifications therefor, and did not file plans or specifications therefor in the office of the County Auditor of the said County of Minnehaha, and did not let contracts upon competitive bids for the construction of said spillway, dams, retaining gates, ditches and other work; that prior to the reconstruction of said spillway the said Board of County Commissioners did advertise for competitive bids for the construc-

tion of the spillway in accordance with certain plans therefor; that bids were received by the said Board of County Commissioners for the construction of a spillway in accordance with such plans, and that the same were rejected by the said Board of County Commissioners, and subsequently the said Board of County Commissioners adopted a new and amended plan for the construction of an entirely different form of spillway, and without advertising for bids for such construction made a contract for the construction of said spillway in accordance with said new and amended plan with the Sioux Falls Construction Company, under which said contract the said Sioux Falls Construction Company constructed such spillway upon the cost plus plan; that under said contract the said Sioux Falls Construction Company was paid the entire cost of the construction of said spillway, together with nine per cent (9%) of the total cost added; that the cost of the construction of said spillway under said cost plus plan was, as plaintiff is informed and believes, upwards of one hundred fifty thousand dollars ($150,000.00) for which said sum drainage ditch warrants upon said drainage ditches No. 1 and No. 2 were issued by the said Board of County Commissioners of Minnehaha County to the said Sioux Falls Construction Company, and to other persons.

XIV.

That on or about the 20th day of November, 1920, the Board of County Commissioners of said Minnehaha County entered into a certain contract with Albert J. Chenoweth and Herman Rettenhouse, co-partners as Chenoweth & Rettenhouse, whereby the said Board of County Commissioners employed the said Chenoweth & Rettenhouse to make a topographical survey showing the lands benefitted and subject to assessment for the payment of the cost of said spillway, dams, retaining gates, ditches and other work, and that by said contract the said Board of County Commissioners agreed to pay the said Chenoweth & Rettenhouse for said survey the sum of Seven thousand five hundred dollars ($7,500.00) to be paid in drainage ditch warrants drawn on drainage ditches No. 1 and No. 2; that the said Chenoweth & Rettenhouse thereupon proceeded to make the purported survey of the lands purported to be subject to assessment for the construction of said spillway, dams, retaining gates, ditches and other work; that the said Chenoweth & Rettenhouse made and filed a report with the said Board of County Commissioners, in which report they made a

purported proposed distribution of benefits; that a copy of said proposed distribution is hereunto annexed, marked "Exhibit B" and made a part hereof.

XV.

That on or about the 10th of June, 1921, the said Board of County Commissioners of the said County of Minnehaha adopted a purported notice of the time and place for equalizing the proportioning of benefits for the construction of said spillway, dams, retaining gates, ditches and other work, and caused the same to be published on July 13th, 1921, and on July 20th, 1921, in the Sioux Falls Daily Argus Leader, the official newspaper of the said County of Minnehaha; that a copy of said drainage notice is hereunto annexed, marked "Exhibit C"; that the proportion of benefits assessed against the plaintiff is 5,369.51 units, out of a proposed total of 32,549.-62 units, and that upon the basis of such apportionment
19 the assessment against plaintiff and its property will be in excess of the sum of fifty-one thousand dollars ($51,000.00); that the said Board of county commissioners of said Minnehaha County are threatening to and will, as plaintiff is informed and believes, unless enjoined by this court, make an apportionment of benefits upon plaintiff of 5,369.51 units, and will make an assessment thereon against plaintiff and its property in the sum in excess of fifty-one thousand dollars ($51,000.00) and that the defendant, Fred E. Ward, as county auditor of the said county of Minnehaha, will spread such assessment upon the books of his office, and that the defendant, J. O. Anderson, as treasurer of the said county of Minnehaha, will proceed to collect the same pursuant to the provisions of said purported statute, "Exhibit A".

XVI.

That this action is a suit of a civil nature to resist and prevent an assessment upon the property of plaintiff under the pretended authority of a purported act of the Legislature of the state of South Dakota claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000.00) and is the amount of said threatened assessment, to-wit: a sum in excess of fifty-one thousand dollars ($51,-000.00).

XVII.

That the costs of the board of county commissioners of said Minnehaha County in constructing said spillway, dams, retaining gates, and ditches, were unauthorized under the constitution and laws of the state of South Dakota, and that the same have been approved by the State Engineer of the state of South Dakota; that no benefits have accrued to plaintiff or its property by the construction of said spillway, dams, retaining gates, and ditches, and by the other work done as aforesaid upon the property in the drainage area of said drainage ditches No. 1 and No. 2, but that the same have been and are a positive damage to the property of plaintiff.

XVIII.

That said purported statute of the state of South Dakota, "Exhibit A" hereto, is unconstitutional and void, in that the same is in violation of Section 2 of Article VI. of the Constitution of the State of South Dakota, and in that the same is in violation of the Fourteenth Amendment of the Constitution of the United States; that said Statute, "Exhibit A", is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area, and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies and other corporations, and upon the property of municipal and quasi-municipal corporations, and upon platted property in cities and villages. Said purported law, "Exhibit A", is further unconstitutional and void in that the same provides for an assessment against property without the right of the property owner to be heard thereon and without notice of any character to the property owner; that if said apportionment of benefits be made as threatened by the said board of county commissioners of said Minnehaha County, and as is provided in said notice, "Exhibit C", the same will constitute the taking of the property of plaintiff and of the other property owners affected by said notice without due process of law, and will deny and deprive plaintiff of the equal protection of the laws; that a cloud will be placed upon the title of the plaintiff to its real property situated within said drainage area affected and attempted to be established by said notice, "Exhibit C"; that there will result a multiplicity of suits; that plaintiff and other property owners

affected will suffer immediate and irreparable injury; and that plaintiff has no plain, speedy, and adequate remedy at law.

Wherefore, plaintiff prays judgment that the defendants and each of them, their agents, servants, employes, attorneys, and successors in office, and each and every one of them, be forever restrained and enjoined from proceeding further in the making of an apportionment of benefits upon the property of plaintiff for the construction of said spillway, dams, retaining gates, ditches, and for the other work done, as aforesaid, by the board of county commissioners in the area of said drainage ditches No. 1 and No. 2 and restrained and enjoined from making any assessment upon the property of plaintiff for the cost of the construction of said spillway, dams, retaining gates, ditches, and other work, or any part thereof, and from proceeding in any manner under said purported statute, "Exhibit A" in the construction of any work in the area of said drainage ditches No. 1 and No. 2 and from doing any act looking toward the apportionment of benefits for any work heretofore done in the area of said drainage ditches No. 1 and No. 2, and from doing any act tending towards the making of an assessment for the cost of any such work heretofore done, and from in any manner proceeding under said purported law, "Exhibit A", in the doing of any work in the area of said drainage ditches No. 1 and No. 2; that the defendant, Fred E. Ward, as auditor of the said county of Minnehaha, be forever restrained and enjoined from making
22 any apportionment of benefits for work done, as aforesaid in the area of said drainage ditches No. 1 and No. 2, and from making any assessment therefor, and from certifying any assessment therefor to the county treasurer of the said county of Minnehaha; that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as county commissioners of the said county of Minnehaha, and their successors in office be forever restrained and enjoined from fixing a proportion of benefits for the construction of said spillway, dams, retaining gates and ditches upon the property of plaintiff and upon the property of the other property owners named in said notice, "Exhibit C", and forever restrained and enjoined from making any assessment against plaintiff, or its property, or against the property of any other property owner in the area of said drainage ditches No. 1 and No. 2 and for the cost of said work; that the defendant, J. O. Anderson, as treasurer of Minnehaha County, South Dakota, and his successors in office, be forever enjoined

and restrained from filing any assessment and from collecting any assessment against the property of plaintiff, or of the other property owners named in said notice, "Exhibit C", upon any assessment for the construction of said spillway, dams, retaining gates and [tiches]; that the said purported statute of the state of South Dakota, "Exhibit A", hereto be adjudged and decreed to be unconstitutional and void; that all acts of the board of county commissioners of said county of Minnehaha and of the state engineer of the state of South Dakota heretofore done in connection with the construction of said spillway, dams, retaining gates and ditches be adjudged and decreed to be illegal and void; that it be adjudged and decreed that no benefits have resulted to plaintiff from the construction of said spillway, dams, retaining gates, and ditches and that no apportionment of benefits or assess-
23 ment of damages ever be made against plaintiff or its property therefor.

That pending the issuance of a perpetual injunction herein this Honorable Court grant an interlocutory injunction herein restraining the defendants herein, their agents, servants and employes and each and every of them from doing any of the above mentioned acts until the final hearing herein or until the further order of this court; that before the hearing and determination of plaintiff's application for an interlocutory injunction this Honorable Court grant a temporary restraining order restraining the said defendants, their agents and servants and each and every of them from doing any of the above mentioned acts until the hearing and determination of plaintiff's application for an interlocutory injunction herein.

The plaintiff further prays that a subpoena of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, individually and as County Commissioners of the County of Minnehaha in the State of South Dakota, and to Fred E. Ward, individually and as auditor of the said county of Minnehaha, and to J. O. Anderson, individually and as Treasurer of the said County of Minnehaha, thereby commanding them and each of them on a day certain therein to be named to be and appear before this Honorable Court and then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular, the premises and to perform and abide by such order, direction or decree as may be made in the premises, and that on fi-

nal hearing hereof said order of injunction may be made perpetual. Plaintiff further prays for such other and further relief as shall to Court seem just and proper, and equitable and for its costs and disbursements herein.

H. E. JUDGE,
Solicitor for Plaintiff.

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of Counsel.

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24 Exhibit B.

Proposed Distribution of Proportional Benefits.

	District or Division	Acres	Units	Percent of total.	
1.	Farm lands north of City Limits and North of South Line of Sec. 12-101-50	13,271.09	10862.30	33.4%	$103,191.85
2.	City Lots and Town of Renner lying north of above line.	81.20	42.52	0.1%	403.94
3.	Farm land and tracts south of above line,	2,065.23	2958.45	9.1%	28,105.28
4.	City lots south of above line,	361.60	1372.52	4.2%	13,038.94
5.	City of Sioux Falls,		3147.95	9.7%	29,905.52
6.	Minnehaha County,		2518.38	7.7%	23,924.42
7.	Township roads,		1573.98	4.8%	14,952.81
8.	Railroads,		4721.91	14.5%	44,858.15
9.	Northern States Power Company,		5351.63	16.5%	50,840.49
	Totals,	15,722.12	32549.62	100.0%	$309,221.40

In the above calculation the Value of One Unit is taken at $9.50.

CHART

TOO

LARGE

FOR

FILMING

26 Endorsed: Filed in the District Court on Jul. 25, 1921, at 4:35 P. M.

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27 (Order granting leave to Minnehaha National Bank of Sioux Falls et al., to intervene and be made parties defendant.)

The matter of hearing the show cause order heretofore issued out of this Court at the instance of the Minnehaha National Bank of Sioux Falls, South Dakota, et al, to the above named plaintiff and defendants in the above entitled cause, coming on regularly for hearing before this Court, at the court room thereof, in the Federal Building, in the City of Sioux Falls, South Dakota, the said plaintiff appearing by its attorneys of record, and the said defendants appearing by their attorney of record, and the petitioning interveners appearing by their attorneys, Porter & Bartlett, and after hearing of said matter, it is hereby

Ordered and Adjudged that the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, said petitioning interveners, petition be granted, and the said Minnehaha Nation Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson,
28 South Dakota, Savings Bank of Hartford, South Dakota, The Colton State Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, the Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, H. E. Donahoe, and W. G. Porter, be and they are hereby made parties defendants to this cause of action, and they are hereby given until the 25th day of August, 1921, at Ten o'clock A. M. thereof, within which time to file their answer to plaintiff's bill of complaint herein, and to make a return to plaintiff's show cause order herein.

And good cause appearing therefor, it is further likewise Ordered that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock as County Commissioners of Minnehaha County, South Da-

kota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, have and they are hereby granted until August 25th, 1921 at Ten o'clock A. M. to file their answers to plaintiff's bill herein, and to make a return to plaintiff's show cause order herein.

And it is further Ordered that the hearing of said show cause order be and the same is hereby adjourned to August 25th, 1921, at Ten O'clock A. M.

Dated this 11th day of August, A. D. 1921.

By The Court:

(Seal of Court) JAS. D. ELLIOTT,
Judge of the District Court.

Attest:
Jerry Carleton,
Clerk of the District Court.

Endorsed: Filed in the District Court on Aug. 19,
29 1921, at 2 P. M.

And afterwards, to-wit, on the 1st day of September A. D. 1921, there was filed in the office of the clerk of said court, Answer of Defendants; that the Title of the Case, Paragraphs A. B, C, D and F of defendants' Special Answer, Paragraph First to Eighteenth, inclusive, of the defendants' General Answer, Paragraphs I, VII, VIII, IX, XII, XIII, XIV and XV of defendants' Affirmative Defense, the Prayer, Petition of F. L. Blackman and others to reconstruct and improve drainage ditches No. 1 and 2, the Order for filing said Petition, the Resolution for survey under said Petition, the Resolution fixing the exact line and width of the ditch and fixing the time and place for hearing said petition, and the Resolution establishing Drainage Ditch No. 1 and 2, all as contained in said Answer of Defendants, is in words and figures the following, to-wit:

30 (Answer.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Northern States Power Company, Plaintiff,

vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of

Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha, County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, W. G. Porter, Intervening Defendants.

Comes now the above name defendants, A. G. Risty, et al., and for their answer to plaintiff's bill of complaint in the above entitled action, admit, deny and allege as follows:

A.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint, allege that said bill does not state any matter of equity entitling plaintiff
31 to the relief prayed for, nor are the facts as stated, sufficient to entitle plaintiff to any relief against the said defendants in that said plaintiff has a plain, adequate and complete remedy at law.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

B.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint and the allegations contained in paragraph seventeen thereof, to-wit: "That there will result a multiplicity of suits and that the owners affected will suffer irreparable injury", are not truly stated or alleged in good faith and are stated with the false and fraudulent purpose of imposing upon the jurisdiction of this court and they are therefore fictitious and fraudulent. And

said defendants say there are no other actions at law or in equity pending or threatened against said plaintiff and that said plaintiff has a plain, adequate and complete remedy at law, all of which these defendants allege to be true and plead the same in bar to said bill.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

C.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint, allege that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this Court in that this suit is wholly based upon the alleged existence of a federal question and diversity of citizenship, and that the amount sued for and the value of the subject matter as alleged in said bill is not truly stated or alleged in good faith. That
32 the allegations of plaintiff's bill show it as being "a suit of a civil nature to resist and prevent an assessment upon the property of this plaintiff under the pretended authority of a purported act of the legislature of the State of South Dakota, claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00) and is the amount of the threatened assessment, to-wit: a sum in excess of Fifty-one Thousand Dollars ($51,000.00)", are false and stated with a false and fraudulent purpose of imposing upon the jurisdiction of this Court and are therefore fictitious and fraudulent. And said defendants say that the amount involved, or value of the subject matter in this suit, does not exceed the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs; that said bill of complaint upon its face shows that under the drainage law referred to in paragraph four thereof the amount of the assessment, or the amount in controversy herein, has not been, and cannot be, determined until after the equalization thereof provided for in such statute and until such equalization, the amount to be hereinafter assessed, if any, by said Board of County Commissioners or by the Courts of the State of South Dakota, to which an appeal is taken, as provided for by said law is purely speculative, is uncertain and undeterminable at this time by said plaintiff, this court, or anyone at all, and is dependent entirely upon the showing

made by this plaintiff at such hearings and determinations provided for by said law, as to the amount of benefits received by this plaintiff; and that no sum has been or can be assessed and determined against the plaintiff's property until such equalization of the proportion of benefits has
33 been had, and at which hearings this plaintiff is permitted to make his showing therein and the amount of benefits, if any, which plaintiff does receive are thereafter equalized and fixed by said Board or Court and the Amount so fixed is then extended and assessed against the property of said plaintiff, and not otherwise, all of which these defendants aver to be true and set up the same in bar of plaintiff's bill of complaint herein.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

D.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint herein, allege that on or about December 4, 1920, an equity suit was instituted in the Circuit Court within and for Minnehaha County, in the State of South Dakota, the same being a Court of general jurisdiction and having jurisdiction over the subject matter there presented by one Oluf O. Gilseth, whose lands are affected by the construction of drainage ditch No. 1 & 2 and against which lands the proportion of benefits for the construction of said ditches has been proportioned upon the same basis and in like manner as the proportion of benefits upon the lands of this plaintiff as hereinafter set forth, which action was brought by the said Oluf O. Gilseth, for himself and as representing an informal organization of farmers and others who are similarly situated, against the defendants herein, the Board of County Commissioners of Minnehaha County, South Dakota, and other persons, which action was instituted with full knowledge, approval, acquiescence and consent of the plaintiff herein, its officers, agents and attorneys, and in which said cause the same facts are alleged and relied on in plaintiff's bill of complaint as herein set forth, and which said bill of complaint prayed that said defendants be
34 forever enjoined and restrained from making or attempting to make any proportion of benefits upon the property of the plaintiffs herein, or the property of other property owners within the drainage area of the drainage ditches No. 1 and No. 2 for the costs and construction of said spillway, dams, retaining gates or other work, and be for-

ever restrained and enjoined from levying any assessment upon the property of the plaintiff or upon the property of other property owners in said drainage area for the payment of the costs of the construction of said spillway, dams, retaining gates or other work, for the reason and upon the grounds that the law under which said drainage ditch was established and constructed was in controvention of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States, to which said bill of complaint said defendant Board of County Commissioners and these intervening defendants set up and relied upon the same facts and defense as are hereinafter set forth; that said action came on for trial before said Circuit Court of Minnehaha County, South Dakota, with the full knowledge, acquiesence, consent and approval of plaintiff and at which trial plaintiff was entitled to be heard and was represented by its attorneys on the 31st day of January 1921, evidence was introduced upon said hearing on behalf of said plaintiff and these defendants and after the taking of evidence therein was closed and thereafter upon the facts there presented, and in the trial of which the plaintiff could have and did participate, said Court made findings and conclusions and judgment thereon dismissing said action upon its merits. That a duly exemplified copy of said bill of complaint, answer, findings, conclusions and Judgments are hereto attached, marked "Exhibit B", and made a part hereof, all of which these defendants allege to be true and plead the same in bar.

35 Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

* * * * * * * * * * * *

36 F.

Comes now the above named defendants, A. G. Risty, et al, and for answer to plaintiff's bill allege that this suit does not really and substantially involve a controversy within the jurisdiction of this court, in that this suit involves the determination of facts and matters controlled and governed by the drainage statute of South Dakota, mentioned in plaintiff's bill of complaint and which by its provisions creates and provides its own special tribunal with exclusive original jurisdiction to try and determine the questions necessarily involved therein, and which are attempted to be presented for litigation in this action, and that, until such determination by said special tribunal so provided for, this court has no jurisdiction over the subject matter set forth in plaintiff's bill of com-

plaint, and that said special tribunal has not fully determined the matters and things herein presented for determination. All of which these defendants allege to be true and plead the same to the jurisdiction of this Court.

Wherefore, defendants pray that plaintiffs' bill of complaint be dismissed with costs.

G.

Comes now the above named defendants, A. G. Risty, et al, and for their further answer to the allegations contained in plaintiff's bill of complaint, admit, deny and allege as follows:

First.

That these defendants admit Paragraph I of said bill.

Second.

That these defendants admit Paragraph II of said bill.

Third.

That these defendants admit Paragraph III of said bill.

37 Fourth:

These defendants, answering said bill of complaint, admit that the Legislature of the State of South Dakota, at its Tenth Session enacted a law entitled: "An Act for the Establishment, Construction and Maintenance of Drainage and Levies in Counties, Whenever such Drainage shall be Conducive to the Public Health, Convenience or Welfare, or Whenever it shall be Necessary or Practicable for the Drainage of Agricultural Lands", which law was approved by the Governor of the State of South Dakota on February 21st, 1907, said law being Chapter 134 of the Session Laws of the State of South Dakota of 1907, and that subsequently thereto, the Legislature of the that subsequently thereto, the Legislature of the State of State of South Dakota, in the years 1909, 1911, 1915 and 1917, enacted laws amendatory thereto, and in 1919 re-enacted said law and amendments thereto, as Sections 8458, to 8491, inclusive, of the South Dakota Revised Code for 1919, and thereafter in the years 1920 and 1921, enacted amendments thereto which law and amendments now constitute the drainage laws of the State of South Dakota, and specifically deny each and every other allegation of said paragraph.

Fifth.

These defendants answering the Fifth paragraph of complainant's bill, deny that the Board of County Commissioners of Minnehaha County, South Dakota, established a drainage ditch known as "Drainage Ditch No. 1 and No. 2", as therein alleged, but allege the fact to be that in the year 1907 the Board of County Commissioners of Minnehaha County, upon the petition of William H. Lyon, accompanied by a proper bond, approved by the County Auditor, and after due notice and other procedure pursuant to and under Chapter 134 of the Laws of 1907 of the State of South Dakota, established Drainage Ditch No. 1 commencing at a point named in the Southeast Quarter (SE¼) of Section Twenty-nine (29), Township One Hundred two (102), Range Forty-nine (49), running thence about two (2) miles directly South, thence in a Southeasterly course about a mile, cutting through the rim of the natural ridge or bluff just North and East of the State Penitentiary in the City of Sioux Falls, and descending about one hundred (100) feet following the slope of the hill, and terminating in the Big Sioux River on the Northeast Quarter (NE¼) of Section Nine (9), Township One Hundred One (101), Range Forty-nine (49), which said drainage ditch was constructed so as to have a bottom width of forty (40) feet, except where the same cut through the bluff and descended into the Big Sioux River, where a thinly lined concrete gutter or spillway, with sufficient capacity only to carry the water that was planned to come through the said ditch, was constructed, but the terminal thereof was never safely or securely anchored and established, and that thereafter and before the construction of said Drainage Ditch No. 1 had been completed, one Iver R. Peterson and numerous other persons, filed their petition in regular form, accompanied by a proper bond duly approved by the County Auditor, with said Board of County Commissioners, asking and praying that the said Drainage Ditch No. 1 be extended Northward several miles through the Valley of the Big Sioux River, to drain other agricultural lands therein situated; the said petition was found sufficient in form, and was ordered filed and referred to the State Engineer, and a resolution for survey regularly adopted thereon, and thereafter, upon the Engineer's written report of said survey, by resolution, the exact line and width of said ditch extension was fixed, and after due notice and hearing, said petition was allowed, and resolution adopted by the Board of County Commissioners establishing said drainage ditch, and

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designating it as "Drainage Ditch No. 2", extending from the North end of Drainage Ditch No. 1, hereinbefore described, Northward about twelve (12) miles to a point near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, and said drainage ditch was thereafter constructed, which ditch so constructed, tapped the Big Sioux River in two places, and the assessment for the costs and expense of the construction thereof was duly spread upon the lands benefited within the territory embraced within the initial point in Dell Rapids Township, and the terminal point in Section Nine (9) of Sioux Falls Township; and further answering said Paragraph V, these defendants admit that prior to the year 1916 assessments were duly spread upon the lands determined to be benefited by the construction therenf, and such assessments collected, but deny each and every other allegation in said paragraph contained.

Sixth.

These defendants answering the sixth paragraph of complainant's bill, admit the allegation contained in said paragraph, but allege the fact to be that in addition to the lands drained lying North of the City of Sioux Falls, the said Drainage Ditches No. 1 and No. 2 also drained, affected and benefited lands lying West and South of said City and also the lands adjacent to said River through and in said City of Sioux Falls were drained affected and benefited thereby.

Seventh.

These defendants answering the Seventh paragraph of the complainant's bill, allege that they are without knowledge as to the facts therein set out, and therefore deny the same.

40 Eighth:

These defendants answering the Eighth Paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

Ninth.

These defendants answering the Ninth paragraph of complainant's bill, admit the statements therein made, but in explanation thereof, allege the further facts to be that after the construction of said spillway, as above described, the capacity of said ditches were increased by the rapidly flowing waters therein, eroding the banks and widening said Ditch No. 1 to nearly twice its original width of forty feet; the natural bar-

rier which originally prevented the waters of the Big Sioux River from flowing into said Ditch No. 1 near its initial point, except in flood times, eroded and wore away and permitted a large part of the water from the Big Sioux River to flow uncontrolled directly into said ditch and through the same to said spillway, which said spillway did not have the capacity to safely carry all of the flood waters that came to it through said ditch; that by reason of the foregoing facts said ditches became out of repair, and filled with sand bars and mud, and other obstructions, and that, owing to the tortuous course of the Big Sioux River through the district drained by said Ditches No. 1 and No. 2, the said river and said ditches were inadequate to carry away the flood waters and properly drain the lands within the area of said drainage ditches during flood seasons; that on or about the 15th day of March, 1916, during a spring flood, said spillway and outlet for said drainage ditches, as above described, was washed out and destroyed, so that the waters passing through said ditches and outlet, were wholly uncontrolled; that at the place where said spillway had been constructed, the waters descend-
41 ed to the basin of the Big Sioux River over a steep bluff by a drop of approximately of the height of one hundred feet, and that after the washing out and destruction of said spillway and outlet, the waters from said ditches washed out a deep gorge in the bluff, and tore away and destroyed the adjacent land to the extent of several acres; that said outlet and spillway were located in the immediate vicinity of State lands belonging to the State of South Dakota, and in the immediate vicinity of the State Penitentiary, and also of the City Water Works of the City of Sioux Falls, by means of which water works the said City was supplied with water from gravel beds immediately adjacent to said drainage ditches, and that by means of the washing out of said spillway and of the uncontrolled waters of said ditches, the said lands of the State of South Dakota, the State Penitentiary and the water works and water supply of the said City of Sioux Falls, as well as the properties of private citizens in the vicinity of said outlet and spillway, were greatly imperiled and endangered; that there was imminent danger of the waters of the Big Sioux River being entirely diverted from their natural course into Drainage Ditch No. 1 and through the said spillway and outlet, and the water power of the Big Sioux River immediately above the mouth of said drainage ditches thereby destroyed, to the great and irreparable damage of many private property owners.

Tenth.

These defendants answering the Tenth paragraph of the complainant's bill, hereby specifically deny the same, and each and every allegation thereof, and in explanation of the facts therein attempted to be set out, allege that upon the oc-
42 currence of the destruction of the original spillway as hereinbefore set out in the Ninth paragraph hereof, that thereupon the Board of County Commissioners of said Minnehaha County took immediate steps to control the said waters coming through said drainage ditches, by means of dams across said drainage ditches above said spillway, and by driving piling therein, and were so employed when, on or about the 21st day of March, 1916, one Charles Kaufmann, and other persons owning property within the area of said Drainage Ditch No. 2, brought an action in the Circuit Court of Minnehaha County, South Dakota, to restrain said Board from so proceeding to control the waters of said drainage ditches, and obtained an order against said Board, requiring them to show cause why an injunction should not be granted, which said order came on for hearing before the said Court on the 25th day of March, 1916, and the said Court thereupon denied said application for said temporary injunction, whereupon said action was dismissed, the same being Circuit Court File of Minnehaha County No. 15708, which is hereby referred to and made a part hereof.

That on or about April 1, 1916, and because of the conditions above described, the plaintiff in the last mentioned suit and a large number of his neighbors, similarly situated and affected by said drainage ditches perfected an informal local organization and appointed a committee of eight members to look after their interests with reference to repairing said drainage ditches, and to urge before the Board of County Commissioners, such improvements as seemed advisable.

That thereafter and on or about the 8th day of April, 1916, several persons representing said local organization or committee, including some of the said plaintiffs in said last mentioned suit, filed a petition and bond with the said Board of County Commissioners praying that the outlet and spillway to said drainage ditches as originally established and constructed, be closed up and abandoned, and that a new outlet for said ditches be provided by diverting the waters thereof at a point above said spillway, as originally constructed, in a Westerly direction through Covell's Lake,

and thence back into the Big Sioux River above the said City of Sioux Falls, upon which said petition the said Board caused a survey to be made, with the approval of the State Engineer, and a surveyor's report to be filed, and a hearing had upon said petition, after notice, as required by law upon which hearing numerous property owners within the territory affected thereby, appeared before said Board and filed objections to the said proposed proceedings, and filed numerous large claims for damages by reason of said proposed change of outlet, and that upon said hearing, on July 8th, 1916, said Board made an order allowing the prayer of said petition, and established said Covell's Lake outlet, and abandoned said outlet and spillway as originally established and constructed; that thereupon numerous conferences were had between the petitioners in said proceeding last
43 above referred to, and the said objectors and property owners owning lands within the area of said Drainage Ditches No. 1 and No. 2, and that it was agreed at said conferences that the proceedings upon said petition last above referred to should be abandoned, and the same were abandoned accordingly, and that a new petition should be filed and new proceedings instituted for the re-establishment of said Drainage Ditches No. 1 and No. 2 and the reconstruction and improvement thereof, and the re-establishment and the reconstruction of the outlet to said ditches, and for the establishment and construction of a new spillway to properly control and take care of the waters flowing through said drainage ditches, and for the enlargement of said drainage district so as to embrace all of the property benefited thereby, extending from the Northern end of said territory included in said Drainage Ditches No. 1 and No. 2, following the course of the Big Sioux River around the City of Sioux Falls, and extending as far down said river as the mouth of said spillway and outlet to said drainage ditches, where the waters thereof were discharged into the Big Sioux River, below the said City of Sioux Falls, and that thereafter, and in accordance with said agreement, and with the consent and acquiescence of this plaintiff, a new drainage petition and bond, approved by the County Auditor, were filed with the Board of County Commissioners, by the City of Sioux Falls, F. L. Blackman, and other persons who owned lands within the area of and that was assessed for the cost of construction of said Drainage Ditches No. 1 and No. 2, praying for the establishment and construction of a new drainage ditch in the exact location of said original ditches, and the re-establishment and construction of a substantial spillway and outlet there-

for, together with several cut-offs or ditches, straightening and canalizing the channel of the Big Sioux River ad-
44 jacent thereto, so as to improve and increase its carrying capacity, and praying that the assessment area be increased to cover said new territory benefited, pursuant to said agreement, which said petition being found sufficient in form by said Board of County Commissioners, was, on August 3, 1916, ordered filed and referred to the State Engineer, who, with the said Board of County Commissioners, on August 4, 1916, inspected the route of said drainage, and had several conferences with the said persons interested as aforesaid, including this plaintiff, and authorized and ordered a survey to be made by Engineer L. E. Stevens, under the supervision of the State Engineer, which said survey was accordingly made by said L. E. Stevens, who, on September 13, 1916, filed his written report with said petition, and thereupon the said Board of County Commissioners fixed the exact route and width of said drainage, and the time and place of hearing thereon, and caused notice of hearing to be given according to law and upon the return date fixed in said notice, after due hearing, and upon the approval and advice of the State Engineer, and without objection upon the part of the plaintiff herein, or any other person, upon October 3, 1916 found said proposed drainage, as petitioned for, to be conducive to the public health, convenience and welfare, and necessary and practicable for draining agricultural lands, and thereupon, by resolution duly adopted, re-established said drainage ditch in the exact location of the original ditches, and fixed the damages caused by the construction thereof, and designated it as "Drainage Ditch No. 1 & 2", and no appeal was taken from such order establishing said "Drainage Ditch No. 1 & 2, and said order so establishing said Drain-
45 age Ditch No. 1 & 2 is now in full force and effect.

Eleventh.

These defendants answering the Eleventh paragraph of the complainant's bill, admit that the Board of County Commissioners of Minnehaha County have expended ap-
46 proximately Two Hundred and Fifty-five Thousand Dollars ($255,000.00) in, payment for work done and material furnished in the construction of ditches, dams, gateways and the spillway upon said Drainage Ditch No. 1 and 2, for which drainage ditch warrants upon Drainage Ditch No. 1 and 2 Fund have been issued, payable only out of the assessments to be hereafter levied upon the lands and properties benefited by the construction of said ditch, and there

is now due thereon, for principal and interest, about Two Hundred and Ninety Thousand Dollars ($290,000.00) and hereby specifically deny each and every other allegation in said paragraph contained, but further allege that the drainage warrants above referred to were issued, only upon duly verified claims, duly presented, audited and allowed by the County Commissioners, and report of the allowance of the same duly published in said Commissioners' proceedings, as provided by law.

Twelfth.

These defendants answering the Twelfth paragraph of complainant's bill, hereby admit that on or about the 3rd day of August, 1916, a petition was filed in the office of the County Auditor of the County of Minnehaha, duly signed by the City of Sioux Falls, by George W. Burnside, its Mayor, and duly attested by Walter C. Leyse, City Auditor, F. L. Blackman, and others, which petition was for the purpose of re-constructing and improving Drainage Ditches No. 1 and No. 2, in Minnehaha County, South Dakota, and to construct a new spillway and outlet to Drainage Ditches No. 1 and No. 2, and to pay therefor by assessments upon the property, persons and corporations benefited thereby, but these defendants specifically deny each and every other allegation, matter and thing contained in said Twelfth paragraph, but allege the facts to be as stated and set forth in the Tenth paragraph of this Answer, and further allege that all acts negatived in said paragraph Twelve, were duly taken, done and performed, upon due notice, as required by the laws of the State of South Dakota.

47 Thirteenth.

These defendants answering the Thirteenth paragraph of complainant's bill, hereby specifically deny each and every allegation in said paragraph contained, as therein alleged, and allege the facts in relation thereto to be as follows: That immediately after the establishment of "Drainage Ditch No. 1 & 2", as hereinbefore described, the said Board of County Commissioners, acting under said newly established Drainage Ditch No. 1 & 2, proceeded to dike, clean out, enlarge and re-construct original Drainage Ditches No. 1 and No. 2, and the additional river cut-offs were constructed, and the outlet and spillway of said drainage ditches re-built in a more substantial and permanent manner, upon plans approved by the State Engineer; that in the course of the construction of said spillway, plans were prepared under the supervis-

ion of the State Engineer, and approved by him on May 7, 1917, and bids for the construction thereof asked for by legal notice, and upon the opening of said bids and a consideration thereof, it was, by resolution of the Board, determined that the "spillway for which bids have been received for 'Drainage Ditch No. 1 & 2' can be constructed for less money than the [amoun] of any bid submitted therefor", and it was "therefore ordered that the Board of County Commissioners cause such spillway to be constructed, hire the necessary labor, machinery, tools and appliances, and a superintendent to oversee the construction thereof, and purchase all necessary material for such construction, without letting a contract for the entire construction thereof", and the Board thereupon proceeded to construct said spillway in accordance with said determination, ordered the necessary material for the construction thereof, and employed the Sioux Falls
48 Construction Company to furnish the necessary labor, superintendent and supervision of the construction thereof, and to furnish the necessary machinery, tools, etc, to be used in said construction.

From the determination of the Board that it would build said spillway without letting a contract therefor, and by buying the necessary material therefor, and employing the Sioux Falls Construction Company to furnish the necessary labor, machinery, tools, superintendent and supervision thereof, one William H. Lyon, being the original petitioner in the construction of original Drainage Ditch No. 1, appealed to the Circuit Court of Minnehaha County, South Dakota, which appeal came on for hearing before the Court on the 14th day of July, A. D. 1917, and the court, after full hearing and consideration of the evidence introduced on behalf of the appellant and the Board, dismissed said appeal, holding that it appeared that the "decision appealed from is one that rests in the sound judgment of the Board of County Commissioners, and is not a proper subject for review by the Court"; that the proceedings upon said appeal are contained in File No. 16405 of the Circuit Court of Minnehaha County, South Dakota, which file and proceedings are hereby referred to and made a part hereof.

That thereupon the said spillway and outlet to said Drainage Ditch No. 1 & 2 was immediately re-constructed in a more substantial manner in accordance with the determination of said Board of County Commissioners, under the supervision

of the State Engineer of the State of South Dakota, at a cost of more than One Hundred Thousand Dollars ($100,000.00); that the soil at the place where said outlet and spillway are constructed is of peculiar formation; that beneath the
49 surface at said point are found deep quicksands, the extent of which was at said time unknown to said Board of County Commissioners; that by reason of the necessity for immediate action in the construction of said spillway, and on account of the difficulties to be encountered in the construction thereof, it was impossible to prepare fully completed working plans at the time said work was commenced, but that the working plans had to be modified and adapted to the difficulties encountered as the work progressed, and that thereupon and by reason thereof, and with the approval and under the supervision of the State Engineer, the said Board of County Commissioners employed one F. C. Shenehon, a competent civil and [hydralic] engineer, to prepare working plans and to superintend the construction of said spillway as the work progressed, and that said working plans were so prepared by said Shenehon, and said spillway re-constructed under his immediate supervision and the supervision and approval of the State Engineer, in a substantial and adequate manner, and that the same, as so constructed, has ever since said time been in operation, and for the past three years has safely controlled and cared for the waters flowing through said drainage ditches, and protected the properties adjacent thereto, as aforesaid, from injury and damage by reason of the said waters, and the same is now in successful operation.

These defendants further allege that the records and proceedings in the establishment and construction of Drainage Ditch No. 1 & 2, on the petition of F. L. Blackman, the city of Sioux Falls, and other persons, referred to in Paragraph Fifth hereof, except the lengthy notices, are hereunto annexed, marked Exhibit "A", and made a part hereof, and that all of said proceedings were taken and had after due and legal notice, as required by law, which notice specifically named the plaintiff herein, and cited it to show cause why said drainage ditch should not be constructed as petitioned for.

50 Fourteenth.

These defendants answering the Fourteenth paragraph of complainant's bill, hereby specifically admit the facts therein set out, except the allegations that said "Chenoweth & Rettinghouse were to be paid in Drainage ditch warrants

drawn on Drainage Ditch No. 1 and No. 2", and except the further allegation that they "made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereto annexed, marked Exhibit "B", and made a part hereof", which allegations are hereby specifically denied, and the facts are alleged to be that the said Chenoweth Rettinghouse were paid in drainage warrants drawn on Drainage Ditch No. 1 & 2 Fund, and that said Exhibit "B" referred to, is merely an analysis or resume or deduction drawn from the facts set out in the report, merely for the purpose of showing the results shown by the proportion of benefits recommended.

Fifteenth.

These defendants answering the Fifteenth paragraph of complainant's bill, deny that said Board of County Commissioners, on the 10th day of June, 1921, adopted a purported notice of time and place of equalizing the proportioning of benefits for the construction of said spillway, etc., as therein alleged, but allege the fact to be that for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum of about

Two Hundred and Fifty-five Thousand Dollars
51 ($255,000.00), in payment of the labor, material, etc., used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commissioners, did, on the 10th day of June, 1921, by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and indirect benefits that accrue by the construction of said drainage, taking a particular tract as a, unit for comparison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty

per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law, to this plaintiff, at which time and place, the apportionment fixed as to the plaintiff's property and other property, will be equalized, and the assessment will be later extended and spread on said equalization, but the defendants have no knowledge of the total number of Units or sum in dollars that will finally be equalized and assessed against said plaintiff's property. The defendants further allege that the notice, in addition to being published, as stated, was also posted according to law, and deny the balance of said paragraph.

Sixteenth:

These defendants answering the Sixteenth paragraph of complainant's bill, specifically deny the same.

Seventeenth.

These defendants answering the Seventeenth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

Eighteenth.

These defendants answering the Eighteenth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

These defendants further answering complainant's said bill, and by way of affirmative defense, allege:

52 I.

That said proceedings of the said Board of County Commissioners so taken and had in the establishment and construction of said Drainage Ditches No. 1 and No. 2, and in the assessment and equalization of the proportion of benefits, and in the assessment of the cost thereof upon the lands benefitted thereby, were taken and had after due and legal notice as required by law, and that said ditches were so established and constructed in accordance with said proceedings.

* * * * * * * * * * * *

53 VII.

These defendants further allege that in the assessment of Drainage Ditch No. 2, hereinbefore referred to, resolutions

were adopted assessing and equalizing the proportion of benefits thereunder upon and including all of the land assessed for the construction of Drainage Ditch No. 1, and other lands, including the lands and property rights of the plaintiff herein, but making due allowance for the assessment already made upon the lands within the area of the original district of Drainage Ditch No. 1 thereby treating and consolidating said two ditches as Drainage Ditch No. 2; that all of the proceedings herein referred to required to be recorded and indexed in a book kept for that purpose in the County Auditor's office, were so recorded and indexed.

VIII.

And the defendants, further answering complainant's bill, admit that they entered into a contract with Chenoweth & Rettinghouse, civil engineers, to make and perfect a topograhical survey of all the lands lying between the City of Dell Rapids and the outlet to said spillway and drainage ditch, lying within the valley of the Big Sioux River, and that said survey was necessary and was made in order that said defendant Board might advisedly make an apportionment of and fix the benefits to the lands and properties affected by reason of the benefits derived by said plaintiff and others like situated, by reason of the diking, cleaning out, reconstruction and improvement made upon said drainage ditch, the river cut-offs and new spillway and outlet to said ditches; and further allege that the original petition for said drainage ditch, river cut-offs and spillway, hereinbefore mentioned, was a compromise between the said petitioners therefor and others affected thereby, as hereinbefore set forth, and that the making and filing of said petition, accompanied by a bond, as provided by law, which was duly approved by the County Auditor of Minnehaha County, South Dakota, transmisssion of a copy thereof to the State Engineer, the inspection of the proposed route of said drainage project, the causing and ordering of a survey thereof to be made by a competent surveyor under the supervision of said State Engineer, the surveyor's report thereon, the filing of the same by the Board with said petition, said Board's determination of the exact line and length and width of said drainage improvement, and the order and resolution of said Board fixing a time and place for hearing said petition, and the giv-
54 ing of notice thereof, the establishment of said drainage district and project by resolution and order of said Board upon said hearing, and the subsequent notice given to all parties interested, of the establishment of the cut-off

ditches, including the plaintiff herein, and the final establishment thereof, and all work done and performed upon said ditches and river cut-offs ditches, and the establishment and construction of said spillway and work done thereon, and the manner of doing the same, and all other work done and performed upon said drainage ditch, cut-offs and spillway, were done and performed by said defendant Board, with the notice, actual knowledge, acquiescence, approval and consent of the plaintiff herein, its officers, agents and servants, and all others like situated, and said plaintiff and all others like, situated during all the time said ditch, river cut-offs and spillway were being established, layed out and constructed, had notice and actual knowledge that payment therefor was to be made by special assessments against the lands and properties of said plaintiff affected thereby, and the lands of others like situated, and that there was no other provision of law or method of making such payment, and said plaintiff and none other of said parties took any legal steps to stop or prevent the establishment of, or work performed upon said ditches, river cut-offs or spillway, or the issuance of certificates of indebtedness or drainage warrants therefor, which said parties had notice and actual knowledge, of, were to be taken up and paid only by said special assessments as aforesaid; and that said plaintiff and others like situated are now, and since 1918 have been receiving large and continu-
55 ing benefits to their lands and properties affected, by reason of said reconstruction and construction of said drainage ditch, river cut-offs and spillway, under the said re-establishment as Drainage Ditch No. 1 & 2.

IX.

These defendants further allege, as special instances of the notice, knowledge, approval and cooperation of the plaintiff with these defendants, as the Board of County Commissioners, in proceeding with the work of establishing, reconstructing and construction said Drainage Ditch No. 1 & 2, its dams, dikes, spillway and controlling works, that the said palintiff, its officers, agents and servants had actual knowledge of the washing out and destruction of the old spillway on Drainage Ditch No. 1, and had it investigated by its engineers; that the plaintiff urged the said Board to take immediate action to place said ditches and the waters flowing therein under control; that said plaintiff was specially summoned in the published notice dated September 15, 1916, to show cause why said Drainage Ditch No. 1 & 2, should not be established and constructed; that the said plaintiff, its officers, agents and

servants had actual knowledge of the proceedings being taken to establish and construct said Drainage Ditch No. 1 & 2, and the work thereon as it progressed; that the said plain-
56 tiff, by special arrangement and cooperation with the defendant Board and its employees, furnished the electricity used for light and power during and in the construction of said spillway during the years of 1917 and 1918, and rendered bills therefor, and were paid monthly for such service; that by special arrangement and co-operation with the defendants, the Board of County Commissioners, the plaintiff furnished and installed the wooden sheet piling used as a core and to prevent the under-mining of the earthen dam constructed in 1920, to keep the waters from the Big Sioux River from flowing directly into said Drainage Ditch No. 1 & 2, near Schjodt's farm, about three miles North of the City of Sioux Falls, and as a part of said drainage ditch work, which sheet piling was put in by plaintiff with the special agreement with the defendant Board, and the members thereof, that the said defendants would cause the said earthen dam to be constructed thereon as a part of said Drainage Ditch No. 1 & 2, which they did.

57 XII.

That by reason of each and all of the foregoing facts, acts and resolutions and orders done, passed and performed as hereinbefore set forth, the said plaintiff and all others like situated are now estopped and forever barred from in any manner claiming or asserting any right or relief herein, or at all.

XIII.

That in pursuance of said resolutions and orders hereinbefore referred to and set forth, and for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum of about Two Hundred and Fifty-five Thousand Dollars ($255,000.00), in payment of the labor, material, etc, used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the

Board of County Commissioners, did, on the 10th day of June, 1921 by resolution duly adopted and filed in said proceedings, fix the proportion of benefits along the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and in-
58 direct benefits that accrue by the construction of said drainage, taking a particular tract as a unit for comparison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law.

XIV.

The above named defendants, A. G. Risty, et al, further answering plaintiff's bill of complaint allege that heretofore and on and prior to October 3, 1916, due and legal notice was given to the plaintiff herein of the time and place appointed by the Board of County Commissioners of Minnehaha County, South Dakota, for claiming any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2 and that the plaintiff herein wholly failed and neglected to present to said Board of County Commissioners at said time and place, to-wit: October 3, 1916, any claim for damages therein, and that by reason thereof this plaintiff is now estopped and debarred from claiming or asserting herein any right, or claim to any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2.

XV.

The above named defendants, A. G. Risty, et al, for further answer to plaintiff's bill of complaint, allege that the plaintiff is not entitled to the aid of a court of equity herein, for
59 the reason that said plaintiff has failed, neglected and refused to tender or offer to tender herein the amount of the actual benefits received by it by reason of the establishment, construction and reconstruction of Drainage Ditch No. 1 and 2.

Wherefore, the defendants, above named, pray that the plaintiff's bill of complaint in said action be dismissed, with costs.

E. O. JONES,
L. E. WAGNER,
Solicitors for Defendants.

B. C. Matthews,
Of Counsel.

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60 Exhibit "A"

Petition.

To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefitted Thereby.

To The Honorable Board of County Commissioners of Minnehaha County, South Dakota:

1. The undersigned petitioners respectively represent and show that they are all residents of Minnehaha County, South Dakota and that each of them is the owner of certain lands and real property situate and lying in said county in the valley of the Big Sioux River and within the territory to be drained, protected and benefitted by the reconstruction and improvement of drainage ditches One and Two in said Minnehaha County, South Dakota, and by the construction of a new spillway or outlet to said drainage ditches numbers One and Two.

2. Your petitioners further represent and show that said drainage ditches Numbers One and Two were established for the purpose of draining agricultural lands in 1907 and 1910 respectively as appears from records of said proceedings in the office of the County Auditor of Minnehaha County, South Dakota, which are hereby referred to and made a part hereof.

3. Your petitioners further represent and show that the said Drainage Ditches Numbers One and Two and the outlet thereto as constructed were and are insufficient to accomplish the purpose for which they were constructed and were
61 and are insufficient to properly drain the agricultural lands within the districts or territory supposed to be drained thereby and insufficient for the drainage of other ag-

ricultural lands lying within the valley of the Big Sioux River above the mouth of the outlet to said Drainage Ditches Numbers One and Two and between the mouth of said outlet and the lands heretofore included within the assessment districts upon which the cost of the construction of said drainage ditches One and Two was imposed and insufficient as constructed to improve, promote and conserve the public health and welfare within said territory hereinbefore described above the mouth of the outlet to said ditches Numbers One and Two lying partly within the City of Sioux Falls, South Dakota, all of which said lands and property would be benefitted, drained and protected by a proper reconstruction and improvement of said Ditches One and Two and by the construction of a new and proper spillway or outlet to the same by means whereof the public health and welfare within the area hereinbefore described and referred to above the mouth of the outlet to said ditches would be conserved and improved.

4. Your petitioners further represent that it is necessary for the drainage of agricultural lands within said drainage districts Numbers One and Two and also agricultural lands lying above the mouth of the spillway or outlet to said ditches and between the mouth thereof and the present boundaries of said drainage Ditches Numbers One and Two to reconstruct, deepen, widen and improve said drainage ditches One and Two and to construct a new outlet or spillway thereto and that the construction of such new outlet or spillway and the [reconstrucion] and improvement of said Ditches One and Two would also be conducive to the public health, convenience and welfare of the
62 City of Sioux Falls, South Dakota, and also of the County of Minnehaha, South Dakota and people resident within the said area hereinbefore described lying between the present boundaries of said drainage districts One and Two and the mouth of the outlet to said ditches and within the valley of the Big Sioux River, partly within the corporate limits of the City of Sioux Falls, and that in the reconstruction of the said ditches One and Two, it will be necessary that the same be cleaned, deepened, widened and that certain levees, dikes, flood gates and barriers thereto be constructed to such extent as may be necessary to carry out the surplus or flood waters and to properly drain and protect the lands within said drainage districts and within the area hereinbefore described and within the city of Sioux Falls and to properly conserve and promote the public health and welfare within the said area as aforesaid.

5. Your petitioners further represent that there should be constructed and installed in the said Drainage Ditches Numbers One and Two and at the head of the said Spillway or outlet of said Drainage Ditches, controlling gates for the purpose of regulating and controlling the amount of water flowing through the said ditches and over the said Spillway, the number and location of said gates and the manner in which they should be installed should be determined by the County Commissioners upon the advice of their engineers.

6. Your petitioners further represent that the present spillway or outlet to said Drainage Ditches Numbers One and Two where the same empties into the Big Sioux River in Section Nine (9) Township One Hundred and one (101) of Range forty-nine (49) is wholly insufficient and has been prac-
63 tically destroyed by the action of the water therein, so that the same has become inefficient as a means of disposing of the waters flowing in said drainage Ditches Numbers One and Two and to such an extent that it has become dangerous to abutting property and to persons living within the vicinity thereof and that it is necessary to entirely abandon said present spillway or outlet and to construct an entirely new outlet or spillway in place thereof in accordance with a new and different plan therefor, the new spillway to be located at or near the present location of the present spillway.

7. Your petitioners further represent that the said drainage ditch or drainage system should consist of the following ditches: First a ditch having its initial point at the beginning of Section Two, (2) of Drainage Ditch Number Two (2) of Minnehaha County as now established at the creek near the Northeast corner of Section thirty-one (31) Township One hundred four (104) of Range Forty-nine (49) and should then run Southwesterly to near the center of said Section thirty-one (31) and then south near the center line through said Section Thirty-one (31) and through Sections Six (6) and Seven (7) of Township one hundred three (103) of Range forty-nine (49) into Section eighteen (18) and then in a Southeasterly direction having its terminal point upon the Big Sioux River Sixteen hundred forty feet (1640) east of the said center of Section Eighteen (18), Township One hundred three (103) of Range forty-nine (49) following the present location of the said Section Two (2) of Drainage Ditch Number Two of Minnehaha County as now located.

Also a ditch having its initial point at the present beginning of Section One of Drainage Ditch Number Two of Minnehaha

County, at the high water channel of the Big Sioux
64 River in the Southeast quarter of Section Twenty (20) Township One hundred three (103) of Range forty-nine (49) thence running in a general southerly direction through the Southeast quarter of Section Twenty (20) Township one hundred three (103) of Range forty-nine (49) and the Northeast quarter of Section twenty-nine (29), The Southwest quarter of Section twenty-eight (28) the west half of Section thirty-three (33) all in Township one hundred three (103) of Range forty-nine (49) and the west half of Section four (4) the northwest quarter of section nine (9) the Southeast quarter of Section eight (8) the east half of Section seventeen (17), the east half of section twenty (20) and the east half of Section twenty-nine (29) all in Township one hundred and two (102) of Range Forty-nine (49) with its terminal point at the southern end of said Section One of Drainage Ditch Number Two in the Southeast quarter of Section twenty-nine (29), Township One hundred two (102) of Range forty-nine (49) following the line of the said Section One of Drainage Ditch Number Two as now established in Minnehaha County.

Also a ditch having its initial point at the present beginning of Drainage Ditch Number One of Minnehaha County at or near the Northeast quarter of the Southeast quarter of the Southeast quarter of Section twenty-nine (29) Township one hundred and two (102) of Range forty-nine (49) thence running south across the East half of the East half of Section Thirty-two (32) in Township one hundred two (102) of range forty-nine (49) and the East half of the Northeast quarter of Section Five (5) Township one hundred one (101) of Range forty-nine (49) and the Northeast quarter of the Southeast quarter of Section five (5) Township one hundred one (101) of Range forty-nine (49) thence across the West half of the Southwest quarter of Section four (4) in Township one hundred one (101) Range forty-nine (49), thence across
65 the northwest quarter of Section Nine (9) Township One hundred one (101) of Range forty-nine (49) and the Southwest quarter of the Northeast quarter of Section nine (9) township one hundred one (101) of Range forty-nine (49) where it empties into the Big Sioux River having its initial point and terminal point the same as and following the line of Drainage Ditch Number One as now established in Minnehaha County. With also, a branch, drain or second part beginning at the point near the center of the Northeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49)

running thence in a southeasterly direction across the Southeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two, (102) of Range forty-nine (49) to where it connects with the main ditch of Drainage Ditch Number One as now established in Minnehaha County.

8. Your petitioners further represent that in order to make the foregoing drainage system complete and adequate for the purposes for which it is designed, that it will be necessary to straighten, clear out and deepen the channel of the Big Sioux River at a number of places within the said Drainage District and especially to straighten the channel, of the said River upon Section thirty-two (32) Township one hundred three (103) of Range forty-nine (49) by a ditch cutting off the bend in said river on said Section. Also to straighten the said River upon section Eight (8) Seventeen (17), Twenty (20) and Twenty-nine (29) in Township one hundred two (102) of Range forty-nine (49) by cutting off bends of the said Sioux River situated upon those Sections, the exact location of the said ditches for straightening, clearing out and deepen-
66 ing the channel of the said Sioux River to be determined by the County Commissioners upon advice of their engineers.

9. Your petitioners further represent and show that the lands and territory likely to be affected by the construction of such new spillway or outlet and by the reconstruction and improvement of said drainage ditches One and Two and which will be drained, benefitted and protected thereby and within which territory the public health and welfare will be promoted includes all of the lands lying in the valley of the Big Sioux River and included within the present boundaries of said Drainage Districts Numbers One and Two as well as all of the lands in said valley of the Big Sioux River between the mouth of said spillway or outlet to said ditches and the City of Dell Rapids, South Dakota, that subject to overflow by the waters of the Big Sioux River and that will be subject to overflow and damage by the waters of said River if the said outlet to said Drainage Ditches Numbers One and Two be abandoned and said outlet thereto closed ond that the said District should be so extended and enlarged as to include all lands and property benefitted thereby as far down the valley of the Big Sioux River as the mouth of said outlet or spillway and including therein the corporation of the City of Sioux Falls as well as the corporation of the County of Minnehaha, South Dakota, which said corporations your petitioners further rep-

resent are and will be largely benefitted by the reconstruction and improvement of said ditches and construction of said new outlet or spillway thereto to their highways, bridges and other corporate properties owned by them respectively.

Dated this 15th day of July, A. D. 1916.

Attest:

WALTER G. LEYSE,
City Auditor.

CITY OF SIOUX FALLS
(Seal of the City of Sioux Falls)
By Geo. W. Burnside,
Mayor.

F. L. BLACKMAN,

W. BRALEY,

DEN DONAHOE

DAN A. DONAHOE,

W. M. DONAHOE

CATHERINE PECK

PORTER P. PECK

MARY C. BRACE

JOHN P. BLEEG

FRANCES G. CARPENTER

M. RUSSELL, By Louis Caille,
Agt.

McKINNEY & ALLEN

E. D. CLARK

67 C. C. BRATRUD

L. P. CALDWELL

Filed in the office of the Auditor of Minnehaha County, South Dakota this 3 day of Aug. 1916

HARRY H. HOWE,
County Auditor.

68 Order for Filing Petition for Drainage

State of South Dakota,
County of Minnehaha—ss.

In re Drainage Ditch Numbers 1 and 2 Minnehaha County, South Dakota.

Whereas F. L. Blackman and others of the County of Minnehaha, State of South Dakota, have this day presented to this Board a petition for the construction of a drainage ditch conducive to public health, convenience and welfare and for the purpose of draining agricultural lands in the Big Sioux River Valley which lands have heretofore been drained and protected from overflow by ditches Number 1 and 2 of Minnehaha County as heretofore established and constructed, in which petition it is represented that it is necessary to re-construct, improve and extend said drainage ditches Number 1 and 2 and to construct a new spillway or outlet where said drainage ditch number one empties into the Big Sioux River in Section Nine (9), Township One Hundred and One (101), Range Forty-nine (49) by reason of the fact that the spillway or outlet of said drainage ditch number 1 is inadequate for its purpose and has been destroyed by action of the water; also that the drainage ditches number 1 and 2 are not adequate for the purpose of which they are constructed and that they should be cleaned, deepened and widened and levees, dikes, and barriers remodeled, re-constructed and improved in such places and to such extent as may be necessary to carry off the surplus or flood water and properly drain the land to be drained thereby and protect other land subject to overflow; also that there should be constructed and installed in said drainage ditches 1 and 2 necessary flood gates for the purpose of regulating the amount of water flowing
69 through; also that it is necessary in order to make such drainage system complete and adequate for the purpose for which it is designated to straighten, clear out and deepen the channel of the Big Sioux River at different places within the drainage district of said drainage ditches number 1 and 2, and said petition having been by this board examined and found sufficient in form and being accompanied by bond with sureties approved by the County Auditor.

Now Therefore it is hereby ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that the said petition be forthwith filed with the County Auditor

of this County and that a copy thereof be transmitted by the said County Auditor to the State Engineer.

A. G. RISTY,
Chairman of County Board.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of Aug. 1916.

HARRY H. HOWE
County Auditor.

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70 Resolution for Survey.

Whereas on the 3rd day of August, A. D. 1916, the City of Sioux Falls, F. L. Blackman and others of Sioux Falls, Minnehaha County, South Dakota, presented to this board a petition for the drainage of lands in the Big Sioux River Valley for the establishment of a drain chiefly to carry off the overflow of water of the Big Sioux River, such drain to begin at the beginning of Section two (2) of drainage ditch number 2 of Minnehaha County, as now established at the creek near the northeast corner of Section 31, Township 104, Range 49, and should end at a point on the said river near the center of Section 9, in Township 101, Range 49, where drainage ditch number 1 as now established in Minnehaha County, empties into the Big Sioux River, which position was accompanied by a proper bond with sureties approved by the County Auditor of said County; and

Whereas said petition was by this board examined and found sufficient in form and was ordered filed with the County Auditor of said County, and was so filed on the 3rd day of August A. D. 1916; and

Whereas this board together with the State Engineer did on the 14th day of August, A. D. 1916, inspect the proposed route of such drainage; and

Whereas this board deems it necessary that a survey of the proposed drainage be made by a competent surveyor.

Now Therefore it is Ordered that a survey be made of the lands in the Big Sioux River Valley between the City of Dell Rapids and the terminus of said proposed drainage for the purpose of determining the exact line of said drainage and
the most practicable method of draining the entire sec-
71 tion of the country of which the lands proposed to be drained are a part. Such surveyor shall include in his

report to this board a description of the exact line of said drainage ditch or ditches as suggested in said petition, the size and width thereof [of], such survey to be made under the supervision of the State Engineer and report filed with the County Auditor with all convenient speed.

And the chairman of this board is hereby authorized to employ such surveyors and his assistants and purchase such material as may be necessary for such survey.

Approved this 14th day of Aug. 1916.

A. G. RISTY.

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72 Resolution Fixing the Exact Line and Width of Ditches and Fixing the Time and Place for Hearing Petition.

(Commissioners Proceedings, September 13, 1916)

Whereas, on September 13, 1916, Mr. L. E. Stevens, Civil Engineer employed by this Board for the making of a survey for a proposed drainage ditch, in the valley of the Big Sioux River, in Minnehaha County, South Dakota, in the territory previously partially drained by Drainage Ditches Numbered One and Two, as heretofore established, pursuant to the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 191[illegible], did file his report of such survey, together with maps and profiles; and

Whereas, this Board has personally inspected the route of said proposed drainage, as described in said petition and as described in the engineer's said report;

Therefore, be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of said proposed drainage, be and the same is hereby fixed as described in said Engineer's report, and that the requisite right of way for said drainag ditch and dump space be as described in said engineer's report; and

Be it further resolved that Monday, the 2 day of October, 1916, at 2 o'clock, P. M. at the Office of the County Auditor of said County be and it is hereby fixed as the time and place for hearing of said petition and that notice thereof be given in accordance with the provisions of Section Four (4) of Chapter 134, of Laws of 1907, as amended by Chapter 102

of the Laws of 1909 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication once in each week
73 for two consecutive weeks in the Sioux Falls Daily Press, and by posting copies of said notice in at least three of the most public places near the route of said proposed drainage ditch, such posting to be made at least ten days prior to the time of said hearing.

Approved:

A. G. RISTY,
Chm. Co. Bd.

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74 Resolution Establishing Drainage Ditch No. 1 and 2.

The matter of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on August, 3, 1916, coming on to be heard by the Board of County Commissioners of said county at a regularly adjourned meeting, on Monday, the 2 day of October, A. D. 1916, pursuant to notice heretofore given, the said Board having heard and considered said petition and all matters in support of the same, and in opposition thereto, and being fully advised by the state engineer with reference thereto, now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said principal drainage ditch as hereinafter described and set forth, is conducive to the public health, convenience and welfare and it is necessary and practicable for the drainage of agricultural land and it is so found;

Be It Further Resolved that the said drainage ditch as hereinafter described be, and it is hereby named and designated as "Drainage Ditch No. 1 and 2";

Be It Further Resolved that the said Drainage Ditch No. 1 and 2 be and the same is hereby established in accordance with the resolution adopted by this Board on September 13, 1916, in so far as the same is set out and described in Sections One, Two, and Three of the engineer's report of preliminary survey, filed herein on September 13, 1916, and particularly described as follows:

75 Section One.

Commencing at a point Fifty-eight (58) feet west and Ten Hundred and Thirty-five feet (1035) north of the Southeast corner of Section Twenty-nine (29), Township One Hundred and Two (102), Range Forty-nine (49) west of the 5 P. M. running thence South parallel to the adjacent highway Two Thousand and Eighty-five (2085) feet to Station One Hundred and Fourteen (114); also commencing at a point Six Hundred and Seventy-four (674) feet north and about Thirty-five (35) degrees west of said Station number One Hundred and Fourteen (114) thence southeasterly Six Hundred and Seventy-four (674) feet to said Station number One Hundred and Fourteen (114), thence south and parallel to said highway Seventy-seven Hundred (7700) feet to station number Thirty-seven (37) thence south forty-five (45) degrees east Three Thousand Seven Hundred (3700) feet to station number zero (0) the same being on high water line, thence South Fifty-nine (59) degrees and Thirty-six (36) minutes east, Four Hundred and Fifty (450) feet, thence south Thirty-one (31) degrees east to the Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point Ten Hundred and Thirty-five (1035) feet north and Fifty-eight (58) feet west of the Southeast corner of Section Twenty-nine (29) in Township One Hundred and Two (102) of Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north Five Hundred and Forty-seven (547) feet; thence north Twenty-three (23) degrees west Thirty-three Hundred and Eighteen (3318) feet to a point
76 Fifty-eight (58) feet west of the quarter quarter line in the northeast quarter of Section Twenty-nine (29) in said Township; thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17) and a part of Section Eight (8), Twelve Thousand Nine Hundred and Thirty-five (12,935) feet; thence north Fifty (50) degrees east Twenty-seven Hundred and Thirty-two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way of the Chicago, Milwaukee & St. Paul Railway Company, in the Northwest quarter of Section Nine (9) in said Township; thence Northerly parallel with and Thirty-three

(33) feet west, of said right of way line Nineteen Thousand Three Hundred and Sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the Southeast Quarter of, Section Twenty (20) in Township One Hundred and Three (103) North of Range Forty-nine (49).

Section Three.

Commencing at a point Sixteen Hundred and Forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103), Range Forty-nine 49); running thence north Thirty-three (33) degrees west Thirty-one Hundred and Fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line in Sections Seven (7) and Six (6) in said Township and in Section Thirty-one (31) in Township One Hundred and Four (104) North of Range Forty-nine (49) to the center line running east and west through said Section Thirty-one (31); thence north-
77 easterly to the creek near the Northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River is to be straightened in Sections Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred and Three (103), North of Range Forty-nine (49) in order to afford better means of communication between the lower end of Section Three (3) of said ditch and the upper end of Section Two thereof; the same being intended to cover the exact location of drainage ditch Number Two (2) as now established and constructed.

Be It Further Resolved that the consideration and determination of the question of the straightening of the Big Sioux River at the several points recommended in said engineer's report, be deferred, without passing upon the merits thereof, to some later date, when said straightening of the Big Sioux River may be given more complete consideration covering the points recommended and other points requested and suggested at the hearing.

Be It Further Resolved that in the construction of the said Drainage Ditch, the rights of flowage of the owner of the mill at or near Baltic, South Dakota, will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch where the same joins with the creek near the North-

east Corner of Section Thirty-one (31) in Dell Rapids Township, that it will not diminish or interfere with said rights of flowage and that the headgate or other protection now established, be maintained to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

78 Be It Further Resolved that headgates or controlling gates be established in said drainage ditch, on Section Twenty (20) of Sverdrup Township and on Section Twenty-nine (29) or Thirty-two (32) in Mapleton Township at such place and of such size and material as the state engineer may direct;

Be It Further Resolved that a good substantial adequate spillway be constructed, under the supervsion of the state engineer, in said ditch on Section Nine (9) of Sioux Falls Township and that an efficient, substantial controlling gate be constructed at the upper end of said spillway in such manner that the same can be closed and all water be prevented from entering said spillway;

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same may be made a special order for Friday, October 6, A. D. 1916, at ten o'clock A. M.

A. G. RISTY,
Chairman of Board of County Commissioners of Minnehaha County, South Dakota.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of October 1916.

HARRY H. HOWE
County Auditor.

Endorsed: Filed in the District Court on Sept. 1, 1921, at 9:30 A. M.

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79 And afterwards, to-wit, on the 28th day of November, A. D. 1921, there was filed in the office of the clerk of said court, stipulation as to certain Drainage Ditch Notice and that same be considered as a part of the answers and returns of the defendants and intervening defendant; that at-

tached to said Stipulation is a "Drainage Ditch Notice"; which said Drainage Ditch Notice is in words and figures the following, to-wit:

80 Drainage Ditch Notice.

Notice is hereby given that Monday, October 2, 1916, at 2 o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others filed August 3rd, 1916, for the establishment and construction of a drainage ditch, pursuant to the provisions of chapter 134 of the laws of 1907 of the State of South Dakota, as amended by chapter 102 of the laws of 1909, the exact line and width of said drainage ditch was determined by action of said board on September 13, 1916, to be as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of section twenty-nine (29) township one hundred and two (102) range forty-nine (49) west of the 5th P. M. runnnig thence south parallel to the adjacent highway two thousand eighty-five (2085) feet to station one hundred fourteen (114); also commencing at a point six hundred and seventy-four (674) feet north and about thirty-five (35) degrees west of said station number one hundred fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south 45 degrees east thirty-seven hundred feet (3700) to station number zero (0), the same being on high water line, thence south fifty-nine (59) degrees thirty-six (36) minutes east four hundred and fifty (450) feet, thence south thirty-one (31) degrees,
81 east to the Big Sioux River, the said line being the center line of said drainage ditch and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five feet (1035) north and fifty-eight (58) feet west of the southeast corner of section twenty-nine (29), in township one hundred and two (102) of range forty-nine (49), the same being the

commencement point of section one (1), hereinbefore described running thence north five hundred and forty-seven (547) feet; thence north twenty-three (23) degrees west three thousand three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the northeast quarter of section twenty-nine (29) in said township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through sections twenty-nine (29), twenty (20), seventeen (17) and a part of section eight (8), twelve thousand nine hundred and thirty-five (12,935) feet; thence north fifty (50) degrees east twenty-seven hundred and thirty two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way to the Chicago, Milwaukee & St. Paul Railway Company in the northwest quarter of section (9), in said township; thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the southeast quarter of section twenty (20) in township one hundred and three (103) north of range forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of section eighteen (18) in town-
82 ship one hundred and three (103), range forty-nine (49) runnnig thence north thirty-three (33) degrees west thirty-one hundred and fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between sections seven (7) and eight (8) in said township; thence north parallel with and sixty (60) feet west of the quarter line in sections seven (7) and six (6) in said township and in section thirty-one (31) in township one hundred and four (104) north of range forty-nine (49) to the center line running east and west through said section thirty-one (31); thence northeasterly to the creek near the northeast corner of said section thirty-one (31). The said line being the center line of said proposed drainage ditch.

That in addition thereto the Big Sioux river is to be straightened in sections seventeen (17), eighteen (18) and twenty (20) in township one hundred and three (103) north of range forty-nine (49) in order to afford better means of communication between the lower end of section three (3) of said ditch and the upper end of section two (2) thereof; the same being intended to cover the exact location of drainage ditch number 2 as now established and constructed.

I further recommend that the Big Sioux river be straightened on section thirty-two (32), township one hundred and three (103) north of range forty-nine (49) west by the construction of a cut off beginning at the intersection of the center line of the highway bridge across the Big Sioux river, on the town line between sections thirty-two (32), township one hundred and three (103), range forty-nine (49) and section five (5), township one hundred and two (102), range forty-nine (49) and the center line of said river; thence northerly at right angles to said bridge two hundred (200) feet; thence
83 northwesterly at an angle of twenty (20) degrees to the west, nine hundred and fifty (950) feet; thence northerly at an angle of nineteen (19) degrees to the east twenty-eight hundred and fifty (2850) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8), township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at a point in the center line of the Big Sioux river, twenty-one hundred and seventy (2170) feet easterly and seven hundred and eighty-five (785) feet southerly from the northwest corner of section eight (8) township one hundred and two (102), range forty-nine (49); thence easterly parallel with the north line of said section eight (8) three hundred feet; thence northeasterly at an angle of twenty degrees (20) to the north, four hundred (400) feet, to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8) township one hundred and two (102) range forty-nine by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the east and west quarter line of section eight (8), township one hundred and two (102), range forty-nine (49); thence northerly at an angle of forty-one (41) degrees and thirty (30) minutes to the north eight hundred (800) feet; thence northwesterly at an angle of seventy-five (75) degrees to the west five hundred and fifty (550) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section seventeen (17), township one hundred and two (102), range forty-nine (49) by the construction of a cut off beginning at a point in the center line of the Big Sioux river seven hundred and twenty (720) feet southerly and six hundred and twenty (620) feet easterly from the west quar-
84 ter post of section seventeen (17) township one hundred and two (102), range forty-nine (49); thence northerly

parallel with the westerly line of said section seventeen (17) six hundred (600) feet; thence northwesterly at an angle of twenty-nine (29) degrees to the west fourteen hundred and ten (1410) feet; thence northerly at an angle of twenty-nine (29) dagrees to the east fifteen hundred and sixty (1560) feet; thence northeasterly at an angle of fifty-five degrees (55) to the east eight hundred and seventy (870) feet to the center of said rivr.

I further recommend that the Big Sioux river be straightened on section twenty (20), township one hundred and two (102) range forty-nine (49), by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty (20), township one hundred and two (102), range forty-nine (49), thence southeasterly at an angle of one hundred and thirteen (113) degrees to the east six hundred and ten (610) feet; thence southwesterly at an angle of thirty-one (31) degrees to the west ten hundred and eighty (1080) feet; thence southwesterly at an angle of twenty-one (21) degrees to the west thirteen hundred and eighty (1380) feet to the center of said river.

Also in said section twenty (20) beginning at the intersection of the center line of Big Sioux river and the south line of section twenty (20), township one hundred and two (102) range forty-nine (49); thence northwesterly at an angle of sixty-two and one-half (62½) degrees to the north twenty-one hundred and ten (2110) feet; thence northerly at an angle of twenty-eight (28) degrees to the east five hundred (500)
85 feet to the center of said river.

I further recommend that the Big Sioux River be straightened on section twenty-nine (29) township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty-nine (29) township one hundred and two (102), range forty-nine (49); thence southerly at an angle of 81 degrees to the south twenty-nine hundred and ninety (2990) feet; thence southeasterly at an angle of thirty-five (35) degrees to the east ten hundred and ninety (1090) feet; thence southerly at an angle of thirty-seven and one-half (37½) degrees to the west eleven hundred (1100) feet, to the center of said river.

All of the above cut-offs to have a bottom width of sixty (60) feet and side slopes of one and one-half (1½) to one (1). A right of way one hundred (100) feet in width, one-

half each side of the above described center lines will be required.

The tract of country likely to be affected by the establishment and construction of the said proposed drainage is in general terms described as follows: Sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty-two (22), twenty-seven (27), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), in township one hundred and one (101) of range forty-nine (49); sections thirteen (13), twenty-four (24) and twenty-five (25) in township one hundred and one (101), range fifty (50); sections three (3), four (4), five (5), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-eight (28), twenty-nine (29), thirty-one (31), thirty-two (32) and thirty-three (33) in township one hundred
86 and two (102), range forty-nine (49); sections five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), twenty (20), twenty-one (21), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty-two (32), thirty-three (33) and thirty-four (34) in township one hundred and three (103), range forty-nine (49); sections twenty-nine (29), thirty-one (31) and thirty-two (32) in township one hundred and four (104), range forty-nine (49), including also the mill property at or near the town of Baltic and the tracts of country covered by the right of flowage belonging to said mill property. Also the following additions to the City of Sioux Falls, Minnehaha County, South Dakota; North Boulevard addition, Carpentar's addition, Central Park addition, Meredith's First Addition, Meredith's Second addition, Harrison's addition, Lincoln Park addition, Englewood addition, West Lawn addition, Sioux Falls Improvements Company's addition, North Park Addition, North Park Second addition, Brooks' addition, Bunker's addition, Lake View addition, Brookings addition, Berwick addition, Summit addition, McClellan's Second addition, West Park addition, Pettigrew & Tate's Eighth addition, Glendale addition, Scott's Second addition, Morningside addition, Van Eps' addition, Millspaugh's addition, Daniels' addition, Morse's addition, Gale's addition, Gale's Sioux Falls, Phillips' addition, Syndicate addition, Central addition and W. R. Green addition.

The separate tracts of land through which said proposed ditch will pass and parts of which will be required therefore and for dump space, and the names of the owners of said

87 tracts as appears from the records in the office of the register of deeds of said county on August 3rd, 1916, that being the date of filing said petition, are as follows:

Owner	Description		Township	Range
Lars Simonson	NW¼ of NW¼	Sec. 32	104	49
Lars Simonson	NE¼ of NE¼	" 31	104	49
Lars Simonson	SE¼ NE¼	" 31	104	49
Gustava Nelson	SW¼ of NE¼	" 31	104	49
P. G. Thompson	E½ of SW¼	" 31	104	49
Julia L. Moe	NW¼ of SE¼	" 31	104	49
Even O. Fossum	NE¼ of NW¼	" 6	103	49
Gunerius Thompson	All that part of SE¼ of NW¼ Sec. 6 lying south of a certain slough running West of Northwest to end of drain ditch		103	49
E. P. Sorkilmo	All that Part of SE¼ of NW¼ Sec. 6 located & lying on the north side of a certain intermittent water-course or slough running through the center of said section in a northwesterly course to ditch on the west line of said "40" except the N½ of N½ of said SE¼,		103	49
Lina Hanson,	N½ N½ SE¼ NW¼ Sec. 6,		103	49
Gunerius Thompson	E½ of SW¼ Sec. 6		103	49
Ole J. Ustrud	E½ of NW¼ Sec. 7		103	49
Magnhild Floren, Olaf Berthum Floren, Mabel Floren & Ovida Mathilda Floren	E½ of SW¼ Sec. 7		103	49
Andrew Swenson Aas	E½ of NW¼ Sec. 18		103	49
John O. Aasen	S½ of NE¼ Section 18		103	49
B. G. Flamoe	NE¼ of NW¼ Sec. 20		103	49
Bernt G. Flame	SE¼ of NW¼ Sec. 20		103	49
Peter Paulson,	E½ of SE¼ Sec. 20		103	49
Olymphious S. Thompson	Tract 3 of County Auditor's Subdivision of the NE¼ of Sec. 29		103	49

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Owner	Description	Township	Range
Olymphious S. Thompson Bertha Peterson, Alice, Christina Thompson, John Oscar Thompson, William Henry Thompson, Fred Raymond Thompson, Reuben Victor Thompson, Mabel Josephine Thompson, Carl Melvin	SE¼ of NW¼ and W½ of SW¼ of Sec. 28	103	49

Thompson	SW¼ of NW¼	Sec. 33	103	49
Andrew J. Aason	NW¼ of NW¼	" 33	103	49
Joseph C. Thompson	NW¼ of SW¼	" 33	103	49
Thomas Hendrickson	SW¼ of SW¼	" 33	103	49
Ole Thompson Aspass	W½ of NW¼	" 4	102	49
Martin H. Oyen and Cleopatra H. Oyen	W½ of SW¼	" 4	102	49
Martin Oien	W½ of NW¼	" 9	102	49
Martin H. Oien	SE¼ of NE¼	" 8	102	49
Ole Gunderson	W½ of SE¼	" 8	102	49
Leonard Renner Ingeberg Peterson Peter R. Peterson Iver R. Peterson	E½ of SE¼	" 8	102	49
Gertie R. Peterson,	W½ of NE¼	" 17	102	49
Christian J. Orstad	W½ of SE¼	" 17	102	49
Albert N. Allis	W½ of NE¼	" 20	102	49
Robert J. Huston	W½ of SE¼	" 20	102	49
Charles E. Kaufmann,	NE¼ & NE¼ of SE¼ of Section 29		102	49
State of South Dakota	SE¼ of SE¼	Sec. 29	102	49
State of South Dakota	E½ of NE¼ & NE¼ of SE¼	" 32	102	49
Hans Ruvald	SE¼ of SE¼	" 32	102	49
Hans Ruvald	E½ of NE¼ & NE¼ of SE¼	" 5	101	49
City of Sioux Falls	Starting at Southwest corner of Section 4, running thence east along Sec. line to the center line of County Ditch #1 as shown on Map #3 of the recorded plat of said ditch, thence in a northwesterly direction along the center line of said ditch to the west line of Sec. 4 thence south along said section line to the place of beginning		101	49
State of South Dakota	SW¼ of Sec. 4, except above described tract		101	49
Southern Minnesota Railway Extension Company (Now Chicago Milwaukee & St. Paul Railway Company.	Right of way across the SW¼ of SW¼ Sec. 4		101	49
Watertown & Sioux Falls Railway Company	Right of Way across the SW¼ of SW¼ Sec. 4		101	49
Watertown & Sioux Falls Railway Company	Right of Way across the East ½ of SE¼ Sec. 5,		101	49
Chicago, Milwaukee & St. Paul Railway Company	Right of Way of Madison Branch, on Sections 8 and 9,		102	49

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Owners Description Township Range

Mapleton Township	Interest in Highway adjacent to the line of the proposed ditch in Sections 4, 8, 9, 17, 20 and 29	102	49
Sverdrup Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 6, 7, 18, 20, 28, 29 and 33.	103	49
Dell Rapids Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 29, 30, 31 and 32,	104	49
Sioux Falls Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 4 and 5 and 9	101	49

90 Berwick Addition to Sioux Falls

	Lot No.	Block No.
Elwin L. Potter	1, 2 and 3	5
Arthur D. Horton	5, 6, 7, 8, 9, 10 and 11	4
State of South Dakota	1, 2 and 3	13
Grant Lines	5, 6, 10 and 11 lying east of Drainage Ditch	14
State of South Dakota	7, 8, and 9	14
State of South Dakota	1, 2 and 3	19
Sophia Krull,	4	18
Sophia Krull, Emma Buchholz, Mary Toepfer, Charles Krull, William F. Krull and Otto R. Krull	5 and 6	18
Sophia Krull	7, 8, 10, 11	18
George W. Hanson (Fee) Security Savings Bank (Tax title)	9	18
Moses M. Robinson	1	31
Security Savings Bank	2 & 8	31
James Kennedy	3	31
Security Savings Bank	All of Block	32

* * * * * * * * *

The Kittery Realty Company—Tract 2 of NE¼ Section 9, Twp. 101, Rge. 49.

The Kittery Realty Company—Tract 3 of NE¼ Sec. 9 Twp. 101 Rge. 49.

State of South Dakota. Tract 3 of NW¼ Sec. 9, Twp. 101 Rge. 49.

91 The separate tracts of land wherein the Big Sioux River is proposed to be constructed and which will likely be affected thereby and the names of the owners of said tracts as appear from the records of the office of the Register of deeds of said County on August 3rd, 1916, that being the date of the filing of said petition, are as follows:

Name of Owner.	Description	Township	Range
Andrew J. Aasen,	W½ NE¼ Section 32	103	49
Andrew J. Aasen	NE¼ of NE¼ Sec. 32	103	49
Joseph O. Thompson,	S½ of SE¼ of NE¼ Section 32,	103	49
Gus S. Thompson,	N½ of SE¼ of NE¼ Section 32.	103	49
Jonas L. Finnegan,	N½ of SE¼ of Sec. 32,	103	49
Margaret Finnegan,	SE¼ of SE¼ Sec. 32.	103	49
John Finnegan,	SW¼ of SE¼ Sec. 32	103	49
Ole Gunderson,	NW¼ Sec. 8	102	49
Iver Nelson,	NW¼ of SW¼ Sec. 8,	102	49
Jonas Olson,	SW¼ of SW¼ Sec. 8,	102	49
Ole Gunderson,	E½ of SW¼ Sec. 8,	102	49
Iver R. and Palma Peterson,	NW¼ of NW¼ of Sec. 17	102	49
Bernt Mekvold,	SW¼ of NW¼ Sec. 17	102	49
C. C. Fleischer,	NW¼ of SW¼ Sec. 17,	102	49
Iver R. and Palma Peterson,	East 26 acres of NE¼ of NE¼ Sec. 18	102	49
Bernt Mekvold,	SE¼ of NE¼ Sec. 18	102	49
W. O. Quincy,	W½ of NW¼ Sec. 20	102	49
Albert N. Allis,	E½ of NW¼ Sec. 20,	102	49
Robert J. Huston	N½ of SW¼ Sec. 20,	102	49
Charles Kaufmann,	S½ SW¼ Sec. 20,	102	49
Charles Kaufmann,	W½ of NE¼ Sec. 29	102	49
Charles Kaufmann,	NE¼ of NW¼ Sec. 29	102	49

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Name of Owner	Description	Township	Range
Ole P. and Maria Schjodt	W½ of SE¼ Sec. 29	102	49
Berit Johnson,	NE¼ of SW¼ Sec. 29	102	49

In addition to the above, notice is also given to Minnehaha County, Townships of Sioux Falls, Mapleton, Sverdrup, and Dell Rapids in said County and the City of Sioux Falls in said County on account of benefits to highways, bridges, parks and city waterworks plant in the said drainage area and notice is also given to the Chicago, Milwaukee & St. Paul Railway Company, also to the Watertown & Sioux Falls Railway Company on account of the benefits to their rights of way within said drainage area;

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have why the said drainage should not be established and constructed;

And all persons deeming themselves damaged by said proposed drainage or claiming compensation for the lands proposed to be taken for said drainage are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 15th day of September A. D. 1916.

THE BOARD OF COUNTY
COMMISSIONERS,
By: A. G. Risty, Chairman.

Attest:

(Seal) Harry H. Howe, County Auditor
93 By E. H. Shenkle Deputy.

Filed in the office of the Auditor of Minnehaha County, S. D., this 15 day of Sept., 1916.

HARRY H. HOWE, County Auditor,
By E. H. Shenkle, Deputy.

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94 (Order directed to defendants to show cause why plaintiff should not be permitted to amend bill of complaint.)

January 28, 1922.

Upon motion of plaintiff in the above entitled action and upon the affidavit of H. E. Judge, Solicitor for plaintiff, duly filed herein, it is Ordered that the defendants and intervening defendants in said action show cause, if any they have, before the court on the 31 day of Jany, 1922, at 10 o'clock A. M., why plaintiff in said action should not be permitted to amend its

bill of complaint to conform to the proof in the manner
95 set forth in said motion.

It is further Ordered that copies of this order to show cause, and of said motion and affidavit of H. E. Judge, be forthwith served upon the solicitors for said defendants and intervening defendants.

Done at Sioux Falls, in said district, this 28th day of January, 1922.

By the Court:

JAS. D. ELLIOTT
Judge.

(Seal of Court)

Attest:
Jerry Carleton,
Clerk.

Service of the above order admitted January 28, 1922.

E. O. JONES
Attorney for Defendants.

PORTER & BARTLETT
Attorneys for Intervenors.

Endorsed: Filed in the District Court on Jan. 28, 1922, at 2:30 P. M.

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96 (Affidavit of H. E. Judge in support of order to show cause.)

97 State of South Dakota,
County of Minnehaha—ss.

H. E. JUDGE, being duly sworn, says that he is one of the solicitors for the plaintiff in the above entitled action; that upon the trial of said action evidence was offered and received tending to establish and in the opinion of deponent establishing the fact that the defendants County Commissioners in said action in their attempted application of the purported drainage ditch statutes of the State of South Dakota to the matters involved in said action, and particularly in the matter of the attempted assessment of plaintiff's property acted arbitrarily and upon a basis purely arbitrary and speculative, and that their acts in the matter were such as would result in depriving plaintiff of its property without due process of law and to deprive plaintiff of the equal protection of the laws, all in violation of the Federal Constitution; that the question arose at the trial of said action as to whether or not plaintiff's

bill of Complaint contained sufficient allegations to raise such issue; that it was deponent's opinion at the time that said bill of complaint did contain sufficient allegations; that the bill is somewhat lengthy and voluminous, and at the time such question was raised deponent was unable to take the time to consider it carefully; that upon a careful consideration of said bill it appears that there is doubt as to whether or not it raises the issue above referred to, and that in order that there may be no further question with reference to said pleading
98 deponent is desirous of amending the same to conform to the proof received upon the trial, and that plaintiff will submit to such terms, if any, as may be imposed by the court by reason of such amendment.

H. E. JUDGE,

Subscribed and sworn to before me this 28th day of January, 1922.

N. B. SAVAGE,
(Notarial Seal) Notary Public, South Dakota.

Endorsed: Filed in the District Court on Jan. 28, 1922.

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99 (Return of defendants to order to show cause why plaintiff should not be permitted to amend bill of complaint.)

Come now the defendants and intervening defendants, in the above entitled action and for return to the plaintiff's Order to Show Cause, issued hereon, on January 28, 1922, say that the plaintiffs said Motion should be denied and the prayer of the plaintiff to amend its bill be denied for the following reasons:

1. That said offer to amend comes too late, and after the entire case has been tried, argued and brief submitted.

2. That the same injects an entirely new cause of action into the bill of complaint which will require a new trial and additional evidence upon the hearing upon the same; the only evidence heretofore introduced going only to the application of the rule for the apportionment of benefits, and that the statute furnishes a determinable basis for the apportionment of benefits upon railroad and other property.

3. That the proposed amendment does not conform to the facts proven in the following particulars:

(a) That the proposed amendment assumes that the board of county commissioners were acting under jurisdiction obtained in the establishment of old Drainage Ditches No. 1 and No. 2, instead of the new drainage proceedings designated as Drainage Ditch No. 1 and 2.

100 (b) That the proposed amendment further assumes that "the equalization of the proportion of benefits" has been made, whereas, the proof shows that merely the tentative fixing of the apportionment of benefits has been made and that no equalization has been made on hearing upon equalization had.

(c) The proposed amendment assumes that the plaintiffs property "has not been and can never be benefited", etc, by old drainage ditches No. 1 and No. 2, while the evidence shows a substantial benefit under Drainage Ditch No. 1 and 2.

(d) The proposed amendment assumes "that the said assessment is so arbitrary, etc., as to deprive the plaintiff of its property without due process of law" while the evidence shows that no "assessment" or "equalization of benefits" has been made or attempted, and under the drainage law no such assessment can be made until after the proportion of benefits has been equalized and finally fixed.

(e) The proposed amendment assumes that the board of county commissioners will act arbitrarily in this matter, and not according to the proofs submitted.

4. That the amendment does not attack the drainage law as arbitrary or the unit provided by the law as arbitrary, but alleges that the acts of the board in fixing the proportion of benefits is abritrary, speculative and unjust, whereas the proof shows the board, with its engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received, and the undisputed evidence further shows that some benefits [was] received, And where there are disputable grounds of discretion or disputable degrees of benefit it cannot be said that such proof establishes arbitrary action.

5. Under the drainage law the board of county com-
101 missioners are created the initial tribunal with exclusive jurisdiction to determine the questions presented by the proposed amendment and an appeal to the state courts is provided from such determination by anyone deeming themselves aggrieved, which provides due process of law and gives the plaintiffs equal protection of the laws.

For all of which reason the defendants insist that the Motion of the plaintiff be dismissed.

E. O. JONES
Attorneys for Defendants.

PORTER & BARTLETT
Attorneys for Intervening Defendants..

Endorsed: Filed in the District Court on Jan. 31, 1922.

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102 (Affidavit of E. O. Jones, and N. B. Bartlett in support of return to order to show cause.)

State of South Dakota,
County of Minnehaha—ss.

E. O. Jones and N. B. Bartlett, being first duly sworn on oath, depose and say: That they are the solicitors for the defendants and intervening defendants above named and that they as such, draw the answers for said defendants to plaintiff's bill of complaint herein, and have had charge of the preparation and trial of the issues in the above matter; that the bill of complaint herein was filed in the above named court on July 25, 1921, and that the answers of the above named defendants and intervening defendants were filed in the above named court on September 1, 1921. That upon the hearing of plaintiff's order to show cause why an interlocutory injunction should not be granted, heard before three judges in this court on or about November 28, 1921, affiants, in presence of plaintiff's attorneys, read to said court a part of plaintiff's bill of complaint herein, wherein plaintiff attempted to set forth its jurisdictional grounds and its purported constitutional question raised by said pleadings and at that time affiants stated in open court, in the presence of plaintiff's attorneys, that the bill of complaint herein did not allege fraud or arbitrary action on the part of the defendant Board of County Commissioners; that notwithstanding said
103 statement in open court, said plaintiff offered no amendment to its bill of complaint, nor did it contradict the statement of affiant nor call the court's attention to any allegation in its complaint wherein the same contained allegations of fraud or arbitrary action on the part of said Board of County Commissioners, nor did they at said time, or at all, state to said court that they were of the opinion that said bill contained any such averments, or that they were relying thereon in this cause of action, nor is there any showing be-

fore this Court now that plaintiff ever intended at any time prior to this motion, to raise by its bill the question of arbitrary action by the Board.

That on December 15, 1921, said matter came on for final determination before the above named court, and upon the first day of said hearing, affiants objected to the evidence offered by plaintiffs purporting to show that the plaintiff was not benefited by Drainage Ditch No. 1 and 2, and, among other grounds, stated at said objection, objected to said testimony for the reason that neither fraud nor arbitrary action was alleged in the bills of complaint, which objections are hereto attached, hereby referred to and made a part hereof. That at said time, the Honorable James D. Elliott, presiding judge, overruled said objection pro forma and stated in open court that after the trial of said cause, he would take said objections and decide them in the order in which they were presented, and at said time stated in substance to plaintiff's counsel that he assumed that they had alleged that the action of the Board in fixing the apportionment was arbitrary and asked plaintiff's counsel if that were true, but that plaintiff's counsel, to the best of your affiants knowledge and belief, did not reply to said question, although plaintiff's counsel at said time did examine its bill of complaint and attempted to find such allegations therein. That said trial proceeded upon the
104 15th, 16th and 17th of December, and all of which evidence on behalf of the plaintiff was received over the foregoing objections of the defendants as hereinbefore set forth, and during all of said time, plaintiff's counsel had due notice of, and was informed of the state of its pleadings. That thereafter, and on December 20, 1921, said matter was orally argued before the Honorable James D. Elliott, presiding judge of the above named court, at which time affiant again read to said court the allegations in plaintiff's bill of complaint, setting forth its jurisdictional grounds and the constitutional questions raised, and again stated in open court that said bill tions raised, and again stated in open court that said bill of complaint contained no allegation of fraud or arbitrary or confiscatory action on behalf of the defendant Board of County Commissioners. That said plaintiff again neglected, failed and refused to offer an amendment to its bill of complaint, although duly informed of the contents thereof. That at said time, affiants dinstinctly called to the court's attention the allegations of plaintiff's bill, wherein it is alleged: "That said statute Exhibit "A" is further void and unconstitutional in that the same provides no fixed and determinable method

or rule for the apportionment of benefits upon the property and property holders situated within the drainage area and furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies" and stated to said court that said allegations did not constitute an averment of arbitrary action on the part of the Board of County Commissioners. That notwithstanding these statements in open court at the time of said argument on December 20, 1921, said plaintiff failed and neglected to offer an amendment and failed and neglected to state to the court at said time, or to contend orally at said time that said bill of complaint contained any allegations of arbitrary action on the part of said defendant Board of Commis-
105 sioners. That said plaintiff's brief herein was filed on or prior to December 30, 1921, and that more than thirty days elapsed after the filing of said brief before said plaintiff complained that said bill of complaint was deficient and moved to amend the same. And affiants verily believe that the plaintiff never intended to allege that the actions of the Board of County Commissioners herein, were arbitrary, nor has he at any time stated in any manner, prior to the present time, that he ever intended to raise the issues presented by his proposed amendment by said bill of complaint herein.

Affiant further says that no evidence has been offered herein showing or tending to show that the equalization of benefits has ever been made by the Board of County Commissioners. That the evidence offered on the part of the plaintiff to show that the plaintiff was not benefited thereon was objected to by the defendants at the time the offer was made, which objections are hereto attached and made a part hereof, and said objections gave notice to the plaintiff that his bill did not contain any averment of arbitrary action on the part of said Board of County Commissioners, and said plaintiff neglected and failed to immediately offer an amendment to his said bill when the same was thereby objected to.

That the evidence offered by the plaintiff and by which the said plaintiff is bound does not support the proposed amendment and is substantially as follows: That the taking of the water out of the river into the ditch at a place known as Thompsons, about twelve miles north of Sioux Falls, and by-passing the same through the ditch, again returning it to the river at the spillway, is of benefit to all land and property affected adjacent to the river in that stretch of the river; that the ditch carries and by-passes from one-third to one-half of the flood water in the Sioux valley and therefore re-

lieves the valley and the lands therein of flood water in from one-third to one-half less time than it would
106 otherwise take to relieve said land from said flood waters along that stretch of the river.

That the plaintiff is the owner of land within the drainage area of Drainage Ditch No. 1 and 2, affected thereby consisting of tracts, water power, dams, water rights and hydro-electric plant erected thereon, a part of which is acreage property, which is adjacent to other acreage property in the benefited district, and is like affected and benefited and like apportioned as such other acreage property. That the Board of County Commissioners had a topographical survey made of the property affected by this drainage ditch included in which is the plaintiff's property. That thereafter the Board of County Commissioners and its engineer made a personal careful inspection of plaintiff's property and found that the acreage land owned by plaintiff was benefited to the same extent and in the same manner that adjoining acreage property was benefited, and apportioned its benefit accordingly, and found further and it was their judgment that the water power, water rights, dams and hydro-electric plant of the plaintiff were specially benefited in addition thereto by reason of the said drainage proceedings protecting said water power from destruction in promoting the channel of the Sioux River being changed to the old ditch bed; by assuring the normal flowage of said river by reason of the construction of the dam at Sebhodts and the controlling works at the Thompson inlet, and also by reason of protecting the said hydro-electric plant and productiveness of power from the excessive floods during flood seasons. That the same unit of benefit that was used and applied to acreage land in general was applied to this plaintiff's acreage land and also applied to the capitalized benefits to the water power, water rights, et cetera in the same manner as it was applied to other property within the drainage area. That Drainage Ditch No. 1 and Drainage Ditch No. 2 have been entirely completed and abandoned and are not a part of the present ditch project and that Drainage Ditch No. 1 and 2, now in controversy is an entire separate and distinct
107 drainage project from Drainage Ditch No. 1 and Drainage Ditch No. 2.

There being no allegations of arbitrary action on the part of said Board of County Commissioners, the defendants herein did not prepare and try said case upon said issues and if such be now made a part of the bill of complaint herein, it will be necessary to introduce additional evidence to justify the pro-

portionment made by the Board. That the defendants will be compelled to and are prepared to show by competent expert testimony the foregoing facts, and by reason of said facts the plaintiff is benefited in an amount substantially as found by the Board of County Commissioners. That the only evidence that defendant offered in the trial of said case under the pleadings was that the plaintiff enjoyed some benefit but that the defendants did not attempt to show the amount of benefit and, therefore, the amount of apportionment of benefit which the plaintiff enjoyed to any particular part of its property. That if the amendments herein are allowed, it will be necessary for the defendants to make such a showing and to justify the apportionment of benefits as tentatively made by the Board of County Commissioners, and that in order to do this, it will be necessary to open up said case and to have an entirely new and additional hearing. That the attempted amendment is an injection of an entirely new cause of action, and the same is not germaine to the cause of action as stated in the bill, and changes the entire character of said cause of action and would be a gross abuse of this court's discretion.

That the return of the defendants hereto attached, is hereby referred to and made a part hereof.

E. O. JONES
N. B. BARTLETT

Subscribed and sworn to before me this 31st day of January, 1922.

(Notarial Seal)

R. A. BIELSKI,
Notary Public, South Dakota.

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108 Exhibit "A"

F. E. WARD, being called as a witness on behalf of the plaintiffs and being duly sworn, testified as follows:

Direct Examination

By Mr. Judge:

Mr. Bartlett: The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set aside for the reasons that said bills of complaint fail to state any matter of equity entitling the plaintiff to the relief prayed for. Nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this Court has no jurisdiction over these matters because the plaintiff's bills of complaint herein do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this Court can infer or assume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that plaintiffs have a plain, adequate and complete remedy at law.

For the further reason that it affirmatively appears from the face of the bills of complaint and record that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits assessment or tax chargeable against the property of
109 the plaintiffs if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multiplicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determination of the State Tribunal upon questions of fact before them, are conclusive upon this Court in this action, this Court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings.

The Court: I am disposed to allow you to proceed and make your records and overrule the motion at this time, pro forma, but with the understanding that the Court will take the questions of the case up in the order in which they are presented and determine them in future. I think it will be conducive to the interests of all parties to have your record perfected. The motion by the defendants is therefore denied at this time with an exception to the defendants.

Q. State your name.

Mr. Bartlett: At this time we object to the introduction of any testimony for the reasons and on the grounds urged in the motion to dismiss.

110 The Court: Same ruling.

Mr. Bartlett: To the offer of those proceedings under this last stipulation starting with petition of Blackman concerning Drainage Ditch Nos. 1 and 2, the defendants offer no objection. As to the offer of the proceedings of Drainage Ditch No. 1 and Drainage Ditch No. 2, the defendants object to the offer for the reason the proceedings are incompetent and irrelevant to the issues in this case. The same touching and concerning a project not here in controversy, the controversy here being an attempt to enjoin further proceedings of the Board of County Commissioners relative to Drainage Ditch Nos. 1 and 2. For the further reason that the offer does not present a federal question nor a matter subject to inquiry before this court in these proceedings, and all offers of instruments up to the establishment of the ditch not being the best evidence.

The Court: It will be received subject to objection.

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111 Exhibit "C"

C. M. BASSETT, Assistant Engineer of the Great Northern, on the stand, examined by Mr. Judge.

Mr. Judge: State the substance of that conversation.

Mr. Bartlett: Objected to as not binding on the defendant Commissioners.

The Court: Objection overruled.

A. We have two bridges within the area and the said Bridge 150.7 that that bridge was about the right size. The bridge 146.0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures. He figured on the amount saved by shortening of the bridge.

Mr. Bartlett: At this time, if the Court please, the defendant objects and asks that the question be stricken, and objects to the testimony of this witness on behalf of the plaintiff, going to the proposition as to whether or not the plaintiffs are benefited or not by the drainage project, for the reason the

same is incompetent, irrelevant and immaterial to the issues in the case, for the further reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction of the subject matter in these proceedings and proceeded with the construction reconstruction and the repair of the ditch in question. For the further reason that this Court has no original jurisdiction of the bill in equity to reject the method pursued by the Board of County Commissioners of Minnehaha County in the construction, reconstruction and repair of this ditch, and that the plaintiffs on the complaints herein have a plain, adequate and speedy remedy
112 at law by appeal from the equalization arising from proceedings taken by the Board of County Commissioners.

For the further reason that it calls for evidence of the facts the determination of which is in the exclusive jurisdiction of the Board of County Commissioners and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action without any allegation or proof of fraud or arbitrary action on the part of that tribunal. Is not within the issues of the case and not a proper subject of inquiry by these collateral proceedings and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these proceedings attacking the question of whether or not they are or are not benefited by the ditch proceedings?

The Court: Yes. The motion is denied. The testimony is received subject to objection.

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113 Exhibit "D"

(At the close of plaintiff's case)

Mr. Bartlett: At this time, Your Honor, at the close of plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these cases and set aside the restraining order heretofore issued, for all the reasons and upon all the grounds urged in the motion made by the defendants at the beginning of these cases.

And for the further reason that the record now shows that notice of opportunity to be heard upon the amount or propor-

tion of benefits these plaintiffs have received and the amount or proportion of assessment that will be made against their property for such benefits has been given, and that all the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessments to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases based upon their judgment of values and benefits conferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment, which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason that the record now shows the Board of County Commissioners of Minnehaha County
114 charged by the law of this state with the execution of the drainage ditch law has jurisdiction to proceed in respect to the property within such drainage area, including the property of these plaintiffs in these actions. And if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs and others, and the record does not indicate upon its face any departure from the requirements of the statute. Therefore this Court cannot inquire into these collateral proceedings and the same are not issues presenting federal questions.

The Court: The motion is denied pro forma, without prejudice to its renewal at the close of all the testimony.

Endorsed: Filed in the District Court on Jan. 31, 1922, at 10 A. M.

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116 (Order permitting amendment to bill of complaint.)

The above entitled matter coming on for hearing this 31st day of January, 1922, at 10 o'clock A. M., upon the order heretofore issued to defendants and intervening defendants

to show cause why plaintiff should not be permitted to amend the bill herein to conform to the proof by adding to Paragraph XV of said bill the following:

117 "That the equalization of benefits of 3,369.51 units out of a total number of units of 32,549.62, amounting in dollars and cents to approximately fifty-one thousand dollars ($51,000.00) sought to be made by the Board of County Commissioners of Minnehaha County, South Dakota, against the property of plaintiff, as above set forth, is wholly arbitrary, unjust, illegal and discriminatory and was made by the Board of County Commissioners without any reasonable or rational basis therefor, and upon a purely arbitrary and speculative basis, and is not in proportion to any benefit which the property of plaintiff has received or ever can receive by the rebuilding of the spillway and the cleaning out, repairing and maintaining of Drainage Ditches No. 1 and No. 2, as herein set forth; that the property of plaintiff has not been and never can be benefitted by the re-building of the spillway and the cleaning out, repairing and maintaining of Drainage Ditches No. 1 and No. 2, as herein set forth, to the extent of fifty-one thousand dollars ($51,000.00), or to any extent whatever, and that the assessment sought to be collected from plaintiff above set forth is out of all proportion to the assessment sought to be made upon the agricultural lands north of the city of Sioux Falls, for the benefit of which the said Drainage ditches No. 1 and No. 2 were originally built; that the said assessment is so arbitrary and discriminatory against the property of plaintiff as to deprive plaintiff of its property without due process of law, and that it deprives plaintiff of the equal protection of the laws."

Plaintiff appearing by its solicitor H. E. Judge, defendants appearing by their solicitor, E. O. Jones, and intervening defendants appearing by their attorneys, Porter & Bartlett, and the court being fully advised in the premises, and it appearing to the court that upon the trial of said action evi-
118 dence was offered and received and from all parties to said action relative to the issue proposed to be raised by said amendment, and that in the furtherance of justice said amendment should be permitted.

Now Therefore, it is hereby Ordered that the motion to amend plaintiff's bill of complaint be and the same is hereby granted; that the amendment be made and filed nunc pro tunc as of the date of the trial of said action on the 15th day of December 1921; that the amendment be made by attaching to the original bill of complaint a copy of the amendment and

making it a part of the original bill; that the bill as amended need not be re-written in full; and that the answers of the defendants and intervening defendants heretofore filed shall stand as answers to the bill as amended.

And the defendants and intervening defendats having asked permission to submit further evidence upon the issue set out out in the amendment, it is further Ordered, that they may do so at any time within 10 days from the date hereof upon two days' notice to solicitor for plaintiff.

Done at Sioux Falls, in said District, this 31st day of January, 1922.

By the Court:

JAS. D. ELLIOTT

(Seal of Court) Judge.

Attest:

Jerry Carleton
Clerk.

Endorsed: Filed in the District Court on Jan. 31, 1922, at 2. A. M.

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120 (Exceptions of defendants to order allowing amendment to bill of complaint.)

January 31, 1922.

Come now the defendants, by their attorney, E. O. Jones, Esq., and the Intervening Defendants, by their attorney, N. B. Bartlett, Esq., and except to the Order permitting the amendment to the Bill to conform to the proof, which exception is allowed by the Court.

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122 (Amendment to Bill of Complaint.)

Now comes the plaintiff and by leave of the court amends its bill by adding to Paragraph XV. of said bill, the following:

"That the equalization of benefits of 5,369.51 units out of a total number of units of 32,549.62, amounting in dollars and cents to approximately fifty-one thousand dollars
123 ($51,000.00) sought to be made by the Board of County Commissioners of Minnehaha County, South Dakota, against the property of plaintiff, as above set forth, is wholly arbitrary, unjust, illegal and discriminatory and was

made by the Board of County Commissioners without any reasonable or rational basis therefor, and upon a purely arbitrary and speculative basis, and is not in proportion to any benefit which the property of plaintiff has received or ever can receive by the rebuilding of the spillway and the cleaning out, repairing and maintaining of Drainage Ditches No. 1 and No. 2, as herein set forth; that the property of plaintiff has not been and never can be benefitted by the rebuilding of the spillway and the cleaning out, repairing and maintaining of Drainage Ditches No. 1 and No. 2, as herein set forth, to the extent of fifty-one thousand dollars ($51,000.00), or to any extent whatever, and that the assessment sought to be collected from plaintiff above set forth is out of all proportion to the assessment sought to be made upon the agricultural lands north of the city of Sioux Falls, for the benefit of which the said Drainage Ditches No. 1 and No. 2 were originally built; that the said assessment is so arbitrary and discriminatory against the property of plaintiff as to deprive plaintiff of its property without due process of law, and that it deprives plaintiff of the equal protection of the laws."

H. E. JUDGE,
Solicitor for Plaintiff.

Endorsed: Filed in the District Court on January 31, 1922, Nunc Pro Tunc as of December 15th, 1921.

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125 (Opinion of the District Court.)

James D. Elliott, District Judge.

United States District Court, District of South Dakota.
Sioux Falls, S. Dak., Feb. 17th, 1922.

Chicago, Rock Island & Pacific Railway Company, a corporation, Plaintiff,
No. 98 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, Milwaukee & St. Paul Railway Company, a corporation, Plaintiff,
No. 99 S. D. vs. In Equity
A. G. Risty, Et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation, Plaintiff,
No. 100 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Northern States Power Company, a Corporation, Plaintiff,
No. 101 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

City of Sioux Falls, a Municipal Corporation, Plaintiff,
126 No. 102 S. D. vs. In Equity.
A. G. Risty, et al., Defendants

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Great Northern Railway Company, a Corporation, Plaintiff,
No. 103 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

C. O. Bailey, Esq., Sioux Falls, S. D. and others, Counsel for Plaintiffs.

Messrs. Porter & Bartlett, and C. O. Jones, Esq., Sioux Falls, S. D., Counsel for Defendants.

Gentlemen:—

I have finally disposed of the questions presented in the various drainage ditch cases, consolidated for the purpose of trial, and which were tried and submitted upon single record.

The question of the constitutionality of the South Dakota drainage statute is pleaded by each plaintiff, and upon this issue, the interests of the plaintiffs in all these suits are identical. It is urged by the plaintiffs in the various suits that the entire South Dakota drainage statute is unconstitutional for the reason that it is in conflict with the Fourteenth Amendment of the Constitution of the United States.
127 Plaintiffs call the Court's attention to the provision of the Fourteenth Amendment that prevents the taking of property "Without due process of law."

If the South Dakota statute does not give the person whose land is to be assessed for the drainage of agricultural lands his "day in court", then there is no "Due process of law." I find upon investigation of the various drainage ditch statutes that almost universally the provision is made for the organization at the inception of the proceeding of a drainage district, with boundaries defined organized after notice to all property owners within the district, and endowed by statute with certain powers consistent with the purpose for which the district is organized. I also note that ordinarily, where no provision is made for the formation of a drainage district, as is the case in this state, provisions are usually made for the notification of the property owners whose interests are supposed to be included in the drainage district, and for the giving to them of an opportunity to be heard in respect to the question of the practicability or feasibility of the drainage proposition, and whether or not the benefits will exceed the cost, and whether or not the particular lands of the owner, shall be included within the drainage district and assessed its pro-rata share of the benefits.

It is urged by the plaintiffs, and must be conceded, that in this regard the South Dakota statute differs from the drainage statutes of most other states. Section 8459, Revised Statutes of South Dakota, provides that a petition for proposed drainage may be filed with the Board of County Commissioners. This is the first step in the proceeding.
128 This petition is only required to set forth the necessity for the drainage, a description of the route, its initial and terminal points, and its general course, or of its exact course in whole or in part, and a general statement of the territory likely to be affected thereby.

Under this statute petitioners are not required to describe the specific tracts of land to be included within the drainage area, or which will be affected thereby or assessed therefor. Neither is it necessary to give the names of the owners of the property. The statute requires only a "general statement" as to the extent of the territory affected.

Section 8461 of said Revised Statutes, provides that the Board shall fix a time and place for the hearing of the petition and shall give notice by publication at least once each week for two consecutive weeks in a newspaper in the county, and by posting notices near the route of the proposed drainage. It also provides that such notice shall describe the route of the proposed drainage, and the tract of country likely to be affected thereby, in general terms, the separate tracts of land through which the proposed drainage will pass, and give the names of the owners thereof as appears from the records in the office of the Register of Deeds on the date of the filing of the petition. It is further provided that such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed.

129 Plaintiffs note that this statute, except as to property owners through whose property the proposed drainage will pass, provides only this general notice, and especially complain that it gives no property owner any notice that his particular tract of land is included among the lands affected by the proposed drainage, and insist that the notice is broad enough to take in each and every tract of land included within the boundaries of the county in which the drainage project is situated.

It is true that, other than this general notice, there is no notice whatever given to the property owner that his particular land is affected by the drainage proposition, or that he has any interest in it, or will be mulcted in assessment for benefits by reason thereof. He receives no summons or other notice, either by personal service or by mail. He has, however, the general notice given in the published summons by the Commissioners to "All persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed."

By Section 8461 of the said Revised Statutes, the County Commissioners pass upon the petition at the time named in

the summons and notice, and if they find it feasible to establish the drainage, no provision is made for any other notice to any property owner, unless it should be found necessary to change the initial or terminal points so that the drainage will pass through other lands than those described in the original notice, or to increase the width of the lands to be taken for the proposed drainage, in which case the Board must give the owners of such lands notice. There is
130 no provision, however, for any notice to any property owner after the drainage ditch is established.

The Board may then proceed without further notice, to its construction. It may incur construction expense before taking any proceedings towards making an assessment for the payment of the costs, or it may before doing the work, estimate the costs and make an apportionment of benefits upon which the assessment may subsequently be spread by the County Auditor.

Section 8463 of said Revised Statutes authorizes the said County Commissioners, after establishing the drainage, to fix the proportion of benefits of the proposed drainage among the lands affected, and also appoint a time and place for equalizing the same. It is then provided that notice of such equalization of proportion of benefits shall be given by publication for two weeks. It is provided that this notice must give a description of each tract of land affected by the proposed drainage, and the names of the owners as appears from the records of the office of the Register of Deeds. It is further provided that the lands to be charged with benefits include all pieces of property that, in the judgment of the Board of County Commissioners are benefitted by the drainage proposition. At this hearing the Board fixes the proportion of benefits for each tract of land, taking any particular tract as a unit, and also fixes the benefit which any railroad company may obtain for its property by such construction and equalizes it together with the proportion of the bene-
131 fits to tracts of land. This statute seems to provide for this hearing for fixing the proportion of the benefits before the ditch is constructed and before it is known what will be the actual amount of money expended. This hearing may be delayed until after the ditch has been built. It also provides that in event there is further expense incurred, or if for any reason, parties assessed do not pay the tax, a new proportion of benefits shall be fixed and new assessments made.

At this hearing the owners of the lands alleged to be benefitted have notice, have the right to appear and contest the amount of the benefits upon their lands, and may even urge that no benefits are derived. From this assessment there is a provision granting an appeal to the Circuit Court of the County in which the lands are situated, in which the proportional benefit may be an issue, and the owner of the land, upon such appeal, may contest the fact that there are any benefits to the land in question. The law further provides for an appeal from the determination of such issue in the Circuit Court to the Supreme Court of the State.

After such proportional benefits are determined the County Auditor spreads the tax and it then becomes a lien upon the property benefitted.

This brief statement of the provisions of the statute, not at all complete, but in a general way outlines the general powers of the Board and the method of the establishment of the ditch, and the various steps up to the spreading of the tax against the lands benefitted.

132 These proceedings are peculiarly limited to the drainage of agricultural lands, because the Constitution of the State of South Dakota provides that:

"The drainage of agricultural lands is especially declared to be a public purpose and the Legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest corporate authorities thereof and the corporate authorities of counties, townships and municipalities, with powers to constitute levees, drains and ditches * * * * * by special assessments upon the property benefitted thereby according to the benefits received."

Pursuant to this provision of the Constitution, the Legislature of the State has provided for the drainage of agricultural lands, but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands "for any public use". Without repetition, and calling attention now to the reasons urged by the plaintiffs sustaining the unconstitutionality of this statute enacted for the purpose of draining agricultural lands, and considering the objections urged in various forms by the different plaintiffs, we find that all of the objections center about the criticism that no notice is provided the owners of lands affected by the drainage ditch, except the general notice, and in fact, no personal notice

until the date fixed by the Board for the equalization of proportional assessments for the various tracts of land
133 benefitted by the drainage. It will be noted that the Legislature has provided that no tax can become effective, no assessment can be made, until the benefits have been ascertained and proportioned, and before this can be done a definite day must be named by the Board and the various land owners are given notice.

The question resolves itself into one of whether or not this hearing after notice, with the right of appeal, constitutes "a day in Court" to the various land owners. I have reviewed the authorities submitted by plaintiffs and I am frank to confess that the statutes of this state do not provide for the description of the lands alleged to be benefitted by the ditch, or the owners of the lands, or that notice shall be given to such owners, or that the owners shall appear and show cause, if any they have, why the ditch is not practicable or should be established, or have the opportunity to show that the cost would be greater than the benefits, or would be confiscatory, and yet, I am satisfied that the courts of the various states and the Supreme Court of the United States have recognized the power of the Legislature to provide the method of the levying of this tax against the lands benefitted by a drainage ditch, and have held that a law that provides for notice and an appearance and the right to contest the amount of the tax, and to contest the right to tax at all, with the right of appeal therefrom, if given to the land owner prior to the time that a tax is levied and becomes effective, is "due process of law."

I was impressed upon the oral argument with counsel's reference to the decision in the North Dakota case, Soliah vs. Heskin, etc., 222 U. S. 522. Counsel urged that the law of North Dakota, very similar to ours, was sustained because it provided for a notice at the time of the establishment of the ditch. Reference to this opinion demonstrates that the Court held as follows:

"Neither does that Amendment invalidate an act authorizing an appointed Board to determine whether a proposed drain will be a public benefit and create a drainage district consisting of land which it decides will be benefitted by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property.

(Underscoring is mine.)

Under the South Dakota statute, applying this rule as announced in the North Dakota case, clearly, the notice is provided and an opportunity to be heard is afforded the land owner before the assessment becomes a lien upon his property, in the drainage of agricultural lands.

Louisiana has held that:

"Whenever by the rules of the state or by state authority, a tax assessment, servitude or other burden is imposed upon property for the public use, * * * * * * * * and those
134 laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person of such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without 'due process of law.' " Davidson vs. New Orleans, 96 U. S. 97.

Massachusetts has held that:

"If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." Spencer vs. Merchant, 125 U. S. 578.

Construing the statutes of the State of Missouri, it was held that:

"It is granted that the land owners were not afforded an opportunity to be heard in respect to the value of their land. While no hearing is given when the lands are appraised a hearing is given when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice when owners aggrieved by the valuation may have a full hearing upon that question. This is due process of law." Embree vs. K. C. & L. Road Dist. 240 U. S. 242.

The drainage statute of Michigan was considered in re Roberts vs. Smith, 72 N. W. ....., and also in Gillette vs. McLaughlin, 37 N. W. 551, and in Smith vs. Carlo, 72 N. W.
22. In these cases the same objections were made to
135 the constitutionality of the law that are urged by the plaintiffs here, and especially that the persons who did not own lands traversed by the drain, but who are within the assessment district, have no opportunity to be heard upon the necessity for laying the drain. And, further, that persons within the assessment district are entitled, under the consti-

tution, to a hearing upon the question of the public necessity for the drain. These contentions were denied in these cases, the law held constitutional, and a full discussion of the questions is to be found in these cases and the cases therein cited.

The Michigan statute is construed again in re Voight vs. Detroit, 82 N. W. 253, and on appeal, 184 U. S. 115, in which it was urged that no provision is made for a notice to property owners of the time and place of hearing upon either the question of fixing the taxing district or the amount of the award to be spread thereon. This, it is claimed, leads to taking property without due process of law, and therefore the law is unconstitutional. It was claimed in this case, by counsel, that the complainant was entitled to notice of the hearing relating to the establishment of the assessment district, and of the amount of the total assessment, and because the statute did not provide for these notices it was unconstitutional. It was held in this case that this position could not be maintained.

"The provision of law by which, when the proceeding has reached the stage where it is proposed to levy the tax, a notice must be served on the property owner, was held sufficient to avoid the constitutional objection, notwithstanding no
136 notice is required in respect to the creation of the district or the determination of the aggregate amount of the tax to be collected.

In re Paulson vs. Portland, 149 U. S. 30 it is held:

"It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question, What proportion of tax shall be assessed upon his land, there is no taking of his property without due process of law."

I repeat that under the South Dakota statute there is ample provision for notice to every land owner, and an opportunity given to be present at the hearing, at which time and place he may assert all objections against the validity and justice of the proposed charge upon his property before the tax is levied, and carried by the County Auditor as such on the books of his office and made a lien upon the property. It follows that, in my judgment, the South Dakota [statutes], enacted in the light of that provision of the Constitution of the State providing for the drainage of agricultural lands, is constitutional.

The case made by the bills filed by the plaintiffs in these various actions involve a real and substantial question under the Constitution of the United States. The amount involved in each case is greatly in excess of Three Thousand Dollars, exclusive of interest and costs. On the question of the jurisdiction of this Court, I am of the opinion that each
137 plaintiff states a case in his bill plainly cognizable in this court. All of the plaintiffs except the City of Sioux Falls allege diversity of citizenship, in addition to the Constitutional question, and the proper amount involved. I repeat that there can be no question as to the bills involving a real and substantial question under the Constitution of the United States, and in such a case the jurisdiction of this Court extends to every question involved, whether of Federal or State law, and enables the Court to rest its judgment or decree on the decision of such of the questions as in its opinion effectually dispose of the cases. Davis et al. vs. Wallace et al. (Opinion Jan. 9, 1922,.... U. S. .... with cases there cited).

It conclusively appears on the face of these pleadings that there is no speedy or adequate remedy at law. The remedy at law must be a remedy on the law side of the Federal Court, not a remedy in the State Courts of South Dakota. In each of the cases where there is a diversity of citizenship, this Court of Equity will not deny the plaintiff relief because there may be a remedy in the courts of the state, for the reason that the non-resident is not required to subject himself to jurisdiction of the Courts of the State in order to obtain relief. U. S. Life Ins. Co. vs. Cable, 95 Fed. 761.

In neither of the cases at bar is there a remedy at law on the law side of the Federal Court. If plaintiffs, or either of them are compelled to pay this tax, no action would lie on the law side of the Court that would give them relief. No action on the law side of the Court would protect them, or either of them, from future assessments and future responsibilities.

There is the further issue presented on the face of the bills, that for the reasons therein stated, no Drainage Ditch No. 1 and 2, under which it is pretended this assessment is made, was ever established. That this is simply a pretense for the maintenance and repair of the ditches that had been theretofore established, and that the steps that have been taken by the County Commissioners are without authority of law. In substance, that the Board of County Commissioners are tres-

passers, acting with no right or color of right. That insofar as there is an attempt to assess benefits to the property of the plaintiffs, or other property in the City of Sioux Falls, the proceedings are entirely void. That as to each of the plaintiffs the assessment of benefits made is arbitrary, unjust, illegal and void. This is the basis of the claim that the assessment is such as to result in the property of the plaintiffs bearing more than its share of the burden of improvements while such property is in no wise benefitted thereby. That the alleged benefits from this improvement have not been estimated upon these properties with the farm lands according to any standard which will produce approximately correct general results. That the taxes upon the plaintiff's property are upon some fanciful view of future benefits, while the farm
138 property is assessed wholly according to its area and position. That the property of the respective plaintiffs is sought to be burdened for this improvement upon a basis so wholly different from that used for ascertaining the contribution demanded from individual owners of agricultural lands adjacent to the drain, as necessarily to produce manifest inequality. That the plaintiffs are therefore deprived of the protection of the law which must be extended to all.

The determination of these various issues necessarily requires a consideration of the facts as they appear in the record. Fortunately there is practically no dispute as to the facts. The only dispute is as to the legal effect of the acts of the Board of County Commissioners.

What, then, was the situation at and prior to the time that the said Board assumed authority to require the plaintiffs and others in the City of Sioux Falls, to pay for the building of this new spillway, and the repair of the ditches hereinafter referred to? The Sioux River flows from the north, in a southerly direction, west of the City of Sioux Falls, then flows in an easterly direction, south of the main portion of the city, then flows north through the city of Sioux Falls, flowing a distance of some ten miles from a point north of the city where the drainage ditch hereinafter referred to leaves the river, to a point where the drainage ditch empties its waters into the river. The river thus describes a large horse-shoe, the drainage ditch cutting across the open end, practically from the river on one side to the river on the
139 other. Dell Rapids is situated in the Sioux Valley more than twenty miles north of Sioux Falls.

At first there was established Drainage Ditch No. 1, and then Drainage Ditch No. 2. These two ditches extended from a point north of the City of Sioux Falls some distance to a point some fifteen miles north of Sioux Falls, at which point Drainage Ditch No. 2 was intended to take the flood water from the Sioux River and conduct it down its length into and through Drainage Ditch No. 1, to the river north of Sioux Falls, cutting through the hills adjacent to the river, and necessitating the conduct of the water down a fall of more than one hundred feet into the river. Drainage Ditch No. 1 and Drainage Ditch No. 2 were duly constructed under the provisions of the Constitution and laws of the state for the drainage of agricultural lands and were operated for the purpose for which they were constructed. The first petition for said Drainage Ditch No. 1 was filed in 1907, and the petition for Drainage Ditch No. 2 was filed in 1910. Such proceedings were had that these two ditches were constructed down the valley in a southerly direction, near the Sioux River until a point was reached north of the City of Sioux Falls, when the ditch was turned in an easterly direction across to the Sioux River at a point north and east of the City of Sioux Falls. Benefits were assessed and paid by the owners of adjacent lands under the provisions of the statutes of the State of South Dakota to which I have referred. In
140 1915 the force of the waters conducted by these two drainage ditches was so great as to wash out what is called the spillway, through the bluff adjacent to the point where the waters from the ditches entered the river. The ditches in the meantime also became out of repair, and at one point several miles above the City where the ditch approached the river, the water was cutting from the river into the ditch, threatening to turn the entire course of the Sioux River at this point into the ditch, and through the ditch back into the river, leaving the Sioux River from that point and for about twelve miles around to where the ditch flowed into the river, without water. The spillway from the ditch through the bluff down into the river was so unskilfully, inefficiently and unscientifically constructed that it would not stand the force of the water with a fall of one hundred feet into the river. It was washed out, and the bluff being of soil and sand, washed out of the entire depth of the river and began washing back through the bluffs, threatening to cut clear back to a point where the water cut through from the river to the ditch, thus taking away from the City of Sioux Falls the benefits of the river, its sewer system and the advantages of the stream, and take the water from the plaintiff, The Northern

States Power Company, that naturally flowed down the river except for the interference by this drainage ditch. And in the cutting into this bluff also threatened to cut into the gravel bed in which the water supply of the City is located, a few miles west of it, and thus drain and destroy and take away from the City of Sioux Falls, its water supply. This was the situation in 1916.

This situation presented no question of the
141 drainage of agricultural lands. The people who had been responsible for the establishment of these two drainage ditches and the conduct of the water down through the hill to the river below because of the inefficient manner in which the spillway had been constructed, had caused all of the trouble. The thing that confronted the Board of County Commissioners at that time, having charge of these two drainage districts, was the maintenance of the ditches and of the spillway which was a part of the ditch that had already been constructed. In the construction of these ditches no suggestion had ever been made that the City of Sioux Falls, all lying entirely south of the districts drained, was in any manner interested in the drainage, or that there could be any benefits assessed to such city or any property owner thereof. The situation that confronted them was not drainage of agricultural lands, it was the maintenance of the ditches that had been established by them, and the prevention of the dangers threatened by the water that they were conducting down through these ditches, through this hill, into the river. They might have taken their chanses upon the damages that their acts were responsible for, and let the river cut down through the ditch that they had constructed and turned the course of the river there and taken the water away from the City of Sioux Falls entirely, and exhausted and destroyed the City's water supply, and destroyed the power of the plaintiff, the Northern States Power Company, by taking the water from the stream at the point where the power plant is located, without in any way endangering the agricultural lands along this ditch, except so much of it as would be
142 washed away in forming this new bed of the river. I apprehended that we may reasonably find from the evidence here that such a cut-off in the river would be to the advantage of the land owners and prevent floods, so that it was not the drainage of the lands that was bothering the Commissioners, it was not the purpose to drain agricultural lands that impelled the Commissioners to act; the thing that impelled them to give this situation any consideration was the dangers that were threatened by reason of their having con-

structed these two ditches, and an effort to stop the ravages of the water they were conducting down there, by the construction of a substantial, adequate spillway. It was also necessary for them, in order to stop this threatened danger, to stop the ravages of the water at the point where it was cutting into their ditch. Certainly, this condition never could have existed if they had never built the ditch. They were responsible for it and it was their duty to maintain the ditch and to stop the ravages of the water cutting into it and through it.

This was one of the questions that they had before them, one of the problems that they had to solve, and they did proceed to construct this spillway in a substantial way and to dike, and with cement to hold the water in the stream at the place where it was cutting into the ditch. The statutes of the State of South Dakota specifically provide the duty and the method for the maintenance of these ditches. Section 8470 of the said Revised Statutes, provides as follows:

"Assessments for maintenance. For the cleaning and
143 maintenance of any drainage ditch established under the provisions of this article, assessments may be made upon the land owners affected, in the proportion determined for such drainage, at any time, upon the petition of any person setting forth the necessity therefor, and after due inspection by the Board of County Commissioners."

When this river cut through into the ditch, when the ditch became clogged in places and was not wide enough in others, when the spillway washed out by the force of the water they were conducting down the ditch, and the cutting of the bluff began and large areas of land were being washed away, and the other dangers were threatened, there was only one proposition presented to the Commissioners, and that was one of maintenance; was one of taking care of the water that they were conducting down these two ditches, No. 1 and No. 2.

Instead of proceeding frankly to maintain the ditches they had established in the manner provided by statute; instead of carrying out the obligations they had assumed when they brought the water down through these ditches, and attempted to deliver it through this bluff into the river; instead of proceeding regularly under this statute to do that which it was their duty to do; instead of performing the obligation that they had assumed when they established the ditches, that of maintaining them, they proceeded to act upon the assumption that because they had conducted the water down into these

ditches, and because of the inefficient manner in which
144 they had constructed the ditches and built the spillway, and all of these dangers were threatened, therefore, the plaintiffs, and others in Sioux Falls, were necessarily to be damaged. And, although a proper maintenence of these two ditches, No. 1 and No. 2, would stop the damage, would prevent any danger, the Commissioners evidently reasoned that because the plaintiffs and others in Sioux Falls were in danger, they must pay for the repair of these ditches. That could not be done by simply saying the ditches shall be repaired and the City of Sioux Falls, the plaintiffs, and others, shall pay for it, or pay a part of it, and therefore, they proceeded to do indirectly what it was conceded they could not do directly. In other words, they then began to look around and see what they would do in the way of taking care of the water and stopping these dangers.

At first it was proposed to change the spillway and conduct the water down in a southerly direction, through a slough or lake, into the river west of the City, and save the great fall that is involved at the point where the water enters the river from the spillway northeast of the city.

This was abandoned and they finally then pretended to act under a statute authorizing the abandonment of ditches. As a matter of fact there was no abandonment in good faith. No attempt to abandon the ditches. In fact, the reading of the resolution shows it was simply that they abandoned the spillway. That they filed a petition which was headed, "To reconstruct and improve Drainage Ditches No. 1 and No. 2, Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by assessment upon the property, persons and corporations benefitted thereby."

This petition was filed in July, 1916, with the Board of County Commissioners. There had never been an abandonment of Ditch No. 1 and Ditch No. 2. There had been a pretended abandonment of the spillway. But the Commissioners proceeded then to construct a proper spillway on the identical location of the old one. In other words, no change whatever was made in the two ditches, No. 1 and No. 2, except to properly construct an efficient, adequate, substantial spillway, and prevent the river cutting from its bed into the ditch, cleaning out the ditch and repairing it, changing the gates at the head of the ditch where the flood waters were taken from the river.

Upon this petition, for this purpose, the Board of Commissioners assumed authority and power to re-christen this Ditch No. and Ditch No. 2, and call it Ditch No. 1 and 2, and for the purpose of making these repairs and maintaining the old ditches under the new name, proceeded as if no ditch had been established, and as if the Ditches No. 1 and No. 2 were not in existence, and as if no obligation had been assumed by the drainage districts when they diverted the water down through the bluffs to the river, and proceeded to make the repairs and to reach out and say that the various plaintiffs were benefitted. Instead of charging the repairs and maintainence of the ditches to those who were responsible for their construction under the provisions of the statutes above referred to, the Commissioners proceeded to assume
145 the right and authority to constitute a new drainage ditch without the abandonment of the old ditches, with no thought of using new or different drainage in any way, except to maintain them and to perfect that which had been inefficiently constructed, with no thought or purpose except to repair the damage that had already been done, and prevent future damage.

Under these circumstances, I am of the opinion that the Commissioners were acting entirely without authority of law. There is no provision in the statutes of the State of South Dakota for the taking in of any other lands and assessing them, for the maintaining of a ditch after it has been constructed, and the benefits of its building have been assessed.

I am of the opinion that the forming of this new ditch was simply a pretense, and that the plaintiffs' pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed.

I am of the opinion that Section 8489 of said Revised Statutes, in regard to invalid and abandoned proceedings is not applicable to any situation such as existed here. That section has reference to the abandonment of a ditch that has been enjoined, vacated, set aside or declared void, and specifically provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expenses paid on the old ditch, and give credit for any payment
146 made upon the old ditch by people benefitted. No such proceeding was attempted to be followed in this case. The proceedings establishing old ditches No. 1 and No.

2 have never been held void, never been set aside, never been abandoned. They are in force today and are rsponsible for the manner in which the ditches were constructed and for any damages that result from their negligence.

Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and maintainence of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage Ditch No. 1 and 2 was ever establised and has no existence.

I am of opinion that the proceedings of the Board of Commissioners in the repair and [maintainence] of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the City of Sioux Falls, are void. Entertaining this view it follows that plaintiffs' prayer for an injunction should be granted.

I may suggest in conclusion, however, that even if the Court had found that Drainage District No. 1 and 2, was legally constituted, and that the Board of County Commissioners had the right to extend the benefits to property within the City of Sioux Falls, the proofs overwhelmingly bring the plaintiffs within the rule recently expressed in re Thomas et al. v. Kansas City Southern Railway Co., et al. (De-
147 cember term A. D. 1921,.....Fed.....) in that the taxation that is imposed upon each of the plaintiffs is a much higher rate, and upon a different basis, than the tax upon land lying within the district. As a matter of fact no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiffs' property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. Taking, for instance, the tax upon one of the plaintiffs, the City of Sioux Falls, for its miles of streets in the City of Sioux Falls, with no pretense that there is any method of taxation or measuring a benefit or a gain, that would produce even approximately correct general results, when considered with benefits to the lands in the district. Simply a vague, indefinite generality, indulged in by the engineer and adopted by the Board. Benefits purely fanciful, with no substantial

basis. Take the railroads, different plaintiffs, there is no pretense that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all.

Referring to the testimony showing the manner of making assessments and the amount, in a general way: I think it fairly appears from the record in the case that the contention of the plaintiffs that the attempt to assess the property of these plaintiffs was an afterthought. It, in my judgment, is established that they could not be benefitted, even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the Board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands. The plaintiff, Chicago, Rock Island & Pacific Railway Company, is simply arbitrarily assessed Eight Thousand Dollars, in raising a total of Three Hundred Thousand Dollars. The Northern States Power Company was assessed Fifty Thousand Dollars, one fifth of the entire expense although there is included in the pretended district agricultural lands something like twenty miles in length and several miles in width. The injustice of this is apparent when it is noted that the record disclosed that it was located upon the rapids of the Sioux River, in the City of Sioux Falls, had been located there for many years. It was, therefore, entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business.

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The injury that was to be remedied by this improvement was one that had been caused by Drainage Ditch No. 1 and Drainage Ditch No. 2, one that could not have existed but for the establishment of those ditches. The duty to maintain these ditches involved the duty to repair the break from the banks of the river, and the duty to pre-

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vent the taking of the water from the river, that would, or should, naturally flow therein to plaintiff's benefit.

Even if there had been a valid establishment of a drainage ditch at the time and place in controversy, and even if the Board of County Commissioners had jurisdiction, there was an entire failure to present any evidence upon which any benefit could possibly be predicated against this plaintiff. The engineer who pretended to work out the hypothetical benefit admitted that he was not a hydro-electric engineer, and therefore, not able to analyze and state the result of the different conditions of the water in the river. The suggestion applies with special force to the status of this plaintiff that the amount of benefits were fanciful, exorbitant and arbitrary, with no possible appreciation in the value of its property as a result of this improvement, and it is self-evident that upon no basis that can be used and applied to all of the property tributary to this ditch, could Thirty Thousand Dollars be ascertained as the reasonable contribution to be demanded of this particular plaintiff.

These suggestions are applicable in a general way to the attempted assessment of the property of all of the plaintiffs, and I am of the opinion that the plaintiffs have all properly invoked the aid of this Court from an arbritary, unwarranted exercise of power by the Board of County Commissioners of Minnehaha County, who, without due process of law or compensation, threatened to deprive them, and each of them, of their property. What I have said, I think, should apply with equal force to all property in the City of Sioux Falls, attempted to be assessed by the Board of Commissioners for the maintenance of this ditch under the name of a new ditch. The responsibility for the maintenance of this ditch, for the repair of the break from the river into the ditch, and the change of the head gates, and the cleaning out of the ditch, and the repair and reconstruction of the spillway, was, and is, upon the two drainage districts responsible for their construction and maintenance, and the amount expended, some $250,000.00, which, with interest, now amounts to $300,000.00 or more, is a charge upon those districts to be assessed and made a lien upon the property within the districts, assessed in the proportion and collected in the manner, provided by the statutes of the State of South Dakota for the maintenance of drainage ditches.

There is another and further suggestion. I am of the opinion that this reconstruction of the old spillway without change

of location, the repair of the break from the river into the ditch, the cleaning of the ditch, the change of the head gates where the flood waters are taken from the river, everything that was done under this pretended establishment of a new ditch, could not be viewed in the same light or as serving the same purpose as the construction of the original
151 ditches, because the thing that caused the Board of Commissioners to take any action with reference to the condition that then existed was the danger that existed because of the conduct of the water down down through these two drainage ditches to and through this spillway. The danger that was threatened was not that the agricultural lands would not be drained, but that immense damage was threatened, that the course of the river was to be diverted to this cut-off, that great areas of land were threatened to be cut away by this river one hundred feet deep, that the water supply of the City was threatened to be taken away because of this drainage ditch and this imperfect spillway. Because the water was to be taken from the river and all of the benefits of the river for several miles, through and around the City of Sioux Falls would be destroyed. The power of the Northern States Power Company would be destroyed by taking the water from the river. If it had not been for those conditions, for these threatened dangers, no action would have been taken, the ditches would have continued to function as they had functioned before. If the spillway had been properly constructed originally, and if it had not proven inadequate, there would have been no cause for any action by the Board in the year 1916. Every consideration that impelled action by the Board was some phase of the threatened danger by reason of the inadequate and imperfect construction and [maintainence] of these two ditches. Neither of these considerations that influenced the action of the Board had anything to do with draining agricultural lands.

It may be said that to remedy these wrongs constituted a public use, as referred to in the Constitution of the State of South Dakota. Admitting that that is true, we are confronted with the proposition that there has been no legislation conforming with the provisions of the Constitution, authorizing the Legislature to provide for the establishment of drainage ditch districts, and the naming of officers with the powers therein referred to. If, therefore, any claim were made that the Commissioners were acting under this authority, independent of the provision of law with reference to the drainage of

agricultural lands, the answer is that the provision of the Constitution is not self-executing, and that no legislation has been provided carrying this provision of the Constitution into effect.

You may prepare proper orders in each case granting plaintiff an injunction as to all property located in the city of Sioux Falls and all Property not within the old Drainage District No. 1 and Drainage District No. 2. Provided an exception in behalf of the plaintiffs to the order of the Court denying the plea of the unconstitutionality of the drainage statute as applied to agricultural lands and the defendants a general exception to each order.

Yours truly,

JAS. D. ELLIOTT
U. S. District Judge.

152 Endorsed: Filed in the District Court on Feb. 23, 1922, at 4:15 P. M.

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154 (Decree, February 28, 1922.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Northern States Power Company, Plaintiff,
No. 101, S. D. vs. In Equity.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Chanock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

and

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls, National Bank of Sioux Falls, South Dakita, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minneha-

ha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, and W. G. Porter, Intervening Defendants.

This cause came on to be heard at this term and was argued by counsel: and thereupon, upon consideration thereof, it was Ordered, Adjudged And Decreed, as follows, viz: that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Chanock, as County Commissioners of the County of Minnehaha, and state of South
155 Dakota, their agents, servants, employes, attorneys and successors in office, and each and every of them, be and they are hereby forever restrained and enjoined from making any apportionment of benefits upon the following described property situated in the county of Minnehaha, and state of South Dakota, to-wit: Tracts Fifteen (15), Sixteen (16), and Twenty (20) of the Southwest Quarter (S. W.¼) of Section Sixteen (16), in Township One Hundred One (101) North, of Range Forty-nine (49), West of the Fifth Principal Meridian; Tracts Six (6) and Seven (7) of the Northeast Quarter (N. E. ¼) of Section Sixteen (16), in said Township and Range; Lot Four (4) of the Equitable Realty Company Sub-division of the Northeast Quarter (N. E. ¼) of the Northwest Quarter (N. W. ¼) of Section Sixteen (16), in said Township and Range; Lots "B" and "C" of Tract Two (2) of the Northwest Quarter (N. W. ¼) of Section Sixteen (16), in said Township and Range; the hydro-electric plant, dam, property rights, and water rights of the plaintiff, Northern States Power Company, situated upon the above described property, or upon any other property in the city of Sioux Falls, in said county and state; any other property of said plaintiff, Northern States Power Company, situated in said city of Sioux Falls; and any water rights of said plaintiff across Sections Sixteen (16), Twenty-one (21), Twenty-two (22), Twenty-seven (27), Thirty-four (34), Thirty-three (33), Thirty-two (32), Thirty-one (31), Thirty (30), Nineteen (19), Eighteen (18), Seven (7), Six (6) and Five (5), Township One Hundred One (101), Range Forty-nine (49), West of the Fifth Principal Meridian, and across Sections Twenty-five (25) and Twenty-four (24) Township One Hundred One, (101), Range Fifty (50), West of the Fifth Principal Meridian, and across Sections Thirty-two (32), Twenty-nine (29), Twenty (20), Seventeen (17), Eighteen (18), Seven (7), Eight (8), and Five (5), Township One Hundred Two (102), Range Forty-nine (49), West of the
156 Fifth Principal Meridian, and across Sections Thirty-two (32), Twenty-nine (29), Twenty (20), and Seven-

teen (17), Township One Hundred Three (103), Range Forty-nine (49), West of the Fifth Principal Meridian, for the construction of the pillway, dams, retaining gates, ditches, and for all other work done or that may hereafter be done under the supervision of the Board of County Commissioners of Minnehaha County, South Dakota, in the matter of the construction or re-construction, repair, and maintenance of Drainage Ditch No. 1 and Drainage Ditch No. 2, otherwise designated by said County Commisisoners as Drainage Ditches No. 1 and No. 2 and as Drainage Ditch No. 1 and 2, of Minnehaha County, South Dakota, and they and each of them are hereby perpetually restrained and enjoined from making and levying any assessments upon said property, or any part, parcel or portion thereof for the cost of the construction or re-construction repair, and maintenance of the said spillway, dams, retaining gates, ditches, and other work heretofore done or which may be hereafter done, or any part thereof, upon the said Drainage Ditches above referred to, or any of them, and from in any manner including any of said property of the plaintiff, Northern States Power Company, within the territory benefitted by said drainage ditches, or any of them.

And the defendant, Fred E. Ward, as Auditor of the County of Minnehaha, and State of South Dakota, his agents, servants, employes, attorneys, and successors in office are hereby forever restrained and enjoined from making any such apportionment of benefits, or making or levying any such assessment upon any of said property, or from certifying any such assessment to the county treasurer of the said county of Minnehaha, state of South Dakota.

157 And the defendant, J. O. Anderson, as Treasurer of the County of Minnehaha, and State of South Dakota, his agents, servants, employes, attorneys, and successors in office are hereby forever restrained and enjoined from filing any such assessment and from collecting any such assessment against the said property hereinbefore described.

It is further Ordered, Adjudged And Decreed that the plaintiff herein, the Northern States Power Company, have and recover from the defendants and intervening defendants herein, and each of them, its costs and disbursements herein taxed and allowed in the sum of .....
.....dollars ($.....), (The amount thereof to be inserted herein by the clerk of the court after the costs shall have been taxed by him).

Done in open Court, at Sioux Falls, in said Southern Division of the District of South Dakota, on the 28 day of February, 1922.

By the Court:

JAS. D. ELLIOTT,

(Seal of Court) Judge.

Attest:

Jerry Carleton,
Clerk.

To the entry of the foregoing decree, the defendants and the intervening defendants duly and severally excepted, which exceptions are allowed by the court.

Dated February 28, 1922.

JAS. D. ELLIOTT, Judge.

158 Endorsed: Filed in the District Court on Feb. 28, 1922, at 3 P. M.

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159 (Assignment of Errors.)

And now, on this 25" day of August, A. D. 1922, come the defendants, by their Solicitor, Elbert C. Jones and L. E. Waggoner, and the intervening defendants, by their Solicitor, Norman B. Bartlett, and say that the decree entered in the above entitled cause on the 28th day of February, A. D. 1922, is erroneous and unjust to the defendants.

First:

Because plaintiff's bill of complaint herein does not set forth any matter of equity entitling the plaintiff to the relief prayed for and it affirmatively appears from said
160 bill of complaint that the plaintiff has a plain, adequate and complete remedy at law.

Second:

Because the bill of complaint does not set forth any matters of equity in addition to the pretended constitutional question, or any special circumstances to bring the case under some recognized head of equity jurisdiction, and it is necessary to allege and prove some special circumstances in addition to the constitutional question, and thereby bring the case under some recognized head of equity jurisdiction, in order that this Court shall have jurisdiction of said matters.

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Third:

Because the bill of complaint fails to set forth facts sufficient from which this Court can infer or presume that there will result a multiplicity of suits, irreparable injury, or a cloud cast upon the title of its property, and it is necessary to specifically allege facts from which this Court can infer that either a multiplicity of suits, irreparable injury or a cloud will be cast upon the title of its property as a direct result of the action that plaintiff is attempting to enjoin, and such allegations must be specific allegations of fact, and not conclusion.

Fourth:

Because it affirmatively appears from the fact of plaintiff's bill of complaint, and the record herein, that there is no jurisdictional amount in controversy in this case at this time, and can be none, and that, therefore, this action is prematurely brought, for the reason that no assessment, levy or tax has been, in fact, made, assessed, equalized, fixed or levied against the property of the plaintiff, or at all.

Fifth:

Because it affirmatively appears from plaintiff's bill
161 of complaint, and the record herein, that the State Tribunal having jurisdiction of said drainage ditch proceedings, was enjoined by this proceeding before such State Tribunal had had an opportunity to perform its statutory duty to determine, equalize, assess, fix or levy the amount of benefit, assessment or tax, if any, chargeable against the property of the plaintiff, and for this Court to maintain jurisdiction before such State Tribunal had performed its full statutory duty, determined, equalized, assessed and fixed the amount of benefit, assessment or tax, was a usurpation of the authority invested in the State Tribunal, and an attempt to substitute this Court for such State Tribunal; and for the further reason that there is no provision of law giving this Court original jurisdiction over said matters.

Sixth:

Because the allegations of plaintiff's bill of complaint herein involve and present for litigation the determination of facts and matters controlled and governed by the drainage statutes of South Dakota, which, by their terms, create and provide a special tribunal with exclusive original jurisdiction to try and determine the questions presented in said bill of complaint, which determinations of said State Tribunal are

final and conclusive upon this Court in this action, for the reason that this Court has no original jurisdiction by a bill in equity, to direct, reject, or control the proceedings and determinations of that tribunal, and thereby take away from that tribunal the power of discretion, and the exercise of its judgment in arriving at a proper determination of the matters before it.

Seventh:

Because until the tribunal created by the drainage statutes of South Dakota has exercised its judgment and discretion in

the determination of questions of fact properly before
162 it, and the necessary steps of procedure have been taken, and it has finally determined, equalized and fixed the proposed tax or assessment, if any, against the plaintiff's property, this Court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, for the reason that until such proposed assessment, tax or servitude has been equalized and fixed and assessed, this action is premature.

Eighth:

Because the undisputed evidence shows that on or about December 4, 1920, an equity suit was instituted in the State Circuit Court, within and for Minnehaha County, South Dakota, the same being a court of general jurisdiction and having jurisdiction over the subject matter therein presented, by one Oluf O. Gilseth, being a person belonging to the same class of persons as the plaintiff herein, whose lands were affected by the construction of Drainage Ditch No. 1 and 2, and against whose lands the proportion of benefits for the construction of said ditch had been proportioned at the same time, upon the same basis, and in like manner and under the same law as the proportion of benefits to the land of this plaintiff, which said action was brought by said Oluf O. Gilseth for himself, and as a representative of the class to which he and this plaintiff belong, and which action was brought against the defendants herein, and was instituted, tried and determined with notice to and knowledge by, approval, acquiescence and consent of this plaintiff, its officers, agents and attorneys, and in which said case the same facts were alleged and relied upon in the bill of complaint of the said Oluf O. Gilseth as are alleged and relied upon by the plaintiff herein in its bill of complaint, and which bill of complaint prayed for the same relief, and which said action came on for

trial, in which trial this plaintiff was entitled to be
163 heard, on the 31st day of January, 1921, and thereafter said State Court entered its judgment and decree dis-

missing said action upon its merits, and denying the plaintiff the right to an injunction against these defendants, which said judgment and decree is now in full force and effect, and which determination is binding upon this plaintiff, and is, therefore, a bar to this action, for the reason that all matters presented by plaintiff's bill of complaint herein are res adjudicata.

Ninth:

Because the uncontradicted evidence in this case shows that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, and upon which the drainage ditch designated as Drainage Ditch No. 1 and 2, was ordered established and constructed, and the notice of hearing said petition given pursuant to law, and the resolution of the Board upon the hearing of said petition establishing said ditch, all contained a description of plaintiff's property, and alleged that the same was affected thereby, and said resolution determined that plaintiff's property so described was affected by said Drainage Ditch No. 1 and 2, which determination, unappealed from, is now final and conclusive upon this plaintiff, and this Court, and, therefore, this Court was unwarranted in determining and decreeing that plaintiff's property is not affected by Drainage Ditch No. 1 and 2, no extrinsic fraud being alleged in plaintiff's bill of complaint.

Tenth:

Because the undisputed evidence in this case shows that the plaintiff's property is receiving some benefit, and that it has not exhausted its statutory remedy for an equalization of such benefits, and its only complaint is that too many units of benefit have been apportioned against its property; and, therefore, this Court has no jurisdiction under its gen-
164 eral equity powers to correct an unequal or unjust assessment, since the statute prescribes a method for reviewing or correcting unequal or unjust assessments.

Eleventh:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was a new project, with plaintiff's property included therein, which finding and jugdment of said Tribunal are binding upon this plaintiff and upon this Court, and can not be attacked in this

collateral action, for the reason that said Tribunal is, by the drainage law of the State of South Dakota, given jurisdiction to determine the nature, kind and character of the proposed drainage, and the description of and the amount of property affected by said drainage project, and having made said findings and judgment, and this plaintiff not having appealed therefrom, said plaintiff is now bound thereby.

Twelfth:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was conducive to the public health, convenience and welfare of the territory described in the petition of the City of Sioux Falls, F. L. Blackman and others, and was necessary and practicable for draining agricultural lands, which findings and judgment of said Tribunal are now binding upon this plaintiff and
165 upon this Court, and cannot be attacked in this collateral action, for the reason that, by the drainage law of the State of South Dakota, the Board of County Commissioners are given authority to determine whether or not a proposed drainage ditch will or will not be conducive to the public health, convenience and welfare of the territory described in the petition therefor, or necessary and practicable for draining agricultural lands; and having found in the affirmative in both instances, and the plaintiff herein not having appealed from such determination, the same is now binding upon this plaintiff and upon this Court.

Thirteenth:

Because no facts have been alleged in plaintiff's bill of complaint constituting extrinsic fraud on the part of the Board of County Commissioners of Minnehaha County, South Dakota, or any one else, in filing the petition of the City of Sioux Falls, F. L. Blackman and others, or in the allegations contained therein, or the resolution or other proceedings on, and prior to, or in the establishment of said drainage ditch designated as "Drainage Ditch No. 1 and 2", on October 3, 1916; and there is no evidence in the record of any extrinsic fraud on behalf of the Board of County Commissioners, or anyone else, in any of said proceedings, and, therefore, the determination of the facts found by said Board in said resolution of October 3, 1916, are now binding and conclusive upon

this plaintiff and upon this Court, and this Court has no right, authority, or jurisdiction to enter upon, attempt to decide, to decide or re-litigate such questions of fact as were previously determined by such special Tribunal.

Fourteenth:

Because the undisputed evidence in this case shows that more than five years have elapsed after this plaintiff
166 had actual knowledge and legal notice of the establishment and construction of Drainage Ditch No. 1 and 2, and during all of said time this plaintiff took no steps to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars ($250,000.00) thereon and plaintiff's bill of complaint wholly fails to make any distinct averments, and none of the evidence tends to excuse this unwarranted delay, and for these reasons this Court should not come to its relief.

Fifteenth:

Because the drainage statutes of South Dakota provide a fixed and determinable basis, method and rule of apportionment of benefits, and, pursuant thereto, the Board of County Commissioners of Minnehaha County, South Dakota, applied such fixed and determinable basis, method and rule of apportionment of benefits, which will probably produce approximately correct general results as to the benefits to plaintiff's property, as well as all other property in the drainage district, and, therefore, such apportionment is not arbitrary, and this Court cannot usurp the power of the Board to equalize the proportion of benefits as provided by
167 said statutes.

Sixteenth:

Because the evidence wholly failed to show that there would result a multiplicity of suits, or irreparable injury, or a cloud cast upon the plaintiff's property, and also failed to show any circumstances to bring the case under some recognized head of equity jurisdiction, and the evidence does show that the plaintiff had a plain, adequate and complete remedy at law.

Seventeenth:

Because all the evidence now shows that there is no jurisdictional amount in controversy in this action, and that, therefore, this action was prematurely brought, in that the apportionment had not been equalized, and no tax had ever been assessed or levied against the plaintiff's

property, or any other property, and that the amount of such tax, if any, and, therefore, the amount in controversy herein, has not been, and cannot be, determined until after such equalization and final assessment has been made, as provided by the law of South Dakota, and the uncontradicted evidence shows that said equalization of the apportionment of benefits was prevented by the temporary restraining order and the final decree in this case.

Eighteenth:

The Court erred in not adjudging and decreeing that on October 3, 1916, Drainage Ditch No. 1 and 2 was duly and legally established by the Board of County Commissioners of Minnehaha County, South Dakota, for a public purpose, including but not limited to the drainage of agricultural lands, for the reason, that the Constitution of the State of South Dakota and Section 8458 of the Revised Code of South Dakota, 1919, provide therefor.

Nineteenth:

The Court erred in not adjudging and decreeing that the proceedings taken by the Board of County Commissioners of Minnehaha County, South Dakota, upon the petition of the City of Sioux Falls, F. L. Blackman and others, filed with the County Auditor on August 3, 1916, and upon which Drainage Ditch No. 1 and 2 was established on October 3, 1916, constituted the establishment of an entirely new drainage proceeding, and gave the Board of County Commissioners jurisdiction to construct such drainage as a new project, for the reason that such petition prayed for the construction of a drainage ditch over the exact line of drainage ditches
168 previously abandoned, and contemplated a more comprehensive and perfect drainage system for the purpose of draining and benefitting additional property, in compliance with and as authorized by Sections 8458, 8476 and 8489 of the Revised Code of South Dakota, 1919, and the undisputed evidence shows the work done consisted of about eight miles of canalizing the river, doubling the capacity of the ditch and outlet, building dikes, dams and controlling works, and an adequate spillway or outlet to said ditch, at a total cost of over Two Hundred Fifty-five Thousand Dollars ($255,000.00), which was more than double the amount of the total assessments for old Drainage Ditch No. 1 and Drainage Ditch No. 2, which was the sum of One Hundred Twenty-seven Thousand, Seven Hundred Six and 10/100 Dollars ($127,706.10).

Twentieth:

The Court erred in not adjudging and decreeing that plaintiff's land was subject to assessment for benefits which it received, if any, under the establishment and construction of Drainage Ditch No. 1 and 2, without regard to whether its lands had been assessed and included within the assessment district of Drainage Ditch No. 1 and Drainage Ditch No. 2, or not, for the reason that Drainage Ditch No. 1 and 2, as established on October 3, 1916, was established as a new project upon due and legal notice to the plaintiff, and in the manner provided by the drainage statutes of South Dakota.

Twenty-First:

The Court erred in entering its decree herein in favor of the plaintiff and against the defendants, upon this plaintiff's bill of complaint and the amendment allowed thereto, for the reason that said plaintiff's offer to amend said bill of complaint came too late, and long after plaintiff's attention was called to the fact that its bill contained no allegation
169 of arbitrary acts by objection to the introduction of testimony during the trial, and after the entire case had been tried, argued and submitted, and briefs had been filed twenty days, which amendment injected an entirely new cause of action into the bill of complaint, and to overcome which, the Court refused to receive evidence showing or tending to show that plaintiff's property was receiving a substantial benefit, and that the apportionment was not arbitrary and which amendment, when offered, did not conform to the facts established upon said trial, in that said proposed amendment assumed that the Board of County Commissioners were acting under jurisdiction obtained in the establishment of old Drainage Ditch No. 1 and Drainage Ditch No. 2, and not under the new drainage proceedings designated as "Drainage Ditch No. 1 and 2", as shown by the undisputed evidence; assumed that the equalization of the proportion of benefits had been had and assessment duly made thereon, whereas, all the evidence shows that merely a tentative fixing of the proportion of benefits had been made; assumed that the property of plaintiff had not been, and never could be, benefited by old Drainage Ditch No. 1 and Drainage Ditch No. 2 while the uncontradicted evidence shows a substantial benefit from the construction of Drainage Ditch No. 1 and 2; assumed that the assessment for benefits had been made, while the uncontradicted evidence shows that no equalization or assessment of benefits had ever been made, and cannot be made until after the proportion of benefits has been equalized and finally fixed;

assumed that the acts of the Board in making the so-called assessment were arbitrary, while the evidence shows that no assessment or equalization of benefit has ever been made; and further, said amendment does not attack the drainage law as arbitrary, or the unit provided by law as arbitrary but al-
leges that the acts of the Board in fixing the amount
170 of the benefits to plaintiff's property were arbitrary, speculative and unjust, whereas, all the evidence shows that the Board, with its Engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received by plaintiff's property, using the fixed and determinable basis, method and rule of apportionment provided by the drainage law of South Dakota, and the undisputed evidence further shows on behalf of both parties that some benefit was received by the plaintiff; assumed the amount of the assessment and made an issue as to the amount of benefit, if any, plaintiff received, which matter this Court has no jurisdiction to determine; assumed and made an issue of the inequality of the so-called assessment upon plaintiff's property, and other agricultural land, which issue is within the exclusive jurisdiction of the State Tribunal, and this Court in this action has no jurisdiction to try or determine the same.

Twenty-second:

The Court erred in not adjudging and decreeing that the plaintiff herein is not in a position to question the regularity of the proceedings in the establishment and construction of Drainage Ditch No. 1 and 2, as an independent drainage proceeding, as it, by its verified bill of complaint herein, alleges that the threatened change of the channel of the Big Sioux
River threatened to destroy this Plaintiff's water
171 power obtained from said river at the Falls thereof, and that the work performed upon said ditches prevented the destruction of the water power at the Falls of said River in the City of Sioux Falls, which allegations are fully supported by the evidence in this case; as it, by its officers and agents, had actual knowledge and legal notice of the proceedings taken to establish said drainage; as it, through its officers and agents, saw the work in the course of construction, assisted in the work of construction thereof, by furnishing services and materials used therein, with knowledge that such services and materials were furnished therefor, and were being used in the construction of said drainage, and received compensation for said services and materials so furnished and used; as it, through its officers

and agents, urged and encouraged the Board of County Commissioners to take the action and do the work which was done under such drainage proceedings for its benefit, and as it is now, and has been for more than three years last past, receiving protection and substantial benefits from said drainage construction, with the full knowledge, that there was no manner of paying for such construction except by assessment upon the property benefited, included in which was plaintiff's property, all without protest against the doing of any such work, or the extent or manner thereof, until such work and drainage project had been substantially completed, and until this action was brought to restrain the making of an assessment to pay for the cost of said construction, and, therefore, the plaintiff is now estopped from questioning said proceedings and maintaining this action.

172 Twenty-third:

The judgment and decree herein is not supported by the evidence, and is contrary to law, in that it appears from the undisputed evidence that the outlet to old Drainage Ditch No. 1 was destroyed and abandoned and thereby said ditch abandoned and that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, fully complied with the requirements of the drainage statutes of South Dakota for the establishment of a new drainage, and that thereafter all the statutory requirements were duly and fully followed and pursued, and such proceedings were had that, pursuant to statute, on October 3, 1916, the Board of County Commissioners of Minnehaha County, upon due notice and hearing of said petition, ordered and adjudged the establishment of said drainage as a new project and drainage ditch, and designated it as "Drainage Ditch No. 1 and 2", and further adjudged and decreed that the construction thereof was for a public purpose, and was necessary and practicable for draining agricultural lands, and that the property of this plaintiff was included within the drainage area, and affected
173 thereby, which property was described in the petition, notice, and said resolution and judgment, which resolution and judgment was never appealed from by this plaintiff, or anyone, and is now in full force and effect, and has been for more than six years last past; that there is no evidence at all in the record that the plaintiff has been in any manner prevented from fully presenting its defense, if any, to the allegations and prayer contained in said petition of the City of Sioux Falls, F. L. Blackman, et al, or from fully

trying all the issues therein presented, or that the jurisdiction of the Board of County Commissioners was imposed upon.

And it further appears from the undisputed evidence that an apportionment of benefits has been made for the payment of the costs of construction of said Drainage Ditch No. 1 and 2, and that the law provides, and the County Commissioners applied, after personal inspection, and exercising their best judgment, a fixed and determinable basis method, and rule of apportionment of benefits, which will probably produce approximately correct general results as to the plaintiff's property, as well as all other property in the drainage district; and that no equalization of benefits or assessment has been had thereon, and that no legal charge or servitude has yet been placed upon the property of plaintiff, or anyone else, and that this action is premature.

Twenty-fourth:

The said decree is not sustained by the evidence, but is contrary thereto, in that it appears from the undisputed evidence that Drainage Ditch No. 1 and 2 was established as a new ditch by the Board of County Commissioners of Minnehaha County, South Dakota, on October 3, 1916, included in which drainage district was plaintiff's property, and of which proceedings this plaintiff had knowledge and legal notice for more than six years last past, and has never taken any
174 steps prior to the institution of this action, to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars ($250,000.00) thereon, and has wholly failed to establish any lawful excuse for said unwarranted delay; and that all steps taken by the Board of County Commissioners leading up to and the establishment of said Drainage Ditch No. 1 and 2, were warranted in law, and said Board was lawfully acting under and in conformity with the Constitution and drainage statutes of the State of South Dakota; and that said drainage ditch was petitioned for, and lawfully established for a public use and purpose, and for the purpose of draining agricultural lands; that the apportionment of benefits, as made by the Board of County Commissioners, was made pursuant to and in conformity with the method and rule laid down by the drainage statutes of South Dakota, and after a personal inspection and deliberation by said Board, applied in conformity therewith in such a manner as will probably produce approximately correct general results as to the benefits enjoyed by plaintiff's property, as well as all other property in the

drainage district and that plaintiff's property is enjoying substantially the amount of benefit apportioned to it.

Twenty-fifth:

For all the reasons and errors aforesaid, the Court erred in not entering and rendering a decree in favor of the defendants, and against the plaintiff, dismissing its bill of complaint, and denying the injunction herein, and in not entering its judgment and decree in accordance with the prayer of defendants' answers.

Wherefore, defendants pray that the judgment and decree of said Court be reversed, with directions to enter a decree in favor of the defendants and against the plaintiff, dismissing plaintiff's bill, as prayed for in defendants' answers.

ELBERT O. JONES and
L. E. WAGGONER
Solicitors for Defendants.

NORMAN B. BARTLETT
Solicitors for Intervening Defendants.

Endorsed: Filed in the District Court on Aug. 25, 1922, at 5 P. M.

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176 (Petition for appeal and allowance thereof.)

To The Honorable James D. Elliott, Judge of the United States District Court Within and for the Southern Division of the District of South Dakota:

The above named defendants and intervening defendants feeling themselves aggrieved by the decree made and entered in this case on the 28th day of February A. D. 1922, do hereby appeal from said decree to the Circuit Court of Appeals, for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that their appeal be allowed, and that citation issue, as
177 provided by law, and that a transcript of the record, proceedings and papers, upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Paul, Minnesota, and your petitioners further pray that a

proper order touching the security to be required of them to perfect their appeal is made.

ELBERT O. JONES and
L. E. WAGGONER
NORMAN B. BARTLETT
Solicitors for Defendants and Intervening Defendants.

The foregoing petition granted, and the appeal allowed upon giving bond, conditioned as required by law, in the sum of One Thousand and No/100 Dollars ($1,000.00).

JAS. D. ELLIOTT
Judge of the United States District Court within and for the Southern Division of the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25,1922, at 5 P. M.

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179 Bond On Appeal.

Know All Men By These Presents: That we, A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, as Principals, and the Southern Surety Company of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the Northern States Power Company, appelleee in the above cause, in the sum of One Thousand Dollars ($1,000.00), conditioned that, whereas on the 28th day of February A. D. 1922, in the District Court of the United States, for the Southern Division of the District of South Dakota, in a suit pending in that court wherein the Northern States Power
180 Company was plaintiff, and A. G. Risty, et al, were defendants, and the Minnehaha National Bank of Sioux Falls, South Dakota, et al, were intervening defendants, numbered on the Equity Docket as 101, a decree was rendered against the said A. G. Risty, et al., defendants, and the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, and the said A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, having obtained an appeal to the Circuit Court of Appeals for the Eighth Circuit,

and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation directed to the said Northern States Power Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals, for the Eighth Circuit, to be held in the City of St. Paul, in the State of Minnesota, on the 2nd day of May, A. D. 1923, next.

Now, if the said A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

A. G. RISTY
Signing for all Defendants.

THE MINNEHAHA NATIONAL BANK OF SIOUX FALLS,
H. V. Harlon, V. P.
Signing for all Intervening Defendants.

SOUTHERN SURETY COMPANY OF DES MOINES, IA.
By C. E. Charnock,
Attorney-in-Fact, Surety.

(Corporate Seal Southern Surety Company)

181 State of South Dakota,
County of Minnehaha—ss.

On this 15th day of August, 1922, before me H. B. Charnock, a notary public in and for said County, and State, personally appeared C. T. Charnock, well known to me to be the Attorney-in-fact of the Southern Surety Company, a corporation that is described in and that executed the above and foregoing instrument and duly acknowledged to me that said corporation executed the same.

And I further certify that at the same time the said C. T. Charnock exhibited to me the original certificate of authority issued to said Company by the Commissioner of the State of

South Dakota, and that the following is a true, perfect and complete copy thereof:

STATE OF SOUTH DAKOTA
DEPARTMENT OF INSURANCE,

Renewable Annually.

Office of the Commissioner

Company's Certificate of Authority.

No. 11050

Whereas, The Southern Surety Company, a corporation organized under the Laws of Iowa, has filed in this Office a sworn statement exhibiting its condition of business for the year ending December 31st, 1921, conformable to the requirements of the Laws of this State regulating the business of Insurance, and

Whereas, The said Company has filed in this office a duly certified copy of its charter, with certificate of organization, and has complied with all the requirements of the Insurance Laws aforesaid;

Now Therefore, I, W. N. Van Camp, Commissioner of Insurance of the State of South Dakota, pursuant to the provisions of said laws do hereby certify that the above
182 named Company is fully empowered through its authorized agents to transact its appropriate business of Accident and Health, Liability, Workmen's Compensation, Fidelity, Surety, Burglary, Theft, Plate Glass and Automobile Insurance in this State according to the Laws thereof, until the last day of February, 1923.

In Testimony Whereof, I have hereunto set my hand and official seal at Pierre, this First Day of March, A. D. 1923.

(Notarial Seal)

W. N. VAN CAMP,
Commissioner of Insurance.
By W. J. Madden,
Deputy Commissioner.

H. B. CHARNOCK,
Notary Public, South Dakota.

The foregoing bond is hereby approved.

JAS. D. ELLIOTT,
Judge of the United States District Court
Within and for the Southern Division of
the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25, 1922, at 5 P. M.

184 (Praecipe for Transcript.)

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the Circuit Court of Appeals of the United States, for the Eighth Circuit, by including therein the following:

1. The Bill of Complaint, except the title and verification, and except the Exhibits thereto attached.

2. Order Allowing Intervention.

3. The following portions of Defendants' Answer, viz:

(a) Paragraphs "A", "B", "C", "D", and "F" of Defendants' Special Answer.

(b) Introduction and Paragraphs "First" to "Eighteenth" inclusive, of Defendants' General Answer; and

(c) Paragraphs "VIII", "IX", "XII", "XIV" and "XV" of Defendants' Affirmative Defense, together with the prayer.

4. The Statement of the Evidence Submitted, and Approved by the Court.

5. Order to Show Cause for Permission to Amend Bill, and Affidavit supporting the same.

185 6. Return to Order to Show Cause and Affidavit.

7. Order Permitting Amendment of Bill, and Exception taken to said Order.

8. Amendment to Bill.

9. The Opinion and Decree of the District Court.

10. Assignments of Error.

11. Petition for Appeal.

12. Order Allowing Appeal.

13. Bond upon Appeal, and Approval of same.

14. Notice of Deposit of Statement of Evidence with Clerk and Proof of Service thereof.

15. Approval of Court of the Statement of the Evidence.

16. Citation in Appeal, and Service thereof.

17. Praecipe and Clerk's Certificate.

Dated at Sioux Falls, South Dakota, this 23 day of September, A. D., 1922.

E. O. JONES
N. B. BARTLETT,
Solicitors for Appellants.

Endorsed: Filed in the District Court on Sept. 23, 1922.

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187 (Notice to plaintiff of lodgment of statement of evidence in District Clerk's office.)

To H. E. Judge, Solicitor for Northern States Power Company, Plaintiff:

Please take notice that the Appellants have prepared a Statement of the evidence to be included in the record upon the appeal of the above entitled matter to the Circuit Court of Appeals, for the Eighth Circuit, and has lodged the same in the office of the Clerk of this Court for your examination, (a copy of which Statement is herewith served upon you).

You will further take notice that the Appellants will ask the Court, at the Government Building, in the City of Sioux Falls, in said District of South Dakota, at ten o'clock in the forenoon of the 3 day of October, A. D. 1922, or as soon thereafter as counsel can be heard, to approve said Statement.

Dated this 23 day of September, A. D. 1922.

E. O. JONES
N. B. BARTLETT
Solicitors for Appellants.

Service of the foregoing Notice this 23 day of September, A. D. 1922 is hereby acknowledged also service of the Statement therein referred to.

. . . . . .
Solicitor for Northern States Power Company, Plaintiff.

Endorsed: Filed in the District Court on Sept. 25, 1922.

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189 (Affidavit of service of notice to plaintiff of lodgment of statement of evidence.)

State of South Dakota,
County of Minnehaha—ss.

N. B. Bartlett, being first duly sworn on oath, deposes and says: That he served the hereto attached notice of lodgement of the statement of the evidence and a statement of such evidence and notice of the time and place set for approval of said statement upon H. E. Judge, Esquire, Solicitor of the above named plaintiff, Northern States Power Company, on September 23, 1922, in the city of Sioux Falls, South Dakota, by then and there handing to and leaving with the said H. E. Judge personally, true copies of the hereto attached notice and statement of evidence.

N. B. BARTLETT

Subscribed and sworn to before me this 25 day of September, 1922.

G. J. CLUTTERBUCK
(Notarial Seal) Notary Public, South Dakota.

190 Endorsed: Filed in the District Court on Sept. 25, 1922.

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192 (Additional praecipe for transcript.)

The Clerk of this court is hereby directed to incorporate into the transcript upon appeal in the above entitled cause, for the use of the Circuit Court of Appeals to the United States for the Eighth Circuit, the following additional portions of the record, which are not indicated in the praecipe filed by appellants, to-wit:

1. The title of the case as a part of and as it appears in the bill of complaint and Exhibit B and Exhibit C attached to and made a part of the bill of complaint.

2. The title of the case as a part of and as it appears in the defendant's answer.

3. Paragraphs I, VII and XIII of defendant's affirmative defense, as a part of defendant's answer.

4. The following exhibits made a part of the answer,
193 to-wit: The petition of F. L. Blackman, and others, upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had; the order for filing said petition; the resolution for survey under said petition; the resolution fixing line and width of the ditch and time and place for hearing the petition of F.

L. Blackman, and others; the published notice of hearing said petition, (said notice not being attached to the answer but having been filed after the filing of the answer and on November 28th, 1921 together with the stipulation that it might be considered as a part of the answer); and the resolution establishing Drainage Ditch No. 1 and 2, all of said exhibits to be inserted as a part of said answer.

HAROLD E. JUDGE
R. M. CAMPBELL
Solicitors for Appellee.

Endorsed: Filed in the District Court on Oct. 24, 1922, at 4 P. M.

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195 (Statement of Evidence.)

(Filed in U. S. District Court on January 10, 1923.)

The above entitled suit came on for hearing before the Court on December 15th, 1921, before the Honorable J. D. Elliott, Presiding Judge, plaintiff appearing by Mr. H. E. Judge and Mr. R. M. Campbell, its solicitors, defendants appearing by Mr. E. O. Jones, their solicitor, and the intervening defendants appearing by Messrs. Porter & Bartlett, their Solicitors, the following proceedings were had:

196 Evidence of Plaintiff.

F. E. WARD, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Stipulation.

"It is stipulated and agreed between all parties that the testimony received in these consolidated cases shall be considered as received in each case, so far as such testimony is pertinent to such case, and that such testimony apply only to that case."

Q. You may state your name?

The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set aside, for the reasons that the said bills of complaint fail to state any matter of equity entitling the plaintiffs to the relief prayed for, nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this court has no jurisdiction over these matters, because plaintiffs' bills of complaint herein do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this court can infer or presume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property, or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that the plaintiffs have a plain, adequate and complete remedy at law.

197 For the further reason that it affirmatively appears from the fact of the bills of complaint and record, that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits, assessment or tax chargeable against the property of the plaintiffs, if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multiplicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determinations of the state tribunal upon questions of fact before them, are conclusive upon this court in this action, this court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings. Motion denied, defendants and intervening defendants excepting.

198 The defendants and intervening defendants then objected to the introduction of any testimony for the reason and on the ground urged in the motions to dismiss. Objection overruled. The Defendants and intervening defendants excepting.

(Testimony of Witness F. E. Ward)

I am the auditor of Minnehaha County, South Dakota; drainage ditch records A and B and Commissioners records

5 and 6 are part of the records of Minnehaha County, and of the drainage proceedings of the Board of County Commissioners of Minnehaha County.

Plaintiff offered and there were received in evidence the following portions of Drainage Ditch Record A.

July 1, 1907.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioner respectfully represents: That he is a resident of the City of Sioux Falls in said County; that he is the owner of certain lands in the valley of the Big Sioux River north and west of the City of Sioux Falls in said County, viz: Blocks Three (3) and Thirty-one (31) of Meredith's First Addition to Sioux Falls, according to the recorded plat thereof; the Northwest Quarter of the South West Quarter of Section Eighteen (18), and the South West Quarter of the North West Quarter of said Section Eighteen (18), except the railroad right of way, all in Township One Hundred and One (101 North, of Range Forty Nine (49); also a certain
199 tract or parcel of land bounded and described as follows, to-wit:—Commencing at a point twenty-four (24) rods north of the southeast corner of the North West quarter of Section Thirty Two (32), in Township One Hundred and Two (102) North, of Range Forty Nine (49); running thence north ten (10) rods; thence west eighty (80) rods; thence south ten (10) rods; thence east eighty (80) rods to the place of beginning all of which lands will be affected by the drainage herein proposed;

Your petitioner further represents that it is necessary for the drainage of agricultural lands in said Big Sioux Valley between the dam of the Cascade Milling Company in the City of Sioux Falls and the City of Dell Rapids that the proposed drainage be established.

Your petitioner further represents that the establishment of such drainage will be conducive to the public health, convenience and welfare of the inhabitants of the City of Sioux Falls and of the inhabitants of the Big Sioux Valley between Sioux Falls and Dell Rapids that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in said valley and will prevent great damage to the buildings and their contents; and will prevent great damage to the highways in said County, and also to

the railroad tracks and rights of way of the Chicago, Milwaukee & St. Paul Railway Company and of the South Dakota Central Railway Company in said valley; and will prevent damage and destruction of any bridges and their approaches in said valley;

Your petitioner further represents that the general purpose of said proposed drainage is, among other things, to
200 prevent the annual or occasional flooding of lands in said valley caused by high water in said river, by providing a drain to carry off all the water of said river above its normal stage or above the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the center line of Section Five (5) in Township One Hundred and One (101) North of Range Forty Nine (49), and running thence southeasterly across said Section Five (5), Section Four (4) and the North Half of Section Nine (9), all in Township One Hundred and One (101) North of Range Forty Nine (49) and east of the buildings of the State Penitentiary to a terminal point on said river in the City of Sioux Falls near the center of Section Nine (9) in said Township, the length of which will be approximately one and three fourths miles.

Your petitioner further represents that the territory likely to be affected thereby is that portion of the Townships of Dell Rapids, Sverdrup, Mapleton, Wayne and Sioux Falls and of the City of Sioux Falls in the immediate valley of the Big Sioux River subject to overflow from said river.

Dated July 1, 1907.

WILLIAM H. LYON
Petitioner.

State of South Dakota,
201 County of Minnehaha.—ss.

Personally appeared William H. Lyon, who being first duly sworn, deposes and says; that he is the petitioner in the above entitled matter; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein

stated on information and belief, and as to those matters he believes it to be true.

WILLIAM H. LYON

Subscribed and sworn to before me, this 1st., day of July, 1907.

M. E. McDOUGAL,
Notary Public.

(Notarial Seal)

Petition for Drainage, Filed this 1st day of July, 1907.

C. E. HILL, County Auditor.
By H. W. Ward, Deputy.

Plaintiff offered and there was received in evidence pages 562 and 563 and the first two lines of 564 of Commissioners' Record 5, it being a resolution of the Board of County Commissioners fixing the route and width of the proposed ditch and the time and place of hearing the petition of W. H. Lyon for the proposed drainage ditch thereafter established as Drainage Ditch No. 1.

This resolution is not printed at length herein because it contains matter not deemed of importance. It established the line of Drainage Ditch No. 1 as follows: Commencing 58 feet west and 135 feet north of the southeast corner of Section 29, Township 102, Range 49, thence south parallel to the adjacent highway 2085 feet to station No. 114; also commencing 674 feet north and about 35 degrees west of Station No. 114; thence southeasterly 674 feet to said Station 114, thence south and parallel to said highway 7700 feet to Station No. 37, thence south 45 degrees, east 3700 feet to Station Zero (0), thence south 59 degrees, 36', east to the Big Sioux River.

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It also contains the following provisions: "Be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the width of said drainage ditch be and it is hereby fixed at 40 feet at the bottom thereof, with a side slope of one foot to one."

Plaintiff offered and there was received in evidence the following part of Commissioners Record 5:—

Sioux Falls, S. D., Dec. 31, 1907.

Pursuant to adjournment, at 10 o'clock A. M. Tuesday, December 31, 1907, the Board of County Commissoners met in their room at the County Court House.

Present:

Dist. No. 5: Thomas McKinnon, Chairman.

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson.

Dist. No. 3: Alfred Acheson.

Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. J. H. Gates, attorney for the Board in the matter of Drainage Ditch No. 1, filed and read a written opinion in regard to the legal propositions presented.

Further remarks were made by Messrs. Porter, Keith and Bates and by Mr. Blackman.

On motion, the Board adjourned at 2 o'clock P. M. Tuesday, December, 31, 1907.

203 Sioux Falls, S. D., Dec. 31, 1907.

Pursuant to adjournment, at 2 o'clock P. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the county court house.

Present:

Dist. No. 5: Thomas McKinnon, Chairman.

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson,

Dist. No. 3: Alfred Acheson.

Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. Howard offered the following resolution:

Resolution Establishing Drainage Ditch No. 1:

The matter of the petition of William H. Lyon for the establishment of a drainage ditch filed in the County Auditor's office of Minnehaha County, South Dakota, on July 1, 1907, the said drainage ditch having been heretofore described

and named "Drainage Ditch No. 1", coming on to be heard by the Board of County Commissioners at a regularly adjourned meeting, on Monday, December 30, 1907, pursuant to notice heretofore given, and written objections thereto having been filed by Martin Oien, et al, and by Joseph C. Carpenter, and by the Chicago, Milwaukee and St. Paul Railway Co. and the claims of said parties having been presented orally by their counsel, and William H. Lyon, F. S. Blackman, O. Benson and others having appeared in behalf of said petition, and said hearing having been adjourned to this 31st, day of December, 1907, and this Board having fully heard and considered said petition and all matters in opposition to and in support of the same; Now Therefore

Be it Resolved by the Board of County Commissioners
204 of Minnehaha County, South Dakota, that said Drainage Ditch No. 1, is conducive to the public health, convenience and welfare, and is necessary and practicable for draining agricultural lands, and it is so found:

Be it further Resolved that said Drainage Ditch No. 1, be and is hereby established:

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land, or other property through which the same shall pass, and damages as compensation for the land taken for the route of such drainage.

Mr. Howard moved the adoption of said resolution, and that the vote be taken by districts. Mr. Harvey seconded the motion. Upon roll call,

Charles Harvey, Dist. No. 1 voted, Yes;

J. E. Johnson, Dist. No. 2 voted, No;

Alfred Acheson, Dist. No. 1 voted, No;

J. D. Howard, Dist. No. 4. voted, Yes;

Thomas McKinnon, Dist. 5 voted, Yes;

The Chairman declared the resolution adopted.

Plaintiff offered and there was received in evidence the following portions of Ditch Record A;

April 11, 1908.

Resolution Assessing Benefits.

Whereas, The Board of County Commissioners of Minnehaha County, South Dakota, has established Drainage Ditch No.

1, and has fixed the damages arising therefrom, and has been investigating and considering the proportion of bene-
205 fits that will accrue to the lands, tracts and lots within the drainage area of said Drainage Ditch; and

Whereas, in arriving at this determination of the proportion of benefits it has considered, not only the benefits which will accrue directly by virtue of the construction of said Drainage Ditch, but also the indirect benefits by virtue of said drainage being an outlet for connecting drains that may hereafter be constructed, and particularly is this so in reference to the lands within the drainage area lying north of a line running east and west through the center of Section Twenty Nine (29) Mapleton Township; and

Whereas, the number of acres set opposite each tract hereinafter described represents the actual number of acres of land within said tract that are benefitted, and excluding therefrom lands taken by said Drainage Ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said Drainage Ditch, the land taken by the drainage is excluded; and

Whereas, in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat of the County Auditor's Subdivision of the particular quarter section in which the land is located on file in the Register of Deeds office; and

Whereas, in the consideration of benefits said Board has assumed that the North East Quarter of the North East Quarter of the South West Quarter of Section Thirty Three (33) in Township One Hundred and Two (102) of Range Forty Nine (49) West of the Fifth P. M., owned by the
206 state of South Dakota, and containing ten acres is benefitted "one", and taking the same as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sverdrup, Mapleton, Sioux Falls and Wayne; the benefits to the County of Minnehaha; and the benefits to the several Railroad Companies hereinafter described, arising and accruing by the construction of Drainage Ditch No. 1, be, and they are hereby fixed and determined in the following proportions, viz:—

(Here follows descriptions of lands in Setcions 31, 32, 33, 29, 28, 21, 20, 19, 17, 16, 9, 8, 5, 4, and 3, Township 102, Range 49, Sections 34, 33, 32, 29, 28 and 27 in Township 103,

Range 49; and Sections 4, 5, 6, 7, 8, 9, 17, 18, 19, 30, and 31, in Township 101, Range 49; and Sections 13, 24, and 25 in Township 101, Range 50; and of lots and blocks in the following additions to Sioux Falls, to-wit: Berwick; Brookings, Brooks; Bunkers; Minnehaha Trust Company Subdivision of Block 3 of Carpenter's Addition; Carpenters; Central Park; Englewood; Harrison; Lake View; Lincoln Park; McClellan Second; Meredith's First; Meredith's Second; Millard Park; North Boulevard; North Park; North Park Second; Sioux Falls Improvement Company; Summit; West Lawn; West Park, and of certain lots in the Town of Renner, with the names of the owners and the proportion of benefits assessed to each; the Northern States Power Company, the Sioux Falls Light & Power Company, The Great Northern Railway Company, and the Chicago, Rock Island & Pacific Railway
207 Company are not named or mentioned, and no property now or ever owned by any of them is described or referred to. A large amount of property situated in a southerly direction from the ditch and its outlet, commonly called "the spillway," and now attempted to be assessed under the proceedings [iniatated] by the filing of the petition of F. L. Blackman, and others, attached to and made a part of the answer herein, and which property is described in the "Drainage Ditch Notice" attached to and made a part of the bill of complaint herein is likewise not described in this exhibit. Following the description of lands, lots, and blocks above referred to and omitted here for the purpose of diminishing the record, are the descriptions of railroad and certain other properties, and the conclusion of the exhibit, which are as follows:

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Name of Owner.	Description	Acres.	Proportion of Benefits
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 28, 29, and 33, township 103, range 49, west 5th p. m.....	25.02	3.75
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4, 9, 16, 21, 28 and 33, township 102, range 49, west 5th p. m. Sioux Falls and Egan line....	72.50	15.41
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 5, 8, and 9, township 102, range 49 west 5th p. m. (Sioux Falls and Madison line)	17.30	2.60

Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4 and 9, township 101, range 49, west 5th p. m.	17.05	5.12
South Dakota Central Railway Co.	Right of way as now laid out and located across sections 29 and 32, township 102, range 49 west 5th p. m.	11.06	3.32
South Dakota Central Railway Co.	Right of way as now laid out and located across sections 4, 5, and 9, township 101, range 49, west 5th p. m.....	17.72	5.32
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 18, Township 101, range 49, west of 5th p. m.	12.18	3.65
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 13, Township 101, range 50, West 5th p. m.	16.88	5.06
Sverdrup Township.	Seven miles and 84 rods of laid out and established highways within the drainage area.		2.9
Mapleton Township.	Twelve miles and 52 rods of laid out and established highways within the drainage area.		7.73
208½			
Sioux Falls Township.	Two and onehalf miles of laid out and established highways within the drainage area.....		3.2
Name of Owner	Description	Acres	Proportion of Benefits
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.		.6
City of Sioux Falls	1⅛ miles of highways and dedicated streets within the drainage area		.9
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area		25.

Be It Further Resolved that Tuesday, the 5th day of May, 1908, at two o'clock P. M. at the office of the County Auditor of said County be and it is hereby fixed as the time and place for the equalization of such proportion of benefits, and that notice thereof be given, in accordance with the provisions of Sec. 6. of Chap. 134 of the Laws of 1907 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the

Sioux Falls Weekly Argus-Leader, once in each week for two consecutive weekly issues, and one further publication in the Sioux Falls Daily Argus Leader, and by posting copies of such notice in at least three public places near the route of said Drainage Ditch, the said posting and the last of such publications to be made at least 10 days prior to the time of said hearing.

Adopted April 11, 1908 THOS. McKINNON,
Chairman.

Attested:
C. E. Hill,
County Auditor.
(Seal)

209 Filed in the office of the Auditor of Minnehaha County, S. D. this 8th day of April, 1908.

C. E. HILL
County Auditor.

Plaintiff offered in evidence pages 53 to 61 inclusive of Ditch Record A, being the record of notice of hearing upon the equalization of benefits with reference to Ditch No. 1 In this notice of hearing the same persons are named and the same property is described as in the "resolution assessing benefits".

Plaintiff offered in evidence pages 260 to 268, inclusive, of Ditch Record A, the same being a record of the levying of the assessment for Drainage Ditch No. 1. In this assessment the same persons and the same property was assessed as is described in the "resolution assessing benefits." This record shows that the commissioners ascertained and determined the entire cost of Drainage Ditch No. 1 to be the sum of $46,600.10.

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210 Plaintiff offered in evidence pages 94 to 95 and a portion of page 96 of Ditch Record A, as follows:

April 10, 1908.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioners respectfully represent that they are all residents of the Township of Mapleton in said County, and that each of them is the owner of certain lands in said Town-

ship in the valley of the Big Sioux River as follows: The said Iver R. Peterson is the owner of the South Half of the South West Quarter of the North East Quarter of Section Seventeen (17) and the South Half of the East Thirteen (13) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said Bernt Mekvold is the owner of the South-West Quarter of the North West Quarter of Section Seventeen (17) and the West Twen-
211 ty-six and Two-Thirds (26 2/3) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said William O. Quincy is the owner of the West Half of the North West Quarter of Section Twenty (20); and that the said Iver I. Nelson is the owner of the East Half of the South West Quarter of Section Seventeen (17) and the North West Quarter of the South West Quarter of Section Seventeen (17), all in Mapleton Township, Minnehaha County, South Dakota, all of which lands will be affected by the drainage herein proposed;

Your petitioners further represent that it is necessary for the drainage of agricultural lands in said Big Sioux Valley from a point about four miles north of the south line of Sverdrup Township to a point about one and one-half miles north of the south line of Mapleton Township, that the proposed drainage be established;

Your petitioners further represent that the establishment of such drain will be conducive to the general health, convenience and welfare of the inhabitants of said territory, and that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in said valley, and will prevent great damage to the buildings and their contents, and will prevent great damage to the highways in said territory, and also to the railroad tracks and the rights of way of the Chicago, Milwaukee and St. Paul Railway Company in said territory, and will prevent damage and destruction of many bridges and their approaches in said territory;

Your petitioners further represent that the general
212 purpose of said proposed drainage is, among other things, to prevent the annual or occasional flooding of land in said territory caused by high water in said river by providing a drain to carry off all of the water of said river above its normal stage from about the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the south line of Section Five (5) of Maple-

ton Township, and running thence southeasterly adjacent to the right of way of the Madison line of the Chicago, Milwaukee and St. Paul Railway Company to the west line of the East Half of the North East Quarter of Section Eight (8) in Mapleton Township, running thence south about three miles to a point about forty (40) rods south of the north line of Section Twenty Nine (29) in Mapleton Township where the said line intersects Silver Creek, running thence southeasterly to the upper end of Drainage Ditch No. 1, as established by said Board;

Your petitioners further represent that, as a part of said plan of drainage, there should be constructed a dike along the south and southeasterly side of said Big Sioux River where the same flows through the North East Quarter of Section Thirty-two (32) in Sverdrup Township, such dike to be of the length of thirty (30) or forty (40) rods.

Your petitioners further represent that the territory likely to be affected thereby embraces Sections Sixteen (16), Seventeen (17), Eighteen (18), Twenty (20), Twenty-one (21), Twenty seven (27), Twenty Eight (28), Twenty Nine (29), Thirty-Two (32), Thirty Three (33) and Thirty Four (34) in Sverdrup Township, and Sections Three (3), Four (4) Five (5), Eight (8), Nine (9), Sixteen (16), Seventeen (17), Nineteen (19), Twenty (20), Twenty One (21), Twenty Eight (28), and Twenty Nine (29) in Mapleton Township.

Dated April 9, 1908

IVER R. PETERSON
IVER I. NELSON
BERNT MEKVOLD
W. O. QUINCY

Petitioners.

Filed in the office of the Auditor of Minnehaha County, S. D., this 10th day of April, 1908.

213 C. E. HILL

County Auditor

Plaintiff offered in evidence page 113 of Ditch Record A, as follows:

January 8, 1909.

Further Petition.

To the Honorable Board of County Commissioners, of Minnehaha County, South Dakota:

The undersigned land owners in the valley north of Sioux Falls respectfully request, pursuant to the trip of inspection made by you on December 15, 1908, that in acting upon the petition of Iver R. Peterson and others for a drainage ditch in Mapleton Township you will cause the proposed drainage ditch to be extended further north and made a part of Ditch No. 1, also that as a part of said proposed drainage system, you will cause a ditch to be established on the west side of the Big Sioux River from a point above the Baltic dam southerly to a suitable place on the river in Section Eighteen (18) in Sverdrup Township, and that you will by a proper outlet on the east side of the river, provide for the taking care of the surplus water so dumped into the river at that point.

A. L. Berg
Ole J. Ustrud
G. T. Gunderson
O. G. Brende
John Aasen
P. M. Thompson
Ole O. Langness
H. G. Solem
T. A. Berven
Oluf Lyng
Mrs. Mary Lee
Mrs. Anne Larson by Agt.
K. Larson
J. H. Williamson
E. O. Fossum
John P. Risvold
Gunerius Thompson

Filed in the office of the Auditor of Minnehaha County,
214 S. D., this 8th day of January 1909.

C. E. HILL, County Auditor.

Plaintiff offered in evidence pages 121 to 123, inclusive, of Ditch Record A, as follows:

Resolution for Adjourned Hearing:

(Transcribed from Commissioners Record No. 6, Page 170-1-2-3)

On motion the following resolution was unanimously adopted:

Resolution:

Whereas, on April 10, 1908, Iver R. Peterson and others filed their petition with the County Auditor of Minnehaha County, South Dakota, for the establishment and construction of a certain drainage ditch in Mapleton Township in said County; and

Whereas, this Board did on June 12, 1908, adopt a resolution for the survey thereof; and

Whereas, Mr. S. Howe, County Surveyor, employed by this Board for making such survey, did on November 13, 1908, file his report thereof, together with maps and profiles, and

Whereas, this Board did on said last named date fix Friday, December 4, 1908, at the office of the County Auditor of said County as the time and place for the hearing of said petition, and did cause notice of said hearing to be given publication and posting, as required by law; and

215 Whereas, December 4, 1908, a petition was presented by A. L. Berg, and others for the extension of said ditch; and

Whereas, said matter has by successive adjournments been continued until April 9, 1909; and

Whereas, said engineer did on April 8, 1909 present his supplemental report of survey and plans and profiles; and

Whereas, this Board has inspected the route of said drainage ditch as described in said petition and as hereinafter described; and

Whereas, this Board deems it practicable, necessary and best that the route of said drainage ditch be varied from the route described in said petition and its northerly terminal points be materially changed; therefore

Be it Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the line of said drainage ditch be and it is hereby changed from the route described in said petition to run as follows: the same being substantially as petitioned for up to the point where the same crosses the Madison branch of the Chicago, Milwaukee and St. Paul Railway Company, viz:

First Section.

Commencing at a point ten hundred forty-five (1045) feet north and fifty-eight (58) feet west of the Southeast corner of Section twenty-nine (29) in Township One Hundred and Two (102) North, Range Forty-nine (49); running thence north five hundred forty seven (547) feet; thence north 23 west thirty three hundred eighteen (3318) feet to a point fifty eight (58) feet west of the quarter quarter line in the North East Quarter (NE¼) of Section Twenty Nine (29), in said Township; thence north parallel with, and fifty-eight (58) feet west of said quarter quarter line through Section

Twenty Nine (29), Twenty (20), Seventeen (17), and a
216 part of Section Eight (8) Twelve thousand nine hundred thirty five (12935) feet; thence north 50 East twenty seven hundred thirty two (2732) feet to a point thirty three (33) feet west of the west line of the right of way of the Chicago, Milwaukee and St. Paul Railway Company in the North West Quarter of Section Nine (9) in said Township; thence northerly parallel with and thirty three (33) feet west of the said right of way line nineteen thousand three hundred, sixty eight (19368) feet to a connection with a high water channel of the Big Sioux River in the South East Quarter of Section Twenty (20) in Township One Hundred and Three (103) North, Range Forty Nine (49).

Second Section:

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103) North, Range Forty Nine (49); running thence north 33° west thirty one hundred and fifty five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line of Section Seven (7) and Six (6) in said Township, and in Section Thirty One (31) in Township One Hundred and Four (104) North, Range Forty Nine (49) to the center line running East and West through said Section Thirty One (31); thence northeasterly to the creek near the northeast corner of said Section Thirty One (31), the said line being the center line of said proposed drainage ditch; that the width of said drainage ditch be and it is hereby fixed at forty (40) feet at the bottom thereof with a side slope of one and one-half feet to one; and that the fall of said proposed drainage ditch be three (3) feet per mile from
217 north to south, and that the area required for right of way and dump space will be four (4) rods on each side of said line, except where it is adjacent to the right of way of the Chicago, Milwaukee and St. Paul Railway Company, and that the area required for right of way and dump space where said proposed line runs adjacent to the right of way of said Railway Company shall be two (2) rods on the easterly side of said line and six (6) rods on the westerly side of said line;

That in addition thereto the Big Sioux River be straightened in Section Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred Three (103) North, Range Forty Nine (49) in order to afford better means of communication

between the lower end of Section Two (2) of said ditch and the upper end of Section One thereof;

Be It Further Resolved that this hearing be and it is hereby adjourned until Thursday May 6, 1909, at two o'clock P. M. at the office of the County Auditor of said County, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by the Laws of 1909, the same to be signed by the Chairman of this Board and attested by the County Auditor by publishing the same once in each week for two consecutive weeks in the Sioux Falls Daily Argus-Leader, and by posting copies of said notice in at least three public places near the route of said proposed drainage ditch as varied and extended, such posting to be made at least two weeks prior to the time of said hearing.

Adopted April 9, 1909.

THE BOARD OF COUNTY COMMISSIONERS MINNEHAHA COUNTY, SOUTH DAKOTA.
By Thos. McKinnon, Chairman.

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218 Plaintiff offered in evidence pages 135 to 136 of Ditch Record A, as follows:

Resolution Establishing Drainage Ditch No. 2:

The matter of the petition of Iver R. Peterson and others for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on April 10, 1908, coming on to be heard by the Board of County Commissioners of said County at a regularly adjourned meeting on Thursday May 6, 1909, pursuant to notice heretofore given, and said Board having heard and considered said petition and all matters in support of the same and in opposition thereto; Now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said drainage ditch as extended and varied and as described and set forth in the resolution adopted by this Board on April 9, 1909, is conducive to the public health, convenience and welfare and is necessary and practicable for draining agricultural lands, and it is so found;

Be it Further Resolved that the said drainage ditch as described and set forth in the said resolution of April 9, 1909, be and it is hereby named and designated "Drainage Ditch No. 2";

Be it Further Resolved that the said Drainage Ditch No. 2 be and the same is hereby established;

Be it Further Resolved that in the construction of said drainage ditch the rights of flowage of Wm. G. Milne, the owner of the mill at or near Baltic, S. D., will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch, where the same joins with the creek near the northeast corner of Section Thirty One (31) in Dell Rapids Township that it will not diminish or interfere with such rights of flowage and that a head gate or other protection will be
219 established if necessary, to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

Be it Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same be made a special order for Friday May 7, 1909, at nine o'clock A. M.,

On motion, the Board adjourned to May 7, 1909 at 9 o'clock A. M.

Plaintiff offered in evidence pages 48 to 60 inclusive of Ditch Record B, as follows:

October 7, 1910.

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The Board having had under consideration for several days the matter of the preliminary Assessment of Proportion of Benefits which was being prepared by J. H. Gates, Attorney with the assistance of Engineer Wagner and the same being completed, on motion the following resolution was adopted:

Resolution Fixing Proportion of Benefits
Drainage Ditch No. 2.

Whereas the Board of County Commissioners of Minnehaha County, South Dakota, has established the Drainage Ditch No. 2, and has fixed the damages arising therefrom and has been investigating and considering the proportion of benefits

that will accrue to the lands, tracts and lots within the drainage area of said drainage ditch; and

Whereas in arriving at this determination of the proportion of benefits it has considered not only the benefits which will accrue directly by virtue of the construction of said drainage ditch, but also the indirect benefits by virtue of such drainage being an outlet for connecting drains that may hereafter be constructed; and

Whereas said Board is of the opinion that the drainage area of Drainage Ditch No. 1 is benefitted by the establishment and construction of Drainage Ditch No. 2, and that both of said drainage ditches are mutually interdependent, and should virtually be considered as one drainage system; and

Whereas in the determination of the proportion of benefits herein fixed and determined upon the several premises embraced within the drainage area of Drainage Ditch No. 1 the proportion of benefits as finally fixed and equalized in the matter of said Drainage Ditch No. 1 have been taken into consideration; and

221 Whereas the number of acres set opposite each tract hereinafter described represent the actual number of acres of land within said tract that are benefitted, and excluding therefrom land taken by said drainage ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said drainage ditch the area therefor taken by the drainage is excluded; and

Whereas in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat in the County Auditor's Subdivision of the particular quarter section in which the land is located, on file in the Register of Deeds' office of said County, and in the description of lands herein by reference to books and pages of deed records such references are to the deed records in the office of said Register of Deeds; and

Whereas, in the consideration of such proportion of benefits said board has assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section Twenty, in Township One Hundred Three North, Range Forty-nine, West Fifth P. M., owned by Martha R. Roberts, and containing ten acres, be benefitted "One", and taking said tract as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sioux Falls, Wayne, Mapleton, Sverdrup and Dell Rapids; the benefits to the County of Minnehaha; and the benefits to the several railroad companies hereinafter described, arising and accruing by the establishment and construction of Drainage Ditch No. 2, be, and they are hereby fixed and determined in the following proportions, viz:

222 (Here follows descriptions of lands in Sections 4, 5, 6, 7, 8, 9, 17, 18, 19, 30, and 31, in Township 101, Range 49; Sections 13, 24 and 25, in Township 101, Range 50; Sections 3, 4, 5, 8, 9, 16, 17, 19, 20, 21, 28 29, 31, 32, and 33, in Township 102, Range 49; Sections 5, 6, 7, 8, 9, 16, 17, 18, 20, 21, 27, 28, 29 32, 33, and 34, in Township 103, Range 49; Sections 29, 31, and 32, Township 104, Range 49; and of certain lots in the town of Renner; and of lots and blocks in the following additions to Sioux Falls, to-wit: Berwick; Brookings; Brooks; Bunkers; Central Park; Englewood; Harrison; Lakeview; Lincoln Park; McClellan's Second; Meredith's First; Meredith's Second; Millard Park; North Boulevard; North Park; North Park Second; Sioux Falls Improvement Co.; Summit; West Lawn; and West Park, with the names of the owners and the proportion of benefits assessed to each. The Northern States Power Company, the Sioux Falls Light & Power Company, the Great Northern Railway Company, and the Chicago, Rock Island & Pacific Railway Company are not named or mentioned, and no property now or ever owned by any of them is described or referred to. A large amount of property situated in a southerly direction from the ditch and its outlet, commonly called "the spillway," and now attempted to be assessed under the proceedings initiated by the filing of the petition of F. L. Blackman, and others, attached to and made a part of the answer herein, and which property is described in the "Drainage Ditch Notice" attached to and made a part of the bill of complaint herein is likewise not described in this exhibit. Following the description of lands, lots and blocks above referred to and omitted here for the purpose of diminishing the record, are the descriptions of railroad and certain other properties, and the conclusion of the exhibit, which are as follows:

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Name	Description	Acres	Proportion of Benefits.
City of Sioux Falls	One and one eighth miles of highways and dedicated streets within the drainage area.....		.090

Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area		.320
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area		.060
Mapleton Township	Twelve miles and 52 rods of laid out and established highways within the drainage area		8.723
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area		17.710
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area		1.936
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area		9.100
Chicago, St. Paul, Minneapolis & Omaha R. R. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50, West 5th P. M., within the drainage area (1.5 miles)	18	20.320
South Dakota Central Railway Co.	Right-of-way as laid out and located across Sections 4, 5 and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49 West; 5th p. m. within the drainage area (2 6 miles)	20.80	59.980
224			
Chicago, Milwaukee & St. Paul Railway Co.	Right-of-way as laid out and located across Sections 4 and 9, Township 101, Range 19, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29 and 33, Township 103, Range 49, and Section 32, Township 104, Range 49 West, 5th p. m. within the drainage area (the above being the Sioux Falls and Egan line); also across Sections 5, 8, and 9, Township 102, Range 49 West, 5th P. M., within the drainage area (being the Renner and Madison line) Total 14.5 miles	167.06	383.130

Be it Further Resolved that Thursday, the 3d day of November, 1910, at two o'clock P. M. at the office of the County

Auditor of said County be, and it is hereby fixed as the time and place for the equalizing of said proportion of benefits, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909 of said State, such notice to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Daily Argus Leader once in each week for two consecutive weeks, and by posting copies of said notice in at least three (3) public places near the route of said drainage ditch, said posting and the last publication of said notice to be made at least ten (10) days prior to the time of said hearing.

Adopted October 7th, 1910.

THOMAS McKINNON, Chairman.

Attest:

(Seal) Henry Howe, County Auditor.

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225 It is stipulated that filed herein as a part of the answer of the defendants are correct copies of the following records of the Board of Commissioners of Minnehaha County, with reference to Drainage Ditch No. 1 and 2, to-wit: the petition of F. L. Blackman and others upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had, the order for filing said petition, the resolution for survey under said petition, the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman and others, the published notice of hearing petition, (such notice not being attached to the answer, but having been filed after the filing of the answer with a stipulation that it might be considered as a part of the answer), and resolution establishing Drainage Ditch No. 1 and 2. Said exhibits were offered in evidence by plaintiff and received in evidence.

(The foregoing exhibits relating to Drainage Ditch No. 1 and 2 are printed herein as a portion of the answer of the defendants and are consequently not herewith reprinted.)

Plaintiff's exhibit "A" was identified by the witness F. E. Ward as one of the records of the office of the County Auditor of Minnehaha County, and was offered in evidence by plaintiff.

To the offer in evidence of plaintiff's exhibit "A" the defendants and intervening defendants objected as incompetent, irrelevant and immaterial to any issue in the case, the same not being pleaded in plaintiff's bill of complaint
226 and part of their case. For the further reason that the apportionment made and set forth in plaintiff's bill of complaint affirmatively appears to be an apportionment made during the year 1921. Plaintiff's exhibit "A" was received in evidence subject to objection and is as follows:

227 Filed
Dec 15 1921
At .....M
Jerry Carleton, Clerk

Plaintiffs A
Exhibit B. O. C.

Drainage Notice

To Whom It May Concern:

Notice is hereby given that Tuesday, April 25th, 1919, at Two o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, at the Court House in the City of Sioux Falls, in said County, have been fixed by the Board of County Commissioners of said County as the time and place for equalizing the proportion of benefits to the several lands, tracts, lots, roads, streets and railroad right-of-way embraced within the district of Drainage Ditch No. 1 and 2, and benefitted by the construction of said Drainage Ditch, and that the route of said Drainage Ditch No. 1 and 2 is as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of Section twenty-nine (29) Township One Hundred Two (102), Range Forty-nine (49), West of the 5th P. M., running thence south parallel to the adjacent highway two thousand and eighty-five (2085) feet to station one hundred and fourteen (114); also commencing at a point Six hundred and seventy-four (674) feet north, and about thirty-five (35) degrees west of said station number one hundred and fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south forty-five (45) degrees, east three thousand seven hundred (3700) feet to Station number zero (0), the same being on high water line, thence south fifty-nine (59)

degrees and thirty-six (36) minutes, east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact loca-
228 tion of drainage ditch Number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five (1035) feet north and fifty-eight (58) feet west of the southeast corner of Section twenty-nine (29), in Township One Hundred and Two (102), Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north five hundred and forty-seven (547) feet, thence north twenty-three (23) degrees, west Thirty-three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the Northeast Quarter of Section Twenty-nine (29), in said Township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17), and a part of Section Eight (8), Twelve thousand nine hundred and thirty-five (12,935) feet, thence north fifty (50) degrees east, twenty-seven hundred and thirty-two (2732) feet to a point thirty-three (33) feet west of the west lines of the right of way of the Chicago, Milwaukee & St. Paul Railway Co., in the Northwest Quarter of Section Nine (9), in said Township, thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with the high water channel of the Big Sioux River, in the southeast Quarter of Section Twenty (20), in Township One Hundred and Three (103), north of Range Forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18), in Township One Hundred and Three (103), Range Forty-nine (49); running thence north thirty-three (33) degrees west
229 thirty one hundred fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8), in said Township; thence north parallel with and sixty (60) feet west of the quarter line in Section Seven (7) and Six (6) in said Township, and in Section Thirty-one (31), in Township One Hundred and Four (104), North of Range Forty-nine (49), to the center line

running east and west through said Section Thirty-one (31); thence northeasterly to the creek near the northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River has been or is being straightened and the channel changes made as follows: Channel changes on Sections Five (5) and Seven (7), Township One Hundred and One (101), Range Forty-nine (49); Channel changes on Section Thirty-two (32), Twenty-nine (29), Twenty (20), Eighteen (18), Seventeen (17), Eight (8) and Five (5), Township One Hundred and Two (102), Range Forty-nine (49); and Channel changes on Sections Thirty-two (32), and Twenty-nine (29), Township One Hundred and three (103), Range Forty-nine (49); the same being in accordance with the lines of said Drainage Ditch as actually constructed and for which the said Board of County Commissioners has heretofore assessed condemnation damages; that maps and profiles of said Drainage Ditch are now on file in the office of the County Auditor of said County, to which reference is hereby made.

That there have been included within the drainage area of Drainage Ditch 1 and 2 the entire drainage area of Drainage Ditches No. 1 and No. 2 heretofore established and constructed, and additional territory contiguous thereto, which is benefitted by the establishment and construction of said Drainage Ditch No. 1 and 2, and that in the judgment
230 of said Board of County Commissioners all of said territory is interdependent, and is considered as one drainage system, that in the determination of the proportion of benefits fixed upon the lands and premises embraced within said drainage area, the amounts of the assessments heretofore made in the matter of Drainage Ditch No. 1 and Drainage Ditch No. 2 have been taken into consideration.

That in the consideration and assessment of benefits, as hereinafter set forth, the said Board of County Commissioners have assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section 20, in Township 103, Range 49, West of the 5th P. M., owned by Martha R. Roberts, and containing ten acres, is benefitted "one"; also that Lot 1, in Block 22 of J. L. Phillips' Addition, owned by G. Keriakedes, containing a single lot, is benefitted "one", and that County Auditor's Tract 14 of the Southwest Quarter of Section 16, Township 101, Range 49, except the east 132 feet thereof, owned by Albert Larson and

George E. Larson, is benefitted "one", and taking the said lands, tracts and lots as a unit, the proportion of benefits to each and all of the lands, tracts, lots, roads, streets and railroad rights of way and the description of each tract of land affected by said drainage, and the names of the owners thereof, as they appear from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, at the date of said petition and at the date of filing said
231 petition, [and at the date of filing said petition,] was fixed as follows:
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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Fred Nelson	W½ of NE¼	4	101	49	57.00	6.897
State of South Dakota	E½ of NE¼ of NW¼	4	101	49	19.5	2.952
State of South Dakota	W½ of NE¼ of NW¼	4	101	49	19.5	2.952
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry. Co. and S. D. Central Ry.) that part of SW¼ Lying South and West of the center line of Drainage Ditch No. 1	4	101	49	12.33	1.863
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry) W½ of NW¼	4	101	49	70.6	10.684
Fred Nelson	SE¼ of NW¼	4	101	49	40.0	6.05
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry) that part of SW¼ lying North and East of the center line of Drainage Ditch No. 1	4	101	49	131.53	19.898
Mary C. Brace	NW¼ of SE¼	4	101	49	30.00	4.538
Mary Brix	Tract 1 of SE¼	4	101	49	3.50	0.532
Mary C. Brace	(Except Tracts 1 and 2) SW¼ of SE¼	4	101	49	8.00	1.21
Hans Ruvald	(Except right-of-way of S. D. Central Ry) NE¼ of NE¼	5	101	49	35.04	5.299
Olander Benson	NW¼ of NE¼	5	101	49	39.66	6.001
Sam Helm	NW¼ of NE¼		101	49	40.00	6.05
Hans Ruvald	(Except right-of-way of S. D. Ry) SE¼ of NE¼	5	101	49	34.45	5.215
A. C. Jensen	NE¼ of NW¼	5	101	49	36.22	5.481
D. A. Scott	NW¼ of NW¼	5	101	49	38.00	5.748

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F. H. Johnson	SW¼ of NW¼	5	101	49	38.00	5.750
Hans Ruvald	SE¼ of NW¼	5	101	49	38.00	5.750
Hans C. Ruvald	NE¼ of SW¼	5	101	49	39.50	5.977
Mary C. Brace	(Except Blocks 34, 35, 49, 50 and 61 of N. Boulevard Addition to Sioux Falls) S½ of SW¼	5	101	49	66.50	9.588

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
F. H. Johnson	NW¼ of SW¼	5	101	49	38.50	5.699
State of South Dakota	(Except right-of-way of S. D. Central Ry Co.) NE¼ of SE¼	5	101	49	34.45	5.215
Hans Ruvald	NW¼ of SE¼	5	101	49	40.00	6.05
Mary C. Brace	(Except Blocks 4, 6, 9, 13 and 29 of N. Boulevard Addition to Sioux Falls, and except right-of-way of S. D. Central Ry Co.) S½ of SE¼	5	101	49	62.66	9.474
D. A. Scott	N½ of SE¼	6	101	49	40.00	4.84
F. H. Johnson	S½ of NE¼	6	101	49	42.00	5.082
F. H. Johnson	N½ of SW¼	6	101	49	14.00	1.694
George E. Barkley	S½ of SW¼	6	101	49	40.00	4.84
F. H. Johnson	N½ of SE¼	6	101	49	73.00	8.803
George E. Berkle	SW¼ of SE¼	6	101	49	38.50	4.659
A. G. Erskine	Tract 1 of SE¼	6	101	49	23.00	2.783
Frances G. Carpenter	Tract 2 of SE¼	6	101	49	15.00	1.815
Frances G. Carpenter	NE¼ of NE¼	7	101	49	40.00	4.84
Frances G. Carpenter	SE¼ of NE¼	7	101	49	40.00	4.84
H. O. Gates & E. J. Sharon	W½ of NE¼	7	101	49	79.50	9.295
H. O. Gates & E. J. Sharon	E½ of NE¼	7	101	49	50.00	6.05

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F. H. Johnson	SW¼ of NW¼	7	101	49	5.00	0.805
E. J. Sharon & F. L. Blackman	The unplatted part of W½ of SE¼ and of E½ of					

	SW¼ of (Except that tract lying North of Block 37 of Meredith's Second Addition to Sioux Falls, and South of center line of Mullberry St., extended West and East of center line of Harvard St., extended and West of center line of Hooker St. extended; also except that portion of Tract 1 lying between Monroe St., extended West and the center line of Manchester Street extended West	7	101	49	37.00	4.477
Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
B. A. Burtch & Henry Brookhouse, Jr.	That part of Tract 1 of SW¼ lying N. of Block 37 Meredith's Second Addition to Sioux Falls, and S. of center line of Mullberry St. extended West and East of center line of Harvard St., extended and West of center line of Hooker St. extended.	7	101	49	1.50	1.815
Henry Brookhouse, Jr.	That part of Tract 1 of SW¼ lying between Monroe St. extended and West of center line of Manchester Street extended West.	7	101	49	1.50	0.182
Richard J. Ford	NW¼ of SW¼	7	101	49	18.00	2.178
J. A. Redfield	N½ of SW¼ of SW¼	7	101	49	15.00	1.815
J. A. Redfield	SE¼ of SW¼ of SW½	7	101	49	7.5	0.908
235						
Frances G. Carpenter	N½ of NE¼	8	101	49	80.0	9.68
Frances G. Carpenter	N½ of NW¼	8	101	49	80.0	9.68
C. E. McKinney	N½ of SW¼	8	101	49	80.0	9.68
E. B. Northrup	SW¼ of SW¼	8	101	49	40.0	4.84
Elmer S. Gilbert	SE¼ of NE¼ of SE¼	8	101	49	5.0	1.10
Frances G. Carpenter	(Except Block 40 of Central Park Add. to Sioux Falls) SW¼ of NW¼	8	101	49	37.50	4.537
Frances G. Carpenter	(Except Blocks 5, 8, 12, and 21 of Central Park Add. to Sioux Falls) SW¼ of NE¼	8	101	49	30.00	3.63

Frances G. Carpenter	NW¼ of NW¼ of SE¼ of NE¼	8	101	49	2.50	0.302
State of South Dakota	That part lying East of the right-of-way of the C. M. & St. P. Ry Co. of S½ of NW¼	9	101	49	14.5	1.755
Frances G. Carpenter	(Except Blocks 33, 48 and 49 of Central Park Add. to Sioux Falls) SE¼ of NW¼	8	101	49	32.50	3.933
Catherine W. Peck & Porter P. Peck	(Except Block 1 and Lots 10, 11 and 12 of Block 34 of Millard Park Add. to Sioux Falls) Tract 1 of NW¼	17	101	49	83.92	10.152

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Catherine W. Peck & Porter P. Peck	Tract 2 of NW¼	17	101	49	12.6	1.524
Catherine W. Peck & Porter P. Peck	Tract 4 of NW¼	17	101	49	0.3	0.036
Maria Winker	Tract 1 of SW¼	17	101	49	12.0	1.452
Francis D. Hoskins	Tract 2 of SW¼	17	101	49	1.85	0.205
Frances G. Carpenter	Tract 3 of SW¼	17	101	49	1.1	0.133

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Security & Guaranty Co.	(Except lots 1, 2, 3, 4, 5, and 6 of Block 3, Lincoln Park Add. to Sioux Falls) NE¼ of NE¼	18	101	49	37.25	4.513
Porter P. Peck	SE¼ of NE¼	18	101	49	35.00	4.235
August Gustafson	SW¼ of NE¼	18	101	49	40.00	4.84
August Gustafson	SE¼ of NW¼	18	101	49	40.00	4.84
W. H. Lyon	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SW¼	18	101	49	33.96	4.114
W. H. Lyon	SW¼ of NW¼	18	101	49	37.00	4.477
S. A. Gehrig	(Except right of way of C. M. & St. P. Ry. Co) NE¼ of SW¼	18	101	49	38.48	4.858
Marcus Russell	W½ of NW¼ of SE¼	18	101	49	30.00	2.42
Marcus Russell	SW¼ of NE¼ of NW¼ of SE¼	18	101	49	2.5	0.301
Marcus Russell	N½ of NE¼ of NW¼ of SE¼	18	101	49	5.0	0.805

Soo Valley Granite Co.	That part of NW¼ of NW¼, lying East of the Big Sioux River (Except Block 89 of Sioux Falls Imp. Co Add to Sioux Falls					0.805
S. Widmark	Tract 1 of NW¼	18	101	49	2.0	0.242
Soo Valley Granite Co.	That part of NW¼ of NW¼ lying West of Big Sioux River (Except Tract 1 and lots 1, 2, 3, 4, 12, 13, 14, 15, 16, 17, & 18 of Block 91 of Sioux Falls Imp. Co. Add. to Sioux Falls	18	101	49	14.00	1.694

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
George J. Morris	(Except right-of-way of C. St. P. M. & O. Ry. Co) East 10 acres of S½ of SW¼	18	101	49	9.37	1.137
German State Bank	(Except right-of-way of C. St. P. M. & O. Ry Co) W. 70 acres of S½ of SW¼	18	101	49	64.35	7.792
O. C. Bratrud	E½ of NE¼	19	101	49	9.5	1.149
Laura A. Darling	S½ of NE¼	19	101	49	2.0	0.242
Den Donahoe & W. M. Donahoe	(Except Block 13 of West Lawn Add. to Sioux Falls) E½ of NW¼	19	101	49	77.5	8.525
E. V. Rowley	W¼ of NE¼ of NW¼ of NW¼	19	101	49	5.0	0.550
Ludwig Seubert	SE¼ of NE¼ of NW¼ of NW¼	19	101	49	2.5	0.275
Jean Obert	NE¼ of NE¼ of NW¼ of NW¼	19	101	49	2.5	0.275
Dan A. Donahoe	NW¼ of NW¼ of NW¼	19	101	49	9.0	0.990
Dan A. Donahoe	S½ of NW¼ of NW¼	19	101	49	19.0	2.090
Daniel A. Donahoe	SW¼ of NW¼	19	101	49	38.00	4.180
Amelia Bauch	(Except the N. 50 rods) Tract 1 of SW¼	19	101	49	14.5	1.595
W. H. Fullerton, Thomas Fullerton, Geo. J. Fullerton & Leopold Guertin	Tracts 2 & 3 of SW¼	19	101	49	7.45	0.825
Thomas F. Loughran & Louis Bauch	Tract 4 of SW¼	19	101	49	8.0	0.880
Mary R. Guertin	North 4 acres of Tract 5 of SW¼	19	101	49	4.0	0.440

J. H. Fernyhough	S 4 acres of Tract 5 of SW¼	19	101	49	4.0	0.440
238						
Daniel A. Donahoe Den Donahoe & Wm. Donahoe	Tract 8 of SW¼	19	101	49	0.75	0.082
Daniel A. Donahoe Den Donahoe and Wm. Donahoe	Tract 10 of SW¼	19	101	49	8.0	0.880
Stella I. Simpson	N½ of NW¼	30	101	49	18.0	1.980
Stella I. Simpson	SW¼ of NW¼	30	101	49	32.0	3.520
Harry A. Chetham	NW¼ of SW¼	30	101	49	20.0	2.200
J. T. Norris	SW¼ of SW¼	30	101	49	33.0	3.630

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Lottie Frank and Ethel F. Neister	(Except the right-of-way of C. St. P. & M. O. Ry. Co. and except the West 13 rods and 4 ft) E½ of NE¼	13	101	50	42.0	5.082
Lottie Frank and Ethel F. Neister	W½ of NE¼	13	101	50	30.0	3.630
Lottie Frank and Ethel F. Neister	W. 13 rods and 4 ft. of E½ of NE¼	13	101	50	7.5	0.908
Hayward Investment Co.	(Except right-of-way of C. St. P. M. & O. Ry Co) E½ of SW¼	13	101	50	30.9	3.729
W. H. Lyon	(Except right-of-way of C. St. P. M. & O. Ry Co) NE¼ of SE¼	13	101	50	32.53	3.933
Lottie Frank and Ethel F. Neister	(Except right-of-way of C. St. P. M. & O. Ry Co) NW¼ of SE¼	13	101	50	36.97	4.477
Louis Lissinger	S½ of SE¼	13	101	50	73.0	8.833
Charley Gibson	A tract beginning at the N/E. Corner of running thence W. 320 ft. thence S. 120 ft. thence S. 70 degrees E. 320 ft. thence N. 20 degrees E. 52 ft. thence North 180 ft. to beginning	24	101	50	1.78	0.217
239						
Louis P. Caldwell	(Except the tract last above described) NE¼ of NE¼	24	101	50	33.7	4.078
William Gage	NW¼ of E¼	24	101	50	8.0	2.198
P. M. Smith	W½ of NW¼	3	102	49	20.7	1.773

John Sittig	E½ of NE¼	4	102	49	77.14	9.329
Ole E. Eggen	W½ of NE¼	4	102	49	78.49	9.492
Gurine Peterson	E½ of NW¼	4	102	49	78.04	11.527
Ole T. Ampaas	(Except right-of-way of C. H. & St. P. Ry Co.) W½ of NW¼	4	102	49	69.66	9.672
Ole T. Nessen	NE¼ of SW¼	4	102	49	40.00	5.95
Andrew P. Brende	SE¼ of SW¼	4	102	49	40.00	5.835

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Martin H. Oyen and Cleopatra H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) W½ of SW¼	4	102	49	72.00	9.272
Ole T. Nessen	SE¼	4	102	49	118.00	14.278
Ole Thompson Aspaas	E½ of NE¼	5	102	49	72.37	11.052
O. O. Gilseth	NW¼ of NE¼	5	102	49	37.4	4.934
O. O. Gilseth	W¾ of SW¼ of NE¼	5	102	49	29.0	3.828
O. O. Gilseth	NE¼ of NE¼ of SW¼ of NE¼	5	102	49	1.5	0.198
John Brekke	E½ of SE¼ of SW¼ of NE¼	5	102	49	5.0	0.66
John Brekke	SE¼ of SE¼ of SW¼ of NE¼	5	102	49	1.5	0.199
O. O. Gilseth	(Except right-of-way of C. M. & St. P. Ry Co.) NW¼	5	102	49	40.00	4.80
P. J. Merakergaard	(Except right-of-way of C. M. & St. P. Ry. Co) SW¼	5	102	49	73.4	8.048
240						
Martin H. Oyen and Cleopatra H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) SE¼	5	102	49	140.48	20.915
Erick O. Evjebak and Olaf Gilseth	Tract 1 of SE¼	5	102	49	9.32	2.186
Martin H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) E½ of NE¼	8	102	49	72.3	11.653
Martin H. Oyen	That part North and East of right-of-way of C. M. & St. P. Ry Co. of W½ of NE¼	8	102	49	2.0	0.264
Ole Gunderson	That part South and West of right-of-way of C. M. & St. P. Ry Co., of W½ of NE¼ (except the north 50 rods of that part West of river	8	102	49	65.4	9.537

J. L. Ingalls	The North 50 rods of that part West of River of W½ of NE¼	8	102	49	3.0	0.64
Ole Gunderson	(Except the South 50 rods of) NE¼ of NW¼	8	102	49	22.00	2.904

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Ole Gunderson	The South 30 rods of NE¼ of NW¼	8	102	49	22.00	2.904
Ole Gunderson	S½ of NW¼	8	102	49	38.00	5.475
Ole Gunderson	NE¼ of SW¼	8	102	49	40.00	5.85
Iver Nelson	(Except 2½ acres in square form in SE Corner) NW¼ of SW¼	8	102	49	17.5	2.310
M. O. Benrud	2½ acres in square form in SE corner of NW¼ of SW¼	8	102	49	2.5	0.33
Jonas Olsen	SW¼ of SW¼	8	102	49	30.00	3.96
Ole Gunderson	SE¼ of SW¼	8	102	49	39.00	5.735
241						
Nellie A. Walkins	(Except 1 acre in square form in NW corner) NE¼ of SE¼	8	102	49	38.16	5.575
School District No. 2	1 acre in square form in NW Corner) of NE¼ of SE¼	8	102	49	0.84	0.136
Ole Gunderson	W½ of SE¼	8	102	49	76.0	12.705
C. H. Renner	SE¼ of SE¼	8	102	49	38.0	8.156
Andrew P. Brende	N½ of NE¼	9	102	49	50.00	6.05
Alfred Christianson	S½ of NE¼	9	102	49	38.00	4.598
Ole T. Nessan	NE¼ of NW¼	9	102	49	32.00	4.752
Martin H. Oyen	That part West of the Southern Minn. R. R. right-of-way of W½ of NW¼ (except right-of-way of Madison Line of C. M. & St. P. Ry. Co.	9	102	49	41.4	5.565
Alfred Christianson	That part East of the Southern Minn. R. R. Right-of-way of W½ of NW¼	9	102	49	31.0	4.604
Andrew P. Brende	SE¼ of NW¼	9	102	49	40.00	5.313
Jonas Olsen	(Except the plat of Olsen's Add. to Renner) E½ of SW¼	9	102	49	71.85	9.24

C. H. Renner	(Except rights-of-way of C. M. & St. P. Ry Co. and except the town plat of Renner) W½ of SW¼	9	102	49	69.7	9.71
Christian Christianson	N½ of SE¼	9	102	49	20.00	2.42

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Jonas Olsen	S½ of SE¼	9	102	49	18.00	2.078
Jonas Olsen	NW¼ of NE¼	16	102	49	2.00	0.242
Barney Finnegan	SW¼ of NE¼	16	102	49	23.00	2.783
John Bliss	E½ of NW¼	16	102	49	75.00	9.075
Leonard Renner	(Except right-of-way of C. M. & St. P. Ry Co) W½ of NW¼	16	102	49	73.00	9.92
Michael P. Brende	NE¼ of SW¼	16	102	49	40.00	4.84
Mary P. Brende	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SW¼	16	102	49	36.9	5.02
Ole O. Velden	(Except right-of-way of C. M. & St. P. Ry. Co) SW¼ of SW¼	16	102	49	36.95	4.948
Ole O. Velden and Thomine O. Velden	SE¼ of SW¼	16	102	49	33.0	3.993
Mary P. Brende	NW¼ of SE¼	16	102	49	19.0	2.299
S. P. Brende	SW¼ of SE¼	16	102	49	25.0	3.025
F. I. Renner	E½ of NE¼	17	102	49	77.0	11.944
Gertie R. Peterson	NW¼ of NE¼	17	102	49	38.0	5.841
Gertie R. Peterson	N½ of SW¼ of NE¼	17	102	49	19.5	3.001
Iver R. Peterson	S½ of SW¼ of NE¼	17	102	49	19.5	3.001
Gertie R. Peterson	NE¼ of NW¼	17	102	49	39.0	5.733
Ingeberg Peterson	NW¼ of NW¼	17	102	49	18.0	2.376
Bernt Mekvold	SW¼ of SW¼	17	102	49	33.0	4.356
Bernt Mekvold	W 26 a/3 acres of SE¼ of NW¼	17	102	49	26.67	3.726

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Gertie R. Peterson	N½ of East 13 Acres of SE¼ of NW¼	17	102	49	6.5	0.105
Iver R. Peterson	S½ of East 13 acres of SE¼ of NW¼	17	102	49	6.5	0.105
C. C. Fleischer	E½ of SW¼	17	102	49	80.00	11.673

C. C. Fleischer	NW¼ of SW¼	17	102	49	37.0	4.884
T. P. Horton	E½ of SW¼ of SW¼	17	102	49	18.0	3.376
Nels I. Nelson	W½ of SW¼ of SW¼	17	102	49	20.0	2.84
Jonas Olsen	E½ of SE¼	17	102	49	78.00	12.092

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. J. Orstad	W½ of SE¼	17	102	49	78.00	12.732
W. O. Quincy	E½ of NE¼	19	102	49	3.00	0.396
Henry J. Schimmel	NE¼ of NE¼	20	102	49	39.00	6.318
Albert N. Allis	W½ of NE¼	20	102	49	78.00	12.049
O. S. Pendar	SE¼ of NE¼	20	102	49	39.00	6.318
Albert N. Allis	E½ of NW¼	20	102	49	76.00	11.207
W. O. Quincy	W½ of NW¼	20	102	49	74.00	9.768
R. J. Huston	N½ of SW¼	20	102	49	73.00	10.238
R. J. Huston	NW¼ of SE¼	20	102	49	39.00	6.025
Chas. E. Kaufman	S½ of SW¼	20	102	49	70.00	9.84
O. S. Pendar	E½ of SE¼	20	102	49	78.00	12.684
O. S. Pendar	SW¼ of SE¼	20	102	49	38.00	6.103
Ole O. Volden and Thomine O. Volden	NW¼ of NE¼	21	102	49	12.00	1.452
E. Larson	(Except right-of-way of C. M. & St. P. Ry. Co.) NW¼	21	102	49	151.85	19.473
Michael P. Brende	E½ of SW¼	21	102	49	39.5	4.785
Paul H. Brende and Martha O. Brende	(Except right-of-way of C. M. & St. P. Ry. Co.) NW¼ of SW¼	21	102	49	36.95	3.025
244						
O. S. Pendar	(Except right-of-way of C. M. & St. P. Ry. Co) SW¼ of SW¼	21	102	49	35.95	4.891
J. A. Erickson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼	28	102	49	142.25	18.890
Alfred Christensen	(Except right-of-way of C. M. & St. P. Ry Co.) SW¼	28	102	49	118.20	19.521
Chas. E. Kaufmann	NE¼	29	102	49	154.5	24.43
Chas. E. Kaufmann	NE¼ of NW¼	29	102	49	39.0	5.748
Carrie Erickson and John A. Erickson	W½ of NW¼	29	102	49	57.0	7.524
M. P. Brende and S. P. Brende	(Except tract 1) SE¼ of NW¼	29	102	49	2.5	0.320

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
M. P. Brende and S. P. Brende	Tract 1 of SW¼	29	102	49	36.0	5.052
Erick O. Eggen	(Except Tracts 1 and 2) NE¼ of SW¼	29	102	49	10.2	1.658
M. P. Brende and S. P. Brende	Tract 1 of SW¼	29	102	49	7.8	1.270
Ole O. Eggen	Tract 2 of SW¼	29	102	49	21.5	3.486
Carrie Erickson and John A. Erickson	(Except right-of-way of S. D. Central Ry Co) W½ of SW¼	29	102	49	38.62	6.259
Ellen Berg and Mary Schodjt	(Except right-of-way of S. D. Central Ry Co.) SE¼ of SW¼	29	102	49	36.49	5.911
Chas. E. Kaufman	NE¼ of SE¼	29	102	49	39.00	7.309
Mary Schodjt and Ole P. Schodjt	(Except ½ acre next below described) NW¼ of SE¼	29	102	49	36.5	6.681
School District No. 17	A tract in the Southeast corner (8 rods North and South by 10 rods East and West) NW¼ of SE¼	29	102	49	0.38	0.052
245						
Mary Schodjt and Ole P. Schodjt	SW¼ of SE¼	29	102	49	35.25	6.24
State of South Dakota	SE¼ of SE¼	29	102	49	35.5	6.786
G. E. Eggen, Guru E. Eggen, Ole E. Moen, Gurine E. Moen and Edward E. Moen	E½ of NE¼	31	102	49	5.0	0.584
K. O. Jellum	E½ of SE¼	31	102	49	43.0	5.106
State of South Dakota	E½ of NE¼	32	102	49	72.9	12.025
Mary Schojdt and Ole P. Schojdt	(Except right-of-way of S. D. Central Ry Co) NW¼ of NE¼	32	102	49	35.88	5.913
Joe H. Whitman	(Except Right-of-way of S. D. Central Ry Co.) SW¼ of NE¼	32	102	49	37.78	6.230
G. E. Eggen, Guru E. Eggen, Ole E. Moen Gurine E. Moen, and Edward E. Moen	(Except right-of-way of S. D. Central Ry Co) N½ of NW¼	32	102	49	66.85	10.929
G. E. Eggen, Guru E. Eggen, Ole E. Moen, Gurine E. Moen, and Edward E. Moen	SW¼ of NW¼	32	102	49	40.0	6.6

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
J. M. Whitman	That part West of River of N½ of SE¼ of NW¼	32	102	49	6.0	0.831
State of South Dakota	That part East of River of N¼ of SE¼ of NW¼	32	102	49	13.0	2.151
Ezra M. Shotwell	North 3 acres of S½ of SE¼ of NW¼	32	102	49	3.0	0.488
W. H. Lyon	South 5 acres of North 8 Acres of S½ of SE¼ of NW¼	32	102	49	5.0	0.488
Thomas Paulson	South 2 acres of N½ of S½ of SE¼ of NW¼	32	102	49	2.0	0.330
N. E. W. Brakke	S½ of S½ of SE¼ of NW¼	32	102	49	10.0	1.650
246						
K. O. Jellum	SW¼	32	102	49	152.0	25.08
State of South Dakota	NE¼ of SE¼	32	102	49	37.50	6.190
J. E. Colton	(Except right-of-way of S. D. Central Ry Co) NW¼ of SE¼	32	102	49	37.98	6.270
Thomas S. Nolan	(Except right-of-way of S. D. Central Ry Co.) SW¼ of SE¼	32	102	49	38.01	6.270
State of South Dakota	(Except right-of-way of S. D. Central Ry. Co.) SE¼ of SE¼	32	102	49	36.69	6.096
Francis A. Miller	(Except right-of-way of C. M. & St. P. Ry Co.) N½	33	102	49	110.2	14.531
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry. Co) N½ of SW¼	33	102	49	76.0	10.285
O. Benson	(Except right-of-way of C. M. & St. P. Ry Co) S½ of SW¼	33	102	49	72.0	10.140
O. Benson	W½ of SE¼	33	102	49	60.0	7.26
Ole O. Langness	(Except right-of-way of C. M. & St. P. Ry. Co.) NE¼ of NW¼	5	103	49	10.29	1.131
Baltic Creamery Co.	A tract 10½ rods West and East by 15 rods North and South in NE corner of NW¼ of NW¼	5	103	49	0.85	0.93
Olaf N. Lyng	(Except the tract last above described) NW¼ of NW¼	5	103	49	33.93	3.732

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
J. O. Langness	That part South of River of SW¼ of SW¼	5	103	49	8.0	0.88
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co) SE¼ of NW¼	5	103	49	3.0	0.330
247						
Sena C. Langness	NE¼ of SW¼	5	103	49	36.75	4.315
John Langness	Tract 1 of SW¼	5	103	49	11.00	1.33
A. J. Floren	Tract 2 of SW¼	5	103	49	6.00	0.726
Gunerius Thompson	Tract 3 of SW¼	5	103	49	3.57	0.392
Gunerius Thompson	Tract 4 of SW¼	5	103	49	1.0	0.11
Gunerius Thompson	Tract 5 of SW¼	5	103	49	34.43	4.163
Gunerius Thompson	(As shown in Book 5 of Plate Page 51) Lot 1 of Tract 6 of SW¼	5	103	49	28.41	3.123
Gunerius Thompson	(Except the tract last above described) Tract 6 of SW¼	5	103	49	2.84	0.31
Gunerius Thompson	Tract 7 of SW¼	5	103	49	27.0	2.97
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SE¼	5	103	49	1.50	0.18
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co.) North 3 acres of SW¼ of SE¼	5	103	49	1.0	0.12
J. O. Langness	(Except the North 3 acres and except the right-of-way of C. M. & St. P. Ry Co) SW¼ of SE¼	5	103	49	17.33	8.09
Mari Lee, Libbie Lang Carrie Lee, Etta M. Lee, Tilda Lee, Mabel O. Lee, and Thomas E. Lee	NE¼ of NE¼	6	103	49	38.81	4.82
	and S½ of NE¼	6	103	49	69.83	9.10
	and N½ of SE¼	6	103	49	75.82	9.87
John Williamson	NW¼ of NE¼	6	103	49	38.60	5.32
Even O. Fossum	NE¼ of NW¼	6	103	49	35.11	5.79
Knud Larson	W½ of NW¼	6	103	49	43.00	6.97
Lina Hanson	N½ of N½ of SE¼ of NW¼	6	103	49	9.05	1.48
K. P. Sorklime	(As described in Book 53 of Deeds, page 434) Lot 1 of SE¼ of NW¼	6	103	49	17.84	2.91

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Gunerius Thompson	That part South of Lot 1 as last above described of SE¼ of NW¼	6	103	49	9.50	1.568
Gunerius Thompson	N½ of NE¼ of SW¼	6	103	49	18.08	2.985
Gunerius Thompson	N½ of NE¼ of SW¼	6	103	49	18.09	2.985
A. L. Berg	S½ of SW¼	6	103	49	59.75	9.302
Gunerius Thompson	SE¼ of SW¼	6	103	49	35.18	5.805
Gunerius Thompson	S½ of SE¼	6	103	49	77.82	10.164
Gunerius Thompson	N½ of NE¼	7	103	49	77.0	10.074
Julia Johnson	S½ of NE¼	7	103	49	78.32	10.247
Ole J. Ustrud and H. O. Ustrud	NE¼ of NW¼	7	103	49	38.18	5.705
Knut O. Larson	W½ of NW¼	7	102	49	59.75	9.302
Ole O. Ustrud and C. C. Sando	SE¼ of NW¼	7	103	49	36.18	5.970
Magnild Floren	NE¼ of SW¼	7	103	49	36.18	5.970
Ole O. Floren	W½ of SW¼	7	103	49	34.40	5.594
Ole O. Floren	SE¼ of SW¼	7	103	49	35.18	5.855
Julia Johnson	N½ of SE¼	7	103	49	78.32	10.247
John Thompson	SW¼ of SE¼	7	103	49	38.82	5.338
John P. Risvold	Tract 1 of SE¼	7	103	49	3.21	0.397
Anders S. Aas	Tract 2 of SE¼	7	103	49	15.50	2.035
Ingeberg Risvold	Tract 3 of SE¼	7	103	49	12.00	1.320
Peder P. Risvold	Tract 4 of SE¼	7	103	49	4.87	0.536
Sivert E. Kringen	(Except right-of-way of C. M. & St. P. Ry Co) N½ of NE¼	8	103	49	38.67	4.679
John P. Risvold	(Except right-of-way of C. M. & St. P. Ry Co.) SW¼ of NE¼	8	103	49	36.00	4.356
John P. Risvold	North 25 acres of SE¼ of NE¼	8	103	49	21.00	2.541
Peder P. Risvold	South 15 acres of SE¼ of NE¼	8	103	49	15.00	1.815

249

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. M. Christianson, Halvor Gunderson and Maria Langness	NE¼ of NW¼	8	103	49	35.50	3.905
Gunerius Thompson	As shown in Book 5 of Plats, page 51, Tract 1 of NW¼ of NW¼	8	103	49	6.70	0.737
Gunerius Thompson	(Except Tract 1 of last above described) NW¼ of NW¼	8	103	49	29.16	3.208
Annie M. Kringen	(As described in Book 26 of Deeds, page 507) SW 4½ acres of SW¼ of NW¼	8	103	49	4.5	0.495
John O. Langness	(Except the Tract last above described) SW¼ of NW¼	8	103	49	33.50	3.685
Jens Erickson	SE½ of NW¼	8	103	49	39.00	4.290
Jens Erickson	NE¼ of SW¼	8	103	49	39.00	4.290
Sara Vollan	NW¼ of SW¼	8	103	49	37.50	4.125
Anders P. Risvold	North 30 acres of SW¼ of SW¼	8	103	49	29.50	3.245
Peder P. Risvold	South 10 acres of SW¼ of SW¼	8	103	49	9.00	0.99
Anders P. Risvold	N½ of SE¼ of SW¼	8	103	49	19.50	2.145
Peder P. Risvold	S½ of SE¼ of SW¼	8	103	49	18.80	2.035
Peder P. Risvold	NE¼ of SE¼	8	103	49	40.00	3.960
Peder P. Risvold	The North 11 acres of that part East of right-of-way of C. M. & St. P. Ry. Co. of NW¼ of SE¼	8	103	49	11.00	1.210
Anders P. Risvold	(Except right-of-way of C. M. & St. P. Ry. Co. and except the N. 11 acres East of such right-of-way) NW¼ of SE¼	8	103	49	25.00	2.750
250						
Anders P. Risvold	(Except right-of-way of C. M. St. P. Ry Co) SW¼ of SE¼	8	103	49	35.00	3.850
Lars Paulson, G. P. Wilson and G. T. Nyhus	SE¼ of SE¼	8	103	49	39.00	3.861

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Sara Vollan	SW¼ of NW¼	9	103	49	8.00	0.968
Sara Vollan	N½ of SW¼	9	103	49	47.90	4.421
Torger H. Nyhus	SW¼ of SW¼	9	103	49	39.00	3.861
Peder P. Risvold	SE¼ of SW¼	9	103	49	38.00	4.235
Ole Johnson	NW¼ of NE¼	16	103	49	37.10	4.040
Torger H. Nyhus	SW¼ of NE¼	16	103	49	38.00	3.762
Peder Risvold	NE¼ of NW¼	16	103	49	39.00	4.247
John Johnson	NW¼ of NW¼	16	103	49	39.00	3.470
Paul A. Risvold	S½ of NW¼	16	103	49	78.00	8.151
Gilbert G. Brende	N½ of SW¼	16	103	49	78.00	8.151
Gilbert G. Brende	SW¼ of SW¼	16	103	49	40.00	4.40
Gilbert G. Brende	SE¼ of SW¼	16	103	49	40.00	3.96
Ole G. Brende	W½ of SE¼	16	103	49	78.00	7.722
Ole G. Brende	SE¼ of SE¼	16	103	49	4.00	0.484
G. T. Nyhus	NE¼ of NE¼	17	103	49	39.00	4.290
Sara Vellan	(Except right-of-way of C. M. & St. P. Ry Co.) W½ of NE¼	17	103	49	70.00	7.700
Gilbert G. Brende and O. L. Brende	SE¼ of NE¼	17	103	49	39.00	4.290
Gilbert T. Gunderson	E½ of N.W¼	17	103	49	77.00	8.470
Peter P. Risvold	N.W¼ of NW¼	17	103	49	37.00	4.070
Gilbert T. Gunderson	SW¼ of NW¼	17	103	49	40.00	4.400
G. T. Nyhus	Tract 1 of SW¼	17	103	49	7.40	1.018
Thomas O. Brende, Thorsten O. Brende, and Joseph O. Brende,	Tract 2 of SW¼	17	103	49	2.18	0.300
251						
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 3 of SW¼	17	103	49	4.70	0.647
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 4 of SW¼	17	103	49	1.00	0.138
Olaf B. Floren	Tract 5 of SW¼	17	103	49	4.80	0.66

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 6 of SW¼	17	103	49	2.04	0.281
Clara Schneider	Tract 7 of SW¼	17	103	49	1.34	0.185
Torger N. Nyhus	Tract 8 of SW¼	17	103	49	3.00	0.413
Sarah Vollan	Tract 9 of SW¼	17	103	49	2.96	0.407
E. G. Brende	Tract 10 of SW¼	17	103	49	3.00	0.413
Iver Paulson	Tract 11 of SW¼	17	103	49	1.03	0.142
E. G. Brende	Tract 12 of SW¼	17	103	49	2.00	0.275
G. T. Gunderson	Tract 13 of SW¼	17	103	49	21.56	2.965
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 14 of SW¼	17	103	49	18.00	2.477
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 15 of SW¼	17	103	49	28.80	3.960
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 16 of SW¼	17	103	49	35.72	3.929
Nidres Norwegian Evangelical Lutheran Congregation	Tract 17 of SW¼	17	103	49	8.60	0.946
Knud Thompson and Jacob Olson	Tract 18 of SW¼	17	103	49	1.83	0.252
Erick H. Oien	NE¼ of SE¼	17	103	49	39.00	4.290
Bortinus Pederson	(Except right-of-way of C. M. & St. P. Ry Co.) W½ of SE¼	17	103	49	70.65	7.772
Mali Johnson	SE¼ of SE¼	17	103	49	40.00	4.400
John O. Aasen	(Except Tracts 1 and 2) NE¼	18	103	49	126.79	17.709
252						
Peder P. Risvold	Tract 1 of NE¼	18	103	49	10.14	1.115
Ole J. Stordahl	Tract 2 of NE¼	18	103	49	1.40	0.154
Andrew Swenson, Aas	NW¼	18	103	49	51.65	8.523
Ole J. Ustrud	That part East of River of NE¼ of SE¼	18	103	49	11.67	1.805
Martha R. Roberts	NE¼ of NE¼	20	103	49	40.00	4.400
B. G. Flamoe	(Except right-of-way of C. M. & St. P. Ry Co.) NW¼ of NE¼	20	103	49	34.50	3.795

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Haagen O. Skatvold	(Except right-of-way of C. M. & St. P. Ry Co.) S½ of NE¼	20	103	49	70.20	9.653
Frederick Johnson and Jens Johnson and Torbjorn Olson	Tract 1 of NW¼	20	103	49	4.28	0.589
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. N. Thompson, Fred R. Thompson, Rueben V. Thompson, Mabel J. Thompson and Carl M. Thompson	(Except Tract 1 and except the Tract next Hereinafter described) NE¼ of NW¼	20	103	49	10.00	1.375
James J. Flamoe	A tract as described in Book 67 of Deeds, page 106, in NE¼ of NW¼	20	103	49	10.00	1.375
John J. Almie, Jr.	NW¼ of NW¼	20	103	49	3.33	0.456
Bernt J. Flamoe	SE¼ of NW¼	20	103	49	8.10	1.114
Peter Paulson	(Except right-of-way of C. M. & St. P. Ry Co.) E½ of SE¼	20	103	49	63.85	8.752
Haagen O. Skatvold	NW¼ of SE¼	20	103	49	15.00	2.063
Peter Paulson	(Except Tract 1) that part lying East of River of SW¼ of SE¼	20	103	49	13.00	1.788
253						
G. T. Nyhus	Tract 1 of SE¼	20	103	49	1.60	0.220
Mattha R. Roberta	North ½	21	103	49	251.75	26.687
Peter Paulson	W½ of SW¼	21	103	49	79.0	10.461
Erick G. Brende	E½ of SW¼	21	103	49	79.0	8.690
Erick G. Brende	SE¼	21	103	49	101.42	8.796
Martha Roberts, John H. Roberts and Thomas S. Roberts	E½ of SW¼ of SW¼	27	103	49	2.00	0.242
Erick O. Eggen and D. D. Russell	W½ of SW¼ of SW¼	27	103	49	17.75	1.764
G. T. Nyhus	(Except 5 acres next described) n½ of NE¼	28	103	49	29.75	6.911
E. G. Brende	5 acres being 10 rods N. and S. at East end, and no rods N. and S. at West end, extending across the North side of N½ of NE¼	28	103	49	3.00	0.363

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
G. T. Nyhus	S½ of NE¼	28	103	49	78.00	7.414
O. S. Thompson	(Except the East 19 acres) E½ of NW¼	28	103	49	60.24	7.449
G. T. Nyhus	East 19 acres of E½ of NW¼	28	103	49	18.76	2.089
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) W½ of NW¼	28	103	49	73.15	10.077
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) N½ of SW¼	28	103	49	70.90	9.405
O. S. Thompson	E.18½ acres of E½ of SW¼ of SW¼	28	103	49	17.80	2.452
Ole Peterson	W 1¾ acres of E½ of SW¼ of SW¼	28	103	49	1.70	2.343
Ole Peterson	(Except right-of-way of C. M. & St. P. Ry Co) W½ of of SW¼ of SW¼	28	103	49	12.95	1.837
Thomas S. Roberts	SE¼ of SW¼	28	103	49	39.00	5.225
254						
G. T. Nyhus	N., 3½ acres of N½ of SE¼	28	103	49	1.50	0.165
Erick O. Eggen	(Except the N 3½ acres) N½ of SE¼	28	103	49	76.50	7.153
Thomas S. Roberts	SW¼ of SE¼	28	103	49	39.00	4.29
Nils E. Eggen	SE¼ of SE¼	28	103	49	39.00	3.861
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. H. Thompson, Fred R. Thompson, Reuben V. Thompson, and Carl Thompson	Tract 1 of NE¼	29	103	49	30.00	4.188
Joseph G. Thompson	Tract 2 of NE¼	29	103	49	15.00	2.178
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) Tract 3 of NE¼	29	103	49	61.31	9.477
O. S. Thompson	N½ of SE¼	29	103	49	52.00	7.908
O. S. Thompson	N½ of SE¼	29	103	49	3.00	0.696
Ole Peterson	SE¼ of SE¼	29	103	49	29.00	4.374
Andrew J. Aasen	N½ of NE¼	32	103	49	67.20	9.399
Andrew J. Aasen	SW¼ of NE¼	32	103	49	37.00	4.477

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. Thompson, Fred R. Thompson, Mabel Thompson and Carl Thompson	N½ of SE¼ of NE¼	32	103	49	19.50	3.159
Joseph C. Thompson	S½ of SE¼ of NE¼	32	103	49	19.50	3.159
Andrew J. Aasen	E½ of NW¼	32	103	49	11.00	1.225
Thomas Hendrickson	E½ of SW¼	32	103	49	20.00	2.640
James L. Finnegan	N½ of SE¼	32	103	49	76.00	11.232
John Finnegan	SW¼ of SE¼	32	103	49	36.00	4.752
Margaret L. Finnegan	SE¼ of SE¼	32	103	49	37.20	5.534
255						
Martha R. Roberts, John H. Roberts and Thomas S. Roberts	NE¼ of NE¼	33	103	49	39.00	3.861
Thomas S. Roberts	NW¼ of NE¼	33	103	49	39.00	4.719
Gurine Peterson	S½ of NE¼	33	103	49	80.00	8.800
Thomas S. Roberts	NE¼ of NW¼	33	103	49	39.00	5.792
Andrew J. Aasen	(Except right-of-way of C. M. & St. P. Ry. Co) NW¼ of NW¼	33	103	49	32.10	4.631
Bertha Peterson, Alice C. Peterson, John O. Thompson, Wm. H. Thompson, Fred Thompson, Reuben V. Thompson, and Mabel Thompson and Carl Thompson	(Except right-of-way of C. M. & St. P. Ry Co) SW¼ of NW¼	33	103	49	33.00	4.967
Gurine Peterson	SE¼ of SW¼	33	103	49	40.00	5.94
Anne O. Haugen, Amanda E. Haugen and Jennie A. Haugen	E½ of SW¼	33	103	49	79.00	11.732
Joseph C. Thompson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SW¼	33	103	49	33.00	5.000
Thomas Hendrickson and B. B. Hendrickson	(Except right-of-way of C. M. & St. P. Ry Co.) SW¼ of SW¼	33	103	49	32.10	4.863
Gurine Peterson	N½ of SE¼	33	103	49	80.00	8.800
Gurine Peterson	SW¼ of SE¼	33	103	49	39.00	4.719

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Gurine Peterson	SE¼ of SE¼	33	103	49	39.00	3.861
Martha R. Roberts, John H. Roberts and Thomas S. Roberts	NW¼ of NW¼	34	103	49	20.75	2.061
Gurine Peterson	SW¼ of NW¼	34	103	49	21.00	2.079
256						
Gurine Peterson	W½ of SW¼	34	103	49	35.50	3.526
Lars Simonson	SW¼ of SW¼	29	104	49	6.67	0.784
C. R. Mattern	SE¼ of SW¼	29	104	49	12.67	1.394
John Bruaas	(Except right-of-way of C. M. & St. P. Ry Co) S½ of SE¼	29	104	49	14.00	1.540
Lars Simonson	E½ of NE¼	31	104	49	37.00	5.088
Hans Nelson	SW¼ of NE¼	31	104	49	20.00	2.888
Lars Simonson	SE¼ of NW¼	31	104	49	11.67	1.926
P. G. Thompson	NE¼ of SW¼	31	104	49	32.85	5.421
Ole L. Mule	S½ of SW¼	31	104	49	19.60	3.234
P. G. Thompson	SE¼ of SW¼	31	104	49	35.18	5.805
P. M. Thompson	NE¼ of SE¼	31	104	49	39.00	4.978
Julie L. Moe and Julie L. Hustoft	NW¼ of SE¼	31	104	49	39.82	5.476
Oluf N. Lyng	E½ of SW¼ of SE¼	31	104	49	19.50	2.682
P. G. Thompson	#½ of S½W¼ of SE¼	31	104	49	19.32	2.657
Oluf N. Lyng	SE¼ of SE¼	31	104	49	38.00	4.717
John M. Bruaas	(Except the right-of-way of C. M. & St. P. Ry Co.) N½ of NE¼	32	104	49	38.00	3.300
Mali P. Langness	(Except right-of-way of C. M. & St. P. Ry Co) S½ of NE¼	32	104	49	50.00	5.500
Mali P. Langness	E½ of NW¼	32	104	49	53.00	5.968
Lars Simonson	W½ of NW¼	32	104	49	53.00	7.013
Mali P. Langness	N½ of SW¼	32	104	49	78.00	8.580
Randi A. Floren	SW¼ of SW¼	32	104	49	38.00	4.279
Columbia Creamery Co.	A tract as described in Book 59 of Deeds, Page 70, in SE¼ of SW¼	32	104	49	.11	0.012

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Mrs. M. O. Nyhus	(Except the Tract last above described) SE¼ of SW¼	32	104	49	36.00	3.960
Mali P. Langness	(Except right-of-way of C. M. & St. P. Ry Co) N.W¼ of SE¼	32	104	49	1.73	0.120
A. J. Pettingill	The West 500 ft. of Tract 9 of SE¼	32	104	49	1.73	0.190
A. J. Pettingill	(Except that part in St. Oluf Mill Tract as shown in Book 5 of Plats, page 63) Tract 3 of SE¼	32	104	49	7.29	0.802
Wm. J. Milne	That St. Oluf Mill Tract as described in Book 5 of Plats, page 63, being part of Tracts 2, 3, and 9 of SE¼	32	104	49	4.37	.4607

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. L. Ferguson	SW¼ of NE¼	24	101	50	32.32	3.555
C. L. Ferguson	SE¼ of NE¼	24	101	50	38.50	4.235
John Johnson	SE¼ of NW¼	24	101	50	12.64	1.390
Chas. L. Ferguson	SE¼ of NW¼	24	101	50	12.64	1.320
Ed Clark	NE¼ of SW¼	24	101	50	5.30	0.583
M. L. Fusselman	SE¼ of SW¼	24	101	50	3.31	0.364
Geo. Parsons	NW¼ of NE¼	25	101	50	40.00	4.400
Geo. Parsons	NW¼ of NE¼	25	101	50	40.00	4.400
Harry A. Chetham	SW¼ of NE¼	25	101	50	40.00	4.400
Harry A. Chetham	SE¼ of NE¼	25	101	50	40.00	4.400
Geo. A. Parsons	NE¼ of NW¼	25	101	50	12.64	1.390
Harry A. Chetham	SE¼ of NW¼	25	101	50	12.30	1.353
Harry A. Chetham	NE¼ of SE¼	25	101	50	40.00	4.400

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Harry A. Chetham	NW¼ of SE¼	25	101	50	40.00	4.400
Harry A. Chetham	W½ of SW¼ of SE¼	25	101	50	20.00	2.200
Harry A. Chetham	SE¼ of SE¼	25	101	50	40.00	4.400
Johnson Bros. Land Co.	E½ of SW¼ of SE¼	25	101	50	20.00	2.200

Harry A. Chetham	NE¼ of SW¼	25	101	50	16.78	1.845
G. A. Castle	SE¼ of SW¼	25	101	50	8.23	0.905
Ludwig Seubert	NE¼ of NE¼	36	101	50	40.00	4.400
Ludwig Seubert	NW¼ of NE¼	36	101	50	36.47	4.011
Dennis & Dennis	SE¼ of NE¼	36	101	50	27.54	3.029
John DeBok	NW¼ of SW¼	31	101	49	30.05	3.305
Wm. H. Lyon	SW¼ of SW¼	31	101	49	4.86	0.534
John DeBok	SW¼ of NW¼	31	101	49	40.00	4.400
John DeBok	NW¼ of NW¼	31	101	49	38.23	4.205
Roger L. Dennis	Tract 1	31	101	49	6.63	0.729
Roger L. Dennis	Tract 2	31	101	49	2.03	0.223
Roger L. Dennis	Tract 3	31	101	49	13.31	1.467
Roger L. Dennis	Tract 4	31	101	49	15.54	1.709
Roger L. Dennis	Tract 5	31	101	49	30.47	3.351

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Roger L. Dennis	Tract 6	31	101	49	5.13	0.564
Roger L. Dennis	Tract 7	31	101	49	4.76	0.523
Roger L. Dennis	Tract 8	31	101	49	10.34	1.137
Roger L. Dennis	Tract 12	31	101	49	9.83	1.081
Roger L. Dennis	Tract 13	31	101	49	13.29	1.461
Roger L. Dennis	Tract 14	31	101	49	25.13	2.764
Roger L. Dennis	Tract 15	31	101	49	9.81	1.079
Roger L. Dennis	Tract 16	31	101	49	8.30	0.931
Roger L. Dennis	Tract 17	31	101	49	21.80	2.398
Roger L. Dennis	Tract 18	31	101	49	2.50	0.275
Roger L. Dennis	Tract 19	31	101	49	13.08	1.438
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Roger L. Dennis	Tract 20	31	101	49	17.03	1.873
Roger L. Dennis	Tract 21	31	101	49	12.03	1.323
Roger L. Dennis	Tract 22	31	101	49	10.02	1.102
Geo. Henderson	S½ of SW¼ of SW¼	32	101	49	16.80	1.848
Thos. Quigley	NW¼ of SW¼ and N½ of SW¼ of SW¼	32	101	49	36.76	2.573
Frank Corey and F. A. Ayers—	S½ of SE¼ of SW¼	32	101	49	12.40	1.364

Joe Seubert	N½ of SE¼ of SW¼ and NE¼ of SW¼	32	101	49	45.30	3.171
Pauline Zetlitz	Except Plat of Hazelville, SE¼	32	101	49	72.05	6.484
Norman O. Hamlin	Lot 2 of S½ of NE¼	32	101	49	28.00	2.520
Norman O. Hamlin	Lot 3 of S½ of NE¼	32	101	49	2.65	0.291
Arne Zetlitz	Lot 4 of S½ of NE¼	32	101	49	7.20	0.504
Wm. Jones	Lots 1, 2, 3 and 4 of Plat of Hazelville, SE¼	32	101	49	3.70	0.407
J. Walkins and C. S. McDonald	Lot 28 of Walkins & McDonald's Plat of W½ of NW¼	33	101	49	23.10	2.541
J. Walkins and C. S. McDonald	Lot 27 of Walkins & McDonald's Plat of W½ of NW¼	33	101	49	17.00	1.870
Chas. Eckert	E½ of NW¼	33	101	49	49.74	5.471

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Oscar Harpel	NW¼ of SW¼	33	101	49	17.35	1.388
G. B. Tuthill	All lying South of River in NE¼	33	101	49	16.22	1.784

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Julius Kuh	All lying North of River in NE¼	33	101	49	70.50	7.755
A. W. Tuthill	N½ of NW¼	34	101	49	24.36	2.679
Chas. Eckert	SW¼ of SW¼	27	101	49	15.58	1.713
Chas. Eckert	SE¼ of SW¼	27	101	49	24.60	2.904
Clark Coats Estate	NE¼ of SW¼	27	101	49	30.30	3.333
Clark Coats Estate	NW¼ of SE¼	27	101	49	20.90	2.299
Clark Coats Estate	SE¼ of NW¼	27	101	49	10.55	1.160
Clark Coats Estate	SW¼ of NE¼	27	101	49	27.63	3.039
Clark Coats Estate	NW¼ of NE¼	27	101	49	14.17	1.558
Clark Coats Estate	SW¼ of SE¼	22	101	49	28.58	3.143
Clark Coats Estate	NW¼ of SE¼	22	101	49	21.50	2.365
Clark Coats Estate	NE¼ of SW¼	22	101	49	8.50	0.935

Name of Owner	Description	Lot	Block	Proportion of Benefit
Town of Renner				
Leonard Renner	Lots 1, 2, 3, 4, 5, 6, 7 and	8		0.094

Olson's Addition to Renner

Jonas Olson		1		0.012
H. W. Ross Lumber Co.	Lots 2, 3, and	4		0.033
Jonas Olson	Lots 5 to 13, inclusive			0.101
H. W. Ross Lumber Co.	Lots 14, 15, 16, 17, 18 and	19		0.062
Jonas Olson	Lots 20, 21, 22, 23 and	24		0.051

Berwick Addition to Sioux Falls.

Grant Lines	Lot 1 and	2	1	0.05
Grant Lines		3	1	0.025
Grant Lines		4	1	0.025
Grant Lines	Lots 5 and	6	1	0.05
Grant Lines	Lots 7, 8, 9, 10, 11 and	12	1	0.15
261				
Security Savings Bank	Lots 1, 2, 3 and	4	2	0.10
Security Savings Bank	Lots 5, 6, 7, 8, 9, 10, 11 and	12	2	0.20
Frank C. Frizzel	Lots 1 and	2	3	0.05
E. N. Frizzell	Lots 3, 4, 5 and	6	3	0.10
Grant Lines	Lots 7 and	8	3	0.05
E. N. Frizzell	Lots 9 and	10	3	0.05
F. C. Frizzell	Lots 11 and	12	3	0.05
A. D. Horton			4	0.20
Elwin N. Potter			5	0.225
Security Savings Bank			6	0.083
F. L. Blackman	Lots 1 and	2	7	0.05
F. L. Blackman	Lots 7 and	8	7	0.05
F. L. Blackman	Lots 11 and	12	7	0.05
F. C. Frizzell	Lots 1, 2, 3 and	4	8	0.10
J. N. Weston	Lots 7 and	8	8	0.05
Name of Owner	Description	Lot	Block	Proportion of Benefit.
F. C. Frizzell	Lots 9 and	10	8	0.05
F. E. Payne		11	8	0.025
Security Savings Bank	Lots 1, 2, 3, 4, 5 and	6	9	0.15
Mathias Blumer		7	9	0.025
Security Savings Bank		8	9	0.025
Security Savings Bank	Lots 9, 10, 11 and	12	9	0.10

J. N. Weston	Lots 1 and	2	10	0.10
J. N. Weston	Lots 10, 11 and	12	10	0.075
State of South Dakota	East Half of		11	0.041
State of South Dakota	Lots 1, 2, 3, 4, 5, 6, 7, 8 and	9	12	0.225
State of South Dakota	Lots 10, 11 and	12	12	0.075
State of South Dakota	Lots 1, 2, 3, 4, 5 and	6	13	0.113
Elwin N. Potter	Lots 7, 8, 9, 10, 11 and	12	13	0.15
State of South Dakota			14	0.175
Security Savings Bank			15	0.30

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Grant Lines	Lots 1 and	2	16	0.05
Grant Lines		3	16	0.025
Grant Lines		4	16	0.025
Grant Lines		5	16	0.025
Grant Lines		6	16	0.025
Grant Lines	Lots 7, 8, 9, 10, 11 and	12	16	0.15
W. C. Archer	Lots 1 and	2	17	0.05
Security Savings Bank	Lots 3 and	4	17	0.05
Dorothy Golden	Lots 5 and	6	17	0.025
Dorothy Golden	Lots 7, 8, 9 and	10	7	0.05
W. C. Archer	Lots 11 and	12	17	0.025
Sophia Krull	Lots 1, 2 and	3	18	0.037
Sophia Krull		4	18	0.12
Sophia Krull	Lots 5 and	6	18	0.12
Sophia Krull	Lots 10 and	11	18	0.024
C. L. Norton		12	18	0.12

Name of Owner	Description	Lot	Block	Proportion of Benefit.
State of South Dakota			19	0.20
State of South Dakota			20	0.31
State of South Dakota	Lots 1, 2 and 3	4	21	0.105
State of South Dakota	Lots 7, 8, 9, 10, 11 and	12	21	0.15
State of South Dakota			22	0.041
Security Savings Bank	Lots 1, 2 and	3	24	0.075
Security Savings Bank		4	24	0.025
J. C. Boynton		5	24	0.025
L. J. Modde		6	24	0.025

M. W. Potter	Lots 7 and	8	24	0.05
Elwin N. Potter		9	24	0.025
Elwin N. Potter	Lots 10, 11 and	12	24	0.075
E. B. Mallet			25	0.02
State of South Dakota			27	0.033
State of South Dakota	Lots 1, 2 and	3	28	0.075
263				
State of South Dakota	Lots 4, 5, 6, 7 and	8	28	0.125
State of South Dakota			29	0.02
State of South Dakota			30	0.02
Security Savings Bank		2	31	0.012
Jas. Kennedy		3	31	0.025
Security Savings Bank		4	31	0.025
Security Savings Bank	Lots 5 and	6	31	0.05
Security Savings Bank	Lots 7 and	8	31	0.05

Brookings' Addition to Sioux Falls.

Wigant Ludewig	Lots 4, 5, 6, 7, 8, 9, 10, 12 and	13	5	0.325
Hans C. Ruvald	Lots 1, 2 and	3	11	0.075
Hans Ruvald	Lots 1 and	2	12	0.065
H. Ruvald	Lots 3, 4 and	5	12	0.015
Hans C. Ruvald		6	12	0.032

Brooks' Addition to Sioux Falls.

Grant Lines	Lots 14, 15, 16 and	17	1	0.075
Name of Owner	Description	Lot	Block	Proportion of Benefit

Bunker's Addition to Sioux Falls.

Hans Ruvald	Lots 1, 2, 3, 4, 5, 6 and	7	1	0.162
N. S. Johnson		8	1	0.02
Geo. C. Hull		9	1	0.02
Hans Ruvald	Lots 10, 11, 12, 13 and	14	1	0.10
Hans Ruvald		15	1	0.02
Hans Ruvald	Lots 16 and	17	1	0.04
Hans Ruvald	Lots 18, 19 and	20	1	0.06
Hans Ruvald		1	2	0.02
Hans Ruvald	Lots 2, 3, 4, 5, 6 and	7	2	0.06
Joseph Elott	Lots 8 and	9	2	0.02
Hans Ruvald		10	2	0.02

Hans Ruvald		11	2	0.02
O. C. Cadwell		12	2	0.02
264				
Hans Ruvald	Lots 13, 14, 15, 16, 17, 18, 19 and 20		2	0.15

Central Park Addition to Sioux Falls.

Chas. Dailey	Lots 1 and	2	1	0.04
Hans Ruvald	Lots 3 and	4	1	0.04
J. H. Fernyhough		5	1	0.02
F. T. Williams		6	1	0.02
Bessie Haas	Lots 7 and	8	1	0.04
J. H. Fernyhough	Lots 9 and	10	1	0.04
Benjamin F. Barnes	Lots 11, 12 and	13	1	0.06
J. H. Fernyhough	Lots 14, 15 and	16	1	0.06
John P. Shoemaker			2	0.30
Frances G. Carpenter			3	0.30
Henry D. Norris			4	0.30
Diantha A. Hurd			5	0.30
Henrietta Levinger			8	0.30
Diantha A. Hurd			12	0.30
Mariette Blomiley			13	0.30

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Frances G. Carpenter			14	0.30
Clara L. Hambright	Lots 1, 2, 3 and	4	15	0.08
Abe Davison and Sippie Davison	Lots 5, 6, 7 and	8	15	0.08
Michael Marousek	Lots 9, 10, 11 and	12	15	0.08
Clara L. Hambright	Lots 13, 14, 15 and	16	15	0.08
Frances G. Carpenter			16	0.30
Frances G. Carpenter			17	0.30
Anne E. Ploog			18	0.30
Frances G. Carpenter			19	0.30
Frances G. Carpenter and G. T. Greeley	Lots 1, 2, 3 and	4	20	0.08
Nora Connell	Lots 5, 6, and 7 and	8	20	0.08
F. G. Carpenter and G. T. Greeley	Lots 9, 10, 11, 12, 13, 14, 15 and	16	20	0.16

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W. R. Timpe and H. L. Schroeder	Lots 1, 2 and	3	21	0.06
F. L. Blackman		4	21	0.02
Mattie M. Hanson	Lots 5, 6, 7 and	8	21	0.08
F. L. Blackman	Lots 9 and	10	21	0.04
F. L. Blackman		11	21	0.02
F. L. Blackman		12	21	0.02
D. J. Carpenter		13	21	0.02
W. R. Timpe and H. L. Schroeder	Lots 14, 15 and	16	21	0.06
Mary C. Brace			30	0.30
F. L. Blackman			31	0.30
Frances G. Carpenter	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and	14	32	0.28
May Sanders and May B. Sanders	Lots 15 and	16	32	0.04
Earl H. Roster			33	0.30
Frances G. Carpenter			40	0.30
Frances G. Carpenter			48	0.30
George H. Brace			49	0.30

Name of Owner	Description	Lot	Block	Proportion of Benefit.
A. Gale, C. A. Greeley, C. C. Carpenter, and G. H. Brace	Outlet "A"			0.075
Geo. H. Brace and James Jameson, Trustees,	Outlet "B"			0.075
Geo. H. Brace and James Jameson, Trustees	Outlet "C"			0.075

Englewood Addition to Sioux Falls.

Marcus Russell	1		0.225
William Fuller	2		0.225
Marcus Russell	3		0.225

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Annie A. W. Nock	4		0.225
James B. Adams	12		0.225
Marcus Russell	13		0.225
Mark M. Powers	14		0.225
Marcus Russell	15		0.225

Marcus Russell			16	0.225
Marcus Russell			17	0.225
James B. Adams			18	0.225
F. I. Russell		1	19	0.015
F. I. Russell		2	19	0.015
M. T. Botsford	Lots 3 and	4	19	0.03
Addie B. Woodsworth	Lots 5, 6, 7 and	8	19	0.06
Marcus Russell	Lots 9, 10 and	11	19	0.045
Sarah Walker		12	19	0.015
Alice M. Steinbach		13	19	0.015
Lillie M. Darrow	Lots 14, 15 and	16	19	0.045
F. L. Blackman	Lots 1, 2, 3 and	4	20	0.06
F. I. Russell		5	20	0.015
Marcus Russell		6	20	0.015
F. I. Russell	Lots 7 and	8	20	0.03
Marcus Russell	Lots 9, 10, 11, 12, 13, 14, 15 and	16	20	0.12
F. I. Russell		1	21	0.015

Name of Owner	Description	Lot	Block	Proportion of Benefit.
S. D. Kennedy	Lots 2, 3, 4 and	5	21	0.06
F. I. Russell		6	21	0.015
M. J. Tinkham	Lots 7 and	8	21	0.03
F. I. Russell	Lots 9, 10, 11, 12, 13 14, 15 and	16	21	0.12
Marcus Russell			22	0.225
Marcus Russell			27	0.225
Marcus Russell			28	0.225
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Marcus Russell			29	0.225
Edward A. Benson and Charles E. Anderton,			30	0.225
Marcus Russell			31	0.225
Marcus Russell	Lots 1, 2, 3 and	4	32	0.06
F. I. Russell	Lots 5 and	6	32	0.03
James Martin	Lots 7 and	8	32	0.03
E. T. Newhall	Lots 9, 10 and	11	32	0.045
Joe Kirby		12	32	0.015
Marcus Russell	Lots 13, 14, 15 and	16	32	0.06

Harrison Addition to Sioux Falls.

A. P. Burtch	Lots 5, 6 and	7	16	0.075
Porter P. Peck			17	0.225
Porter P. Peck			18	0.225
O. C. Potter	Lots 1, 2 and	3	19	0.06
Oscar C. Potter	Lots 4, 5, 6, 7, 8, 9, 10, 11 and	12	19	0.18
Lester D. Sharon			20	0.225
G. H. Grebel			21	0.225
G. H. Grebel	Lots, 2, 3, 4, 5, 6, 7 and	8	22	0.14
W. L. Oaks			25	0.225
G. H. Grebel			26	0.225
G. H. Grebel			27	0.225
G. H. Grebel			28	0.225
G. H. Grebel			29	0.225

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Oscar C. Potter			30	0.225
Porter P. Peck			31	0.225
Porter P. Peck			32	0.225

268 Lincoln Park Addition to Sioux Falls.

P. P. Peck	Lots 1 and	2	3	0.20
P. P. Peck	Lots 3 and	4	3	0.20
P. P. Peck	Lots 5 and	6	3	0.20

McClellan's Second Addition to West Sioux Falls.

John McClellan Estate	Lots 1, 2, 3, 4, 5, 6, 7, 8, and	9	29	0.27
G. T. Blackman, Administrator of John McClellan Estate	Lots 17 and	18	29	0.06
M. O. Thompson Estate	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and	14	30	0.275
M. O. Thompson Estate		15	30	0.006

Meredith's First Addition to Sioux Falls.

F. L. Blackman			1	0.225
Herbert C. Everson and Hattie A. Everson			4	0.225
Chas. A. Scott	Lots 1, 2 and	3	8	0.06
R. E. Bach and Fred Diver	Lots 4, 5, and	6	8	0.06

Sam Smith		7	8	0.02
J. H. Fernyhough	Lots 8 and	9	8	0.04
R. E. Bach and Fred Diver	Lots 10, 11 and	12	8	0.06
Melvin J. Brooks			9	0.225
S. J. Stoneall			16	0.225
Mariette Blomiley			17	0.225
Soren Monson			18	0.225
Soren Monson			23	0.225
Marion Chase			24	0.225
Thos. Scanlon			25	0.225
Thos. Scanlon			26	0.225
W. H. Lyon			31	0.225

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Name of Owner	Description	Lot	Block	Proportion of Benefit.
Thos. Scanlon	Lots 1, 2, 3, 4, 5 and	6	32	0.12
Thos. Scanlon	Lots 7, 8, 9, 10, 11 and	12	32	0.12

Meredith's Second Addition to Sioux Falls.

E. J. Sharon			33	0.225
E. J. Sharon			34	0.18
Horatio A. Burtch			37	0.14
A. G. Erskine			38	0.225
A. G. Erskine	Lots 1, 2 and	3	39	0.06
A. G. Erskine	Lots 4, 5, 6, 7, 8 and	9	39	0.12
A. G. Erskine	Lots 10, 11 and	12	39	0.065
John E. Batheal			40	0.225
A. G. Erskine			43	0.225
Horatio A. Burtch			44	0.225
F. L. Blackman and E. J. Sharon			45	0.14
F. L. Blackman and E. J. Sharon			46	0.14
F. L. Blackman and E. J. Sharon			47	0.225
Horatio A. Burtch			48	0.115
W. H. Lyon			56	0.075
F. L. Blackman and E. J. Sharon			57	0.20

F. L. Blackman and E. J. Sharon			58	0.18
I. E. Kosier			59	0.06
Carrie Lundell			60	0.115
I. E. Kosier			74	0.18
E. R. Loucks	Lots 1 and	2	75	0.035
I. E. Kosier	Lots 4, 5, 6, 7, 8, 9, 10, 11 and	12	75	0.165

270 Millard Park Addition to Sioux Falls.

Porter P. Peck			1	0.135
Porter P. Peck	Lots 10, 11 and	12	34	0.035

Name of Owner	Description	Lot	Block	Proportion of Benefit.

North Boulevard Addition to Sioux Falls.

Geo. H. Brace			4	0.225
Mary C. Brace			6	0.225
Mary C. Brace			9	0.225
Mary C. Brace			13	0.225
Mary C. Brace			29	0.225
Geo. H. Brace			34	0.225
Chas. Brigham, John C. Spofford and Geo. H. Brace			35	0.225
Mary C. Brace			49	0.225
Mary C. Brace			50	0.225
Mary C. Brace			61	0.225

North Park Addition to Sioux Falls.

Lilly E. Braley	Lots 1 and	2	1	0.04
James A. Guest	Lots 3, 4, 5 and	6	1	0.08
Hans Ruvald	Lots 7 and	8	1	0.04
Hans Ruvald	Lots 9 and	10	1	0.04
Hans Ruvald	Lots 1, 2, 3, 4, 5, 6 and	7	2	0.14
Hans Ruvald		8	2	0.02
John Kadinger	Lots 9, 10, 11 and	12	2	0.08
Hans Ruvald		13	2	0.02
Hans Ruvald	Lots 14, 15 and	16	2	0.06
Hans Ruvald		1	3	0.02
Hans Ruvald		2	3	0.02

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Name of Owner.	Description	Lot	Block	Proportion of Benefit.
Hans Ruvald		3	3	0.02
Hans Ruvald	Lots 4, 5, and	6	3	0.06
H. Ruvald	Lots 7, 8 and	9	3	0.06
H. Ruvald		10	3	0.02
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	3	0.12
H. Ruvald			4	0.30
Emma J. Nelson	Lots 1 and	2	5	0.04
Emma J. Nelson	Lots 3, 4, 5, 6, 7 and	8	5	0.12
Emma J. Nelson	Lots 9, 10, 11, 12, 13, 14, 15 and	16	5	0.16
Hans Ruvald	Lots 1, 2, 3, 4 and	5	6	0.10
John Frederickson, Peter Helland and Hans Ruvald		6	6	0.02
Hans Ruvald	Lots 7 and	8	6	0.04
Hans Ruvald	Lots 9 and	10	6	0.08
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	6	0.16
Henry Teimeier	Lots 1 and North Half of	2	7	0.03
F. W. Pieper	Lots 3 and South half of	2	7	0.03
F. W. Pieper	Lots 4 and	5	7	0.04
F. W. Pieper		6	7	0.02
F. W. Pieper	Lots 7 and	8	7	0.04
E. C. Lord		9	7	0.02
H. Ruvald	Lots 10 and	11	7	0.04
Hans Ruvald	Lots 12, 13, 14, 15 and	16	7	0.10
Hans Ruvald	Lots 1 and	2	8	0.04
Hans Ruvald	Lots 3, 4 and	5	8	0.06
H. Ruvald	Lots 6 and North Half of	7	8	0.03

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Hans Ruvald	Lots 8 and South Half of	7	8	0.03
Lena H. Bessler		1	10	0.02
F. H. Bessler		2	10	0.02
P. B. Hunt	Lots 3, 4 and	5	10	0.06
J. M. Warren	Lots 10, 11 and South Half of	12	10	0.05

Lena Bessler	Lots 13 and North Half of	12	10	0.03
Hans Ruvald	Lots 1 and	2	11	0.04
Louise Guest Estate	Lots 3 and	4	11	0.04
Hans Ruvald	Lots 5, 6 and	7	11	0.06
H. Ruvald		8	11	0.02
Peter P. Simson	Lots 1 and	2	12	0.04
Hans Ruvald		3	12	0.02
Name of Owner	Description	Lot	Block	Proportion of Benefit.
H. Ruvald		4	12	0.04
Hans Ruvald	Lots 5, 6, and	7	12	0.06
H. Ruvald		8	12	0.02

North Park Second Addition to Sioux Falls.

Julia W. Anderson			1	0.30
Hans Ruvald			2	0.30
Hans Ruvald			3	0.40
Ira Cox			4	0.30
Hans Ruvald			5	0.30
Hans Ruvald			6	0.30
Theron S. Swain and Henry E. Shaw			7	0.30
Hans Ruvald			8	0.30
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Hans Ruvald			9	0.30
Hans Ruvald			10	0.30
Ira Cox			11	0.30
Julia W. Anderson	Lots 1 to 16, inclusive		12	0.30
Hans Ruvald	Lots 17 and	18	12	0.05
Julia W. Anderson	Lots 19, 20, 21, 22, 23 and 24		12	0.15
Hans Ruvald			13	0.30
Dan Hamway	Lots 1, 2 and	3	14	0.063
Thomas E. Powers	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12 and	13	14	0.275
Dan Hamway	Lots 14, 15 and	16	14	0.063
Hans Ruvald			15	0.40
Geo. J. Fullerton	Lots 1 and	2	16	0.05
S. Olney		3	16	0.02
S. Olney		4	16	0.02

S. Olney		5	16	0.02
H. Ruvald		6	16	0.02
H. Ruvald	Lots 7 and	8	16	0.04
Edward H. Story		9	16	0.02
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Hans Ruvald		10	16	0.02
Hans Ruvald		11	16	0.02
Hans Ruvald		12	16	0.02
Hans Ruvald		13	16	0.02
W. W. Ormiston		14	16	0.02
Hans Ruvald		15	16	0.02
Hans Ruvald		16	16	0.02
Hans Ruvald	Lots 1 and	2	17	0.04
Hans Ruvald	Lots 3, 4, 5, 6, 7 and	8	17	0.12
274				
Hans Ruvald	Lots 9 and	10	17	0.04
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	17	0.12
H. Ruvald	Lots 1 and	2	18	0.04
Hans Ruvald		3	18	0.02
Hans Ruvald		4	18	0.02
Hans Ruvald	Lots 5 and	6	18	0.04
S. E. White		7	18	0.02
Hans Ruvald	Lots 8, 9, 10, 11, 12 and	13	18	0.12
Hans Ruvald	Lots 14, 15 and	16	18	0.06
Hans Ruvald			20	0.30
H. Ruvald	Lots 1, 2 and	3	21	0.06
H. Ruvald		4	21	0.02
H. Ruvald		5	21	0.02
H. Ruvald		6	21	0.02
H. Ruvald	Lots 7 and	8	21	0.04
Hans Ruvald	Lots 9, 10, 11, 12, 13, 14, 15 and	16	21	0.16
Hans Ruvald	Lots 1, 2, 3, 4, 5 and	6	22	0.12
H. Ruvald		7	22	0.02
Hans Ruvald		8	22	0.02
H. Ruvald	Lots 9 and	10	22	0.04
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	22	0.12

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Hans Ruvald			23	0.30
Wigant Ludewig			24	0.45
Sioux Falls Improvement Co's Addition to Sioux Falls.				
S. E. Reinius			89	0.20
Soo Valley Granite Co.	Lots 1, 2, 3, and	4	91	0.046
Sarah Foster	Lots 12, 13 and	14	91	0.025
J. Reichard and J. W. Richard	Lots 15 and	16	91	0.02
275				
Moses Hawkins		17	91	0.012
James W. Bowles		18	91	0.012
Summit Addition to Sioux Falls.				
Harry J. Brown		1	17	0.025
Soo Valley Investment & Construction Co.		2	17	0.025
Anna Hillner	Lots 23, 24, 25 and	26	17	0.10
F. L. Blackman		1	18	0.025
Margaret M. Matthews and Hannah L. Matthews		2	18	0.025
Alex Matthews		3	18	0.025
Bertha M. Ferguson		4	18	0.025
F. L. Blackman	Lots 5, 6 and	7	18	0.025
J. B. Fearon		8	18	0.025
J. H. Fernyhough		9	18	0.025
F. L. Blackman	Lots 16, 17, 18 and	19	18	0.10
A. W. Ibach		20	18	0.025
F. L. Blackman	Lots 21, 22, 23, 24, 25 and	26	18	0.15
West Park Addition to Sioux Falls.				
David R. Rector	Lots 1 and	2	1	0.05
Augusta C. Fowler	Lots 14 and	15	1	0.05
Sioux Falls Trust Co.		16	1	0.025
Sioux Falls Trust Co.	Lots 17, 18, 19 and	20	1	0.10
Sioux Falls Trust Co.	Lots 1, 2, 3, and	4	2	0.075

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Sioux Falls Trust Co.	Lots 5, 6 and	7	2	0.075
Sioux Falls Trust Co.		8	2	0.025
Sioux Falls Trust Co.	Lots 9, 10, 11, 12 and	13	2	0.125
Sioux Falls Trust Co.		14	2	0.025
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Board of Education of the City of Sioux Falls	Lots 15, 16, 17 and	18	2	0.075
Sioux Falls Trust Co.	Lots 19 and	20	2	0.025
Sioux Falls Trust Co.	Lots 13 and	14	3	0.05
Sioux Falls Trust Co.	Lots 15 and	16	3	0.05
	J. L. Phillips Addition to Sioux Falls.			
Manchester Biscuit Co.	Lots 1, 2, 3, and	4	25	0.833
Chicago, Milwaukee & St. Paul Ry Co.,	Lots 5, 6, 7, 8 and	9	25	2.291
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 10, 11, 12, 13, 14, 15, 16, 17 and	18	24	3.094
Geo. B. Cone	Lots 1 and	2	24	0.480
F. M. Mills		3	24	0.229
W. I. Thompson and J. W. Wadden		4	24	0.229
Madison Mill & Grain Co.		5	24	0.229
W. I. Thompson		6	24	0.229
Rock Island Plow Co.	Lot 7 and North Half of	8	24	0.343
Luella A. Jones	Lot 9 and South Half of	8	24	0.343
W. K. Van Brunt	Lots 1, 2 and North Half of	3	23	0.859
Van Brunt-Overland Co.	South Half of Lot 3 and North Half of	4	23	0.480
Geo. H. Brace	South Half of Lot 4, and Lots 5 and	6	23	1.145
J. N. Weston		7	23	0.572
German Savings Bank		8	23	0.687
Joe Tosini	North Half of	9	23	0.480
Carl Lock	South Half of	9	23	0.572
G. Kiriakedes		1	22	1.145
Inez Van Eps		2	22	1.145

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Name of Owner	Description	Lot	Block	Proportion of Benefit.
Lacotah Building Co.	Lot 3 and north half of	4	22	1.719
Frank Angel	South half of	4	22	0.572
Inez C. Van Eps		5	22	1.145
Mary Zentel		6	22	1.145
E. B. Northrup		7	22	1.145
R. F. Pettigrew		8	22	1.145
M. C. Smith		9	22	1.145
H. A. Homan	Lot 17 and North Half of	16	21	6.874
E. L. Smith	Lot 15 and South half of	16	21	1.489
L. A. Kelley	Lots 13 and	14	21	1.375
J. W. Jones		12	21	0.480
W. Braley and Geo T. Blackman	West 100 ft. of Lots 10 and	11	21	0.480
J. W. Jones	East 50 feet of lots 10 and	11	21	0.229
J. P. Edmison	Undivided ½ lots 4, 5 and	6	26	3.437
E. L. Smith	Undivided ½ lots 4, 5, and	6	26	3.437
Chicago, Rock Island & Pacific Ry Co.	West 44 feet of Lots 7, 8 and	9	26	0.412
H. T. Parmley	East 42 feet of West 86 Feet of Lots 7, 8, and	9	26	0.412
Pete Ellingson and John Ellingson	East 42 Feet of West 128 Feet of Lots 7, 8 and	9	26	0.412
P. Ellingson	East 22 feet of lots 7, 8, and	9	26	0.229
Koenig Realty Co.	Lots 10, 11 and	12	15	0.685
G. T. Greeley	North Half of Lot	13	15	0.115
Josephine Levinger	South Half of Lot	13	15	0.115
E. J. Daniels		14	15	0.229

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Name of Owner	Description	Lot	Block	Proportion of Benefit.
C. C. Bratrud		15	15	0.229
G. T. Bratrud	North Half of	16	15	0.115
F. Hyde	South Half of	16	15	0.115
Inez C. Van Eps	Lots 17 and	18	15	0.480
Chas. Look and W. H. Look	Lot 10 and South Half of	11	14	0.344

John Tossini	North Half of	11	14	0.115
Wm. Reynolds		12	14	0.229
John McKee	Lot 13 and South Half of	14	14	0.344
G. H. Perry Estate	North Half of Lot 14 and lot	15	14	0.344
Chas. S. Lund		16	14	0.229
Wm. Tate	South Half of	17	14	0.115
G. L. Nadel	North Half of	17	14	0.115
Beach Parshall Realty Co.		18	14	0.229
Robert R. Plane		10	13	0.229
L. Koplow	Lot 11 and South half of	12	13	0.344
W. I. Thompson	North Half of Lot 12 and South 117 Feet of	13	13	0.688
F. J. Solari and S. J. Solari	North 33 Feet of	13	13	0.688
F. J. Solari and S. J. Solari		14	13	0.229
Pat Shannon	South Half of	15	13	0.115
A. M. Whitman	North Half of	15	13	0.115
Geo. W. Egan	South Half of	16	13	0.115
C. O. Bailey	North Half of	16	13	0.115
Albert Anderson		17	13	0.229
Victor Anderson and Albert Anderson		18	13	0.229

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F. S. Emmerson Estate		1	21	0.344
Chas. Kaufmann	North Half of	2	21	0.172
G. T. Greeley	South Half of	2	21	0.172
E. L. Smith	North Half of	3	21	0.172
E. L. Smith	South Half of Lots 3 and Lot	4	21	0.515
E. B. Northrup		5	21	0.229
Will A. Beach	North Half of	6	21	0.114
A. K. Pay	South Half of	6	21	0.114
Name of Owner	Description	Lot	Block	Proportion of Benefit.
G. T. Greeley		6	21	0.229
S. K. Grigsby	South Half of	9	21	0.114
Wm. Carswell	North Half of	9	21	0.114

Burlington's Sub-Division of Lots 10 to 13. Block 26 of J. L. Phillips' Addition.

A. H. Stites	Lots 1, 2 and	3	26	2.750
Farley & Denton Co.		4	26	0.916
Brown Drug Co.	Lots 5, 6 and	7	26	2.750

Morningside Addition to Sioux Falls.

Howard Holden		1	3	0.022
Wm. Weslund	Lots 2 and	3	3	0.048
Caroline Langager		4	3	0.022
Laura A. Brown		5	3	0.022
David Vesper	Lots 8 and	9	3	0.048
F. I. Hardimon	Lots 10, 11, 12, 13 and	14	3	0.114

Gale's Addition to Sioux Falls.

Frank C. Hardimon	Lots 1, 2 and	3	25	0.343
Chicago, Rock Island & Pacific Ry. Co.	Lots 1, 2, 3, 4, 5 and	6	24	0.550
Anna Bakken	West 50 Feet of Lots 1 and	2	26	0.091
280				
Ludwig Seubert	East 100 feet of Lots 1 and	2	26	0.137

Morse's Addition to Sioux Falls.

Stephen Donahoe, Den Donahoe, Dan Donahoe, and Wm M. Donahoe	East Half of		1	0.480
Anna Barrett		7	1	0.069
Stephen Donahoe, Den Donahoe, Dan Donahoe and Wm. M. Donahoe	Lots 8, 9, 10 and	11	1	0.400

Millspaugh's Addition to Sioux Falls.

Chicago, Rock Island and Pacific Ry Co.	Lots 1 and	2	13	0.137
Girton-Adams Ice Co.	Lots 1, 2, 3, 4 and	5	14	0.412
P. O. Stiver	Lots 6, 7, 8, 9, 10, 11 and	12	14	0.641
Girton-Adams Ice Co.	Lots 13, 14, 15 and	16	14	0.321
Name of Owner	Description	Lot	Block	Proportion of Benefit.
P. O. Stiver	Lots 1 and	2	15	0.137
Girton-Adams Ice Co.	Lots 3, 4, 5 and	6	15	0.114
P. O. Stiver	Lots 8, 9, 10 and	11	15	0.366

Girton-Adams Ice Co.	Lots 12, 13, 14 and	15	15	0.344
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 16 and	17	15	0.183
Girton-Adams Ice Co.	Lots 10, 11 and	12	28	0.114
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 13, 14 and	15	28	0.275
P. O. Stiver	Lots 16, 17 and	18	28	0.175
P. O. Stiver	Lots 1, 2, 3, and	4	16	0.275
J. L. Brookings	Lots 13 and	14	16	0.137
P. O. Stiver	Lots 8, 9, 10, 11, 12, 13 and	14	27	0.412

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Daniels' Addition to Sioux Falls.

Susan Burke			4	0.480
Chicago, Milwaukee & St. Paul Ry. Co.			5	0.343
Girton-Adams Ice Co.	Blocks 12 and		13	0.916
Kittery Realty Co.	Blocks 10 and		11	1.031

Van Eps' Addition to Sioux Falls.

Joe Tosini	Lots 6, 7, 8, 9, 10, 11 and	12	2	0.229
Jos. Tosini	Lots 1, 2 and	3	1	0.137
Jos. Tosini	Lots 1, 2, 3, 4, and	5	2	0.229
Jos. Tosini	Lots 1, 2 and	3	3	0.069
Inez C. Van Eps	Lots 1, 2, 3, 4, 5, and	6	8	0.275
Inez C. Van Eps	Lots 10, 11 and	12	8	0.137
Inez C. Van Eps	Lots 1, 2, 3, 4, and	5	24	0.114
William Lackay		6	24	0.011
Inez C. Van Eps	Lots 1, 2, 3, 4, 5, 6, and	10	18	0.229
Inez C. Van Eps			19	0.069

Brookings & Edmunds' Addition to Sioux Falls.

Wm. H. Thomas	Lots 10, 11 and	12	31	0.685
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Parlin & Orendorf Plow Co.	Lot 13 and South Half of	14	31	0.344
O. S. Jones Seed Co.	North Half of Lot 14 and South Half of	15	31	0.229
R. A. Wyman	North Half of	15	31	0.115
Jewett Bros. & Jewett	Lots 16, 17 and	18	31	0.685

Braley's Addition to Sioux Falls.

W. Braley		1	1	0.25
W. Braley	Lots 9, 10, 11, 12 and	13	1	0.125
W. Braley			2	0.425
W. Braley			3	0.475
282				
W. Braley	Lots 1, 2, 3, 4, 5, 6, and	7	4	0.175
C. R. Lewis	Lots 8, 9 and	10	4	0.075
W. Braley	Lots 11, 12, 13, 14, 15, 16, 17, 18, 19 and	20	4	0.25
W. Braley	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and	10	5	0.25
W. Braley	Lots 11, 12, 13 and	14	5	0.175
W. Braley	Lots 1, 2 and	3	6	0.125
Geo. F. Boyle	South 88 Feet of	4	6	0.050
W. Braley	North 44 Feet of	4	6	0.025
W. Braley	Lots 5, 6, 7 and	8	6	0.175
W. Braley			7	0.35
W. Braley			8	0.375
Lois W. Jellies		1	9	0.075
W. Braley	Lots 2, 3, 4, 5 and	6	9	0.375
W. Braley			10	0.50
W. Braley			11	0.50
W. Braley			12	0.625
W. Braley	Lots 1, 2, 3 and	4	13	0.10
Anna Vaghn		5	13	0.025
W. Braley	Lots 6, 7, 8, 9, 10, 11 and	12	13	0.175
H. W. Bullard		13	13	0.025
Name of Owner	Description	Lot	Block	Proportion of Benefit.
W. Braley	Lots 14 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and	30	13	0.425
W. Braley	Lots 1 and	2	14	0.05
W. Braley	Lots 3 and	4	14	0.05
W. Braley	Lots 25, 26, 27, 28, 29 and	30	14	0.15
W. Braley	Lots 1 and	2	15	0.025
W. Braley	Lots 26, 27, 28, 29 and	30	15	0.125

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Silver Park Addition to Sioux Falls.

Great Western Investment Co.	Blocks 1, 2, 3, 4 and	5	1.375
Charles N. Hare		7	0.165
F. R. Webber		8	0.275
F. O. Lyford	Blocks 10 and	24	0.357
Great Western Investment Co.	Blocks 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and	23	3.575
N. B. Turner		25	0.275
E. A. Flanders	Blocks 26 and	27	0.550
Great Western Investment Co.	Blocks 28, 29, 30, 31, 32, 33, 34, 35 and	36	2.475
Annie E. Skinner	Blocks 37 and	42	0.550
A. G. Holmes		38	0.275
David B. Stewart	Blocks 39, 40, 41 and	42	1.10
Great Western Investment Co.		43	0.247
Great Western Investment Co.	Blocks 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63 and	64	5.500

Unplatted Lands Situated in Sections 16, 21, and 22, Township 101, Range 49, Within the City of Sioux Falls.

Equitable Realty Company's Sub-division of Tract 1 of the Northwest Quarter of Section 16.

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Dakota Iron Store	Lot 2			1.145
Dakota Iron Store	Lot 3			1.145
Dakota Iron Store	Lot 4			0.480
International Harvester Co.	Lot 1			0.916
Dakota Iron Store	Lots 8 and 9			0.480
Equitable Realty Co.	Lot 5			1.375

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Chicago, Milwaukee & St. Paul Ry. Co.	Lot 6		1.833
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 7		1.833
Equitable Realty Co.	Lot 10		2.290

Equitable Realty Company's Sub-Division of Northeast Quarter of Northwest Quarter of Section 16.

Equitable Realty Co.	Lot 1	0.480
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 2	0.685
W. F. Hesse	Lot 3	1.375
Chicago, Milwaukee & St. Paul Ry. Co.	Depot Grounds on Southwest Quarter of Northwest Quarter, Section 16	2.062
Chicago, Milwaukee & St. Paul Ry. Co.	Tract 3 of Northwest Quarter, Section 16	0.685
Chicago, Milwaukee & St. Paul Ry. Co.	Tract 4 of Northwest Quarter Section 16	0.915
Edward Ellis	Tract 5 of Northwest Quarter, Section 16	0.229
Larabee Mills Co.	Lot 5 of Sioux Falls Light & Power Co.'s Sub-Division of the Northeast Quarter of Northwest Quarter, Section 16	2.00
Northern States Power Co.	Lot 4 of Sioux Falls Light & Power Co's Sub-Division of the Northeast Quarter of Northwest Quarter, Section 16,	2.00
Larabee Mills Co.,	Lot A, Tract 12 of Northwest Quarter, Section 16,	0.29
Northern States Power Co.,	Tracts 6 and 7 of Northeast Quarter, Section 16,	2.583
Name of Owner	Description	Proportion of Benefit.
Watertown & Sioux Falls Ry. Co.	Benefit to Bridge and Trackage across Sioux River on Northwest Quarter, Section 16	4.583

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Guy Strahon	Tract 21 of Southwest Quarter Section 16 (Except W. 30 ft.)	0.687
A. S. Held and John Schetzel	West 30 Feet of Tract 21 of Southwest Quarter, Section 16,	0.480
F. H. Hollister	Tract 22 of Southwest Quarter, Section 16,	0.687
Emerson-Brantingham Implement Co.	Tract 23 of Southwest Quarter, Section 16	0.480
Mary C. Brace	Tract 24 of Southwest Quarter, Section 16	0.720
Etta Esta Boyce and A. B. Fairbanks	Tract 25 of SW¼ of Sec. 16	2.062

J. M. Freese	Tract 4 of Southwest Quarter, Section 16	2.750
Sioux Falls Gas Co.	Tract 3 of Southwest Quarter, Section 16	4.478
Chicago, Rock Island & Pacific Ry. Co.	Tract 29 of Southwest Quarter, Section 16	3.437
Chicago, Rock Island & Pacific Ry Co.	Tracts 1 and 2, Southwest Quarter, Section 16	3.437
J. H. Donahoe	Tracts 13 and 15, Southeast Quarter, Section 16.	5.155
Northern States Power Co.	Tracts 15, 16, and 20, Southwest Quarter, Section 16	5.840
Illinois Central Ry. Co.	Depot Grounds on Southwest Quarter, Section 16,	3.895
Chicago, Rock Island & Pacific Ry. Co.	Lots A and B. Sub-Division Tract 17, Southwest Quarter, Section 16	0.480
S. H. Hurst and T. McKinnon	Lot C, Sub-Division Tract 17, Southwest Quarter, Section 16.	0.480
T. McKinnon	Lot D, Sub-Division Tract 17, Southwest Quarter, Section 16	0.343
S. H. Hurst	Lot E, Sub-Division Tract 17, Southwest Quarter, Section 16	0.229
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Depot Grounds on Southwest Quarter, Section 16.	4.583
Great Northern Ry. Co.	Depot Grounds on Southwest Quarter, Section 16.	3.437
Farley-Loetscher Co.	Lots D and C of Franklin Investment Co's Sub-Division of Part of Tract 3 of Southwest Quarter, Section 16.	1.145

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Name of Owner	Description	Proportion of Benefit.
Franklin Investment Co.	Lots A and B of Franklin Investment Co's Sub-division of Part of Tract 3 of Southwest Quarter, Section 16.	1.145
H. R. Dennis	East 132 Feet of Tract 14 of Southwest Quarter, Section 16.	1.145
Albert Larson and Geo. E. Larson	Except East 132 Feet, Tract 14 of Southwest Quarter, Section 16.	6.874
A. C. Schoeneman	Tract 8 of Southwest Quarter, Section 16	8.593
J. W. Tuthill	North 50 Feet of Tract 9 of Southwest Quarter, Section 16.	0.572

John C. Felger	Except North 50 Feet, Tract 9 of Southwest Quarter, Section 16.	1.145
John W. Tuthill Lumber Co.	Tract 12, Southwest Quarter, Section 16.	0.343
John W. Tuthill Lumber Co.	Tract 13, Southwest Quarter, Section 16.	2.750
John W. Tuthill Lumber Co.	Tract 7, Southwest Quarter, Section 15.	2.062
B. W. Harding	Tract 6, Southwest Quarter, Section 16.	0.687
A. J. Jordan	Tract 5, Southwest Quarter, Section 16.	2.062
John W. Tuthill Lumber Co.	Tract 7, Southeast Quarter, Section 16.	0.916
M. Margulies	Tract 8, Southeast Quarter, Section 16.	0.229
M. Margulies	Tract 10, Southeast Quarter, Section 16.	2.290
W. H. Lyon	All that part of Tract 2 of Southeast Quarter of Section 16 lying West of Franklin Avenue	1.375
Board of Education of the City of Sioux Falls.	All of Franklin Investment Co's Sub-Division of No. 1 of Part of Tract 2 of Southeast Quarter, Section 16.	1.833

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J. H. Drake	Tract 1, Southeast Quarter, Section 16,	2.062
Girton-Adams Ice Co.	Tract 12, Southeast Quarter, Section 16.	2.290
Sioux Falls Gas Co.	Tract 3 of Northeast Quarter, Section 21.	1.375
E. H. Hyde	Tract 12 of Northeast Quarter, Section 21	0.916
Girton-Adams Ice Co.	Tract 4 of Northwest Quarter, Section 22.	0.572
Joe Tosini	Tract 2, of Northwest Quarter, Section 22.	1.375
Inez C. Van Eps.	Tract 1 of Northwest Quarter, Section 22.	2.062
Ed Bell.	Tract 1 of Northeast Quarter Section 22.	0.229

Name of Owner	Description	Proportion of Benefit.
City of Sioux Falls	Parks, Water System, Highways and dedicated streets within the drainage area.	111.11
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area.	0.384
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.	0.072
Mapleton Township	Twelve miles and fifty-two rods of laidout and established highways within the drainage area.	10.468
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area.	21.252
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area.	2.323
Minnehaha County	Benefits arising from and to the safety and preservation of bridges within the drainage area.	55.555
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Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50 West of the 5th P. M., within the drainage area (1.5 miles)	15.263
Watertown & Sioux Falls Ry. Co.	Right-of-way as laid out and located across Sections 4, 5, and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49, West of the 5th P. M., within the drainage area (2.60 miles),	
Chicago, Milwaukee & St. Paul Ry. Co.	Right-of-way as laid and located across Sections 4 and 9, Township 101, Range 49, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29, and 33, Township 103, Range 49, and Section 32, Township 104, Range 49, West of the 5th P. M., within the drainage area, (the above being the Sioux Falls and Egan line), also across	

Sections 5, 8 and 9, Township 103, Range 49, West of the 5th P. M., within the drainage area, (being the Renner and Madison line), total 14.5 miles 147.533

All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed, as stated, and the said determination of said Board made final.

Dated March 8, 1919.

A. G. RISTY

289 Chairman of the Board of County Commissioners of Minnehaha County, South Dakota.

Attest:

E. H. Shenkle
County Auditor
(Seal)

Filed in the office of the Auditor of Minnehaha County, S. D. this 8 day of March, 1919.

E. H. SKENKLE
County Auditor.

It is stipulated that attached to the bill of complaint herein is a true copy of the drainage ditch notice of hearing upon the question of equalization of apportionment of benefits of Drainage Ditch No. 1 and 2 on the 1st day of August, 1921, caused to be published by the Board of County Commissioners of Minnehaha County, South Dakota, said Drainage Ditch Notice being Marked "Exhibit C".

Exhibit "C" attached to the bill of complaint is offered in evidence by plaintiff and received in evidence.

(Exhibit "C" being printed herein as an exhibit to the bill of complaint, is not at this place reprinted.)

(Cross-Examination of witness F. E. Ward)

The proportion of benefits of Drainage Ditch No. 1 and 2 was not equalized upon the notice returnable April 25th, 1919, upon that date or at any other time. The proceeding was abandoned on account of errors in the published notice.

A. G. RISTY called and sworn as a witness for the plaintiff testified as follows:

(Direct Examination)

My name is A. G. Risty; I am one of the defendants in this action and am and for nine years have been a member of the Board of County Commissioners of Minnehaha County, South Dakota; for about seven years I have been Chairman of the Board; in the spring of 1919 the County Commissioners passed a resolution apportioning the benefits for Drainage Ditch No. 1 and 2; notice of hearing upon the proposed equalization of such benefits was published; the plaintiff's Exhibit "A" is the notice I refer to; I was a member of the Board at the time of making that apportionment of benefits.

290 Q. Please state to the Court, Mr. Risty, in what manner and upon what basis you determined, in the resolution referred to, the proportion of benefits to the Chicago, Minneapolis, St. Paul & Omaha Railway?

Objected to by defendants as incompetent, irrelevant and immaterial, the record now showing that the exhibit referred to by counsel in his question, that the proceedings therein were abandoned and are not the proceedings upon which the present actions were instituted, or the present controversy before the court.

Counsel for plaintiff: I state to the Court this is offered solely for the purpose of showing to the court the attempted application by the County Commissioners of the law which we are questioning.

The evidence received subject to objection.

A. Well, in all those cases we tried to take into consideration the right of way, the value of the line as compared with adjacent lands and the benefits that might be derived from this drainage proposition as to the maintenance of the track and the bridges and so on.

In determining the apportionment of benefits as stated in Exhibit "A" to the Chicago, St. Paul, Minneapolis & Omaha Railway, 1.5 miles; to the Watertown & Sioux Falls Railway Company, 2.60 miles; and to the Chicago, Milwaukee & St. Paul Railway Company 14.5 miles; I don't think we computed on a mileage basis; we may have had that number of miles in mind, but we tried all the while to base it on a certain unit, as I remember it.

Q. Just how, Mr. Risty, did you compare the alleged benefits to the three railway companies mentioned, with the
291 unit of agricultural lands to which you have just referred?

A. How we determined the units for the railroads?

Q. No. How you compared the alleged benefit to the railroads with the unit you have referred to.

A. Well, we arrived at—I don't remember what value we passed on that unit at that time (referring to the agricultural unit). We had the value fixed of the agricultural unit and the proportion of benefit that this drainage would be to that unit; when we came to the railroad question and other properties we took into consideration the benefits that they would derive and I might say we capitalized that—how much the average annual benefit would be to those properties, we might say to a certain piece of railroad, and having that amount fixed, we took the benefit that this unit of farm land was supposed to have and divided the benefits of the railroads—for instance we will say the unit of the farm land was $100; we would make the proportion of the benefit 25% or $20; then when we came to place a unit on other property after having exercised our judgment and made our investigation as to what those benefits might be, we arrived at a certain amount; we divided that by 25, the benefit of the farm unit and that gave us the number of units that we would assess up to that property or railroad, you might say if you wish; I am now testifying with reference to the procedure in 1919; we employed about the same procedure all the time.

Q. Mr. Risty, I call your attention to the fact that the units tentatively assessed to each railroad company in the drainage notice Exhibit "A" bears the same proportion to the mileage of said railway company in each case; with that in mind will you state to the court whether or not that attempted assessment was made by you upon a mileage basis?

A. The mileage basis—if it is the same number of
292 miles or if it s the same per mile for each company, then we must have estimated that the benefit was about the same and that [give] the same number of units per mile.

In our attempted fixing of proportion of benefits which is in question in this lawsuit I don't think we used the mileage basis but I don't remember positively.

With reference to drainage Ditch No. 1 and 2 no warrants to any great amount have been issued since the time of fixing this proportion of benefits in the

spring of 1919; it might possibly be that the cleaning of the ditch was not paid at that time; I don't remember that would be the kind of work that has been paid for since if it wasn't paid for before that; we have done some work around the foot of the spillway and so on since the publication of this notice in April, 1919, but I don't remember what it cost.

Q. In what manner, Mr. Risty, did you determine the benefit to the unit of agricultural land in 1919?

A. We made an estimate of what that land was worth according to our judgment and how much more it would be worth after it had the benefit of this drainage ditch, fair value, I don't remember we had any other basis to go on other than our own judgment as to the value of the land before the drainage and after the drainage.

We arrived at our determination with reference to the benefit of 111.11 units to the parks, water system, highways, and dedicated streets of the City of Sioux Falls without the drainage area in April, 1919, in just the same way as I stated to you that we arrived at the benefit to the railroads
293 and so on; what in our judgment we thought was the benefits; we fixed the amount that in our judgment we thought was right and proper and divided by the benefit to the agricultural unit to get the number of units in regard to this other property; we based that judgment upon the fact that some of us, most of us, are farmers or were farmers and we all know the price of land—was selling it at that time; with reference to parks, water system, highways, and streets of the City of Sioux Falls we based our determination upon the same facts as we used in regard to all other property; we estimated according to our judgment and our investigation what these properties had cost and what benefit they were to the public, what loss they would be at in case they were annually overflowed; to some extent we used the cost of the parks of the City of Sioux Falls; the cost of the water system of the City of Sioux Falls was talked of; we made our determination on the estimate of the cost and the benefit that those properties would derive; we never had a hearing; it might be more and it might be less we didn't get far enough to hear the other side; we made an estimate of the damages that might accrue in case the highways and streets of Sioux Falls were overflowed; we based that estimate on our best judgment; suppose you have a building down along the Sioux here and have it overflow; the basement filled with water; your own estimate on what damage it would be to you and it would vary probably a great deal from mine;

neither one might be right. It is doubtful whether you and I would agree. I have stated the manner in which we compared the benefits to the parks and water system, streets and highways of the City of Sioux Falls with the agricultural unit; we took the public highway that would be annual-
294 ly overflowed; we had in mind as road builders what damages that would be to that road; in our judgment we fixed the damages to be what we thought were right and the number of units on that piece of property; then we proceeded as in all other cases, divided by the benefit to our original unit; to get the number of units we first attempted to determine what the benefit was and then divided it to get the proportion; it is possibly a fact that the unit as used by us in the measurements in the spring of 1919 represented approximately $80.00 or $85.00 in cost; we used at 10A. unit; I am not certain whether the unit was supposed to have been benefitted $80.00 to $85.00 or $7.00 to $8.00 per acre, that might be it, I don't remember.

Q. I now call your attention, Mr. Risty, to the drainage notice providing for hearing on the 1st day of August, 1921, upon the equalization of benefits of drainage ditch No. 1 and 2 and call your attention to the benefits to roads, railroads, etc. and ask you to state to the court in what manner and upon what basis you arrived at your determination with reference to the proportion of benefits to the Chicago, Rock Island & Pacific [Rr].. the Chicago St. Paul, Minneapolis & Omaha Ry., the Great Northern Ry., the Chicago, Milwaukee & St. Paul Ry., the City of Sioux Falls, and the Northern States Power Co., referring particularly to the benefits to the Hydro-Electric plant and water rights of the Northern States Power Co.

Mr. Barlett: "That is objected to as incompetent, irrelevant and immaterial,, not within the issues that can be tried by this Court in this collateral action, the same being a legislative matter and not subject to inquiry in this Court, it not having been alleged in plaintiff's bill of complaint herein that the Commissioners acted fraudulently or arbitrarily."

295 The Court: "Received, subject to objection."

A. As to the railroads and other property mentioned in this question we arrived in the manner stated before; we took into consideration the value of the right-of-way compared the right-of-way with adjacent lands and what protection from this water would benefit them and the savings it would be in upkeep of the railroad track, bridges, etc; in re-

gard to the Hydro-Electric Co. plant we took into consideration the overflow and high water that would clog up their turbines and put them out of working order for some time, and we had in mind the great overflow of 1881 when it swept out the lumber yards down there and took out the mill at the foot of the falls, and in our estimation after having taken all those things into consideration which I wouldn't mention all now, we arrived at the conclusion that this water, the drainage proposition was of immense value to the Water Power Co. and we figured on that with a good deal of care and then I think we arrived at the amount of $50,000.00; I would not say positively that was the amount; we compared the benefits which we arrived at to the Northern States Power Co. with the benefit to our 1A tract of agricultural land as I have stated before; the benefit to that unit we had said was $25.00; when we had estimated the benefits to the water power company was $50,000.00 we wanted to find out how many units that it represented and we divided it by 25 and that gave us the number of units that would be assessable to the water power company; I suppose there was no material increase in value of the railroad companies' rights-of-way and other property I have mentioned by the making of these two apportionments of benefit unless it might be increase in value with the value of other property increased at
296 that time, but the expenses to be paid were more; there were probably in the neighborhood of $250,000.00 of ditch warrants outstanding at the time we made this apportionment of benefits in 1919: I know there has been some issued since but I don't know how much; in estimating the benefits to various railroad companies in our last apportionment of benefits, we had about the same ideas as we did in 1919; we did not use the mileage basis or farm basis or street basis anywhere; we used the units.

Q. Just how did you use the units, that is what I am trying to find out?

A. When we find out what amount we have to raise—when we come to levy the assessment, the proportional benefits will be assessed to each unit—one unit may be 100%, another is 150% and some only 10%, others 25%; they won't all be alike, of course they are not benefitted alike; in arriving at our determination in 1921 of the last apportionment of benefits and the number of units of the benefit to the Chicago, Rock Island & Pacific [Rr.] Co. we took into consideration the damages that might be done to the railroad tracks with high water to the grades; and in regard to the bridges, bridges

could be built smaller; wooden bridges generally have a duration of about ten years and if they could get along with smaller bridges or make grades instead of [tressel] works which would be a benefit to the company; we inquired minutely into those things but as I say haven't heard the other side; we might be away off; the hearing was not allowed and we didn't get any basis from you folks on that question; we determined that the benefit to the track of the Rock Island Ry. from the ditch was a certain specified amount in dollars and cents; I wouldn't say that we put those amounts on record; that is the way we arrived at our units; we took into consideration in determining this benefit the fact that the Rock Island
297 might build a shorter bridge somewhere and that was part of the basis of our assessment of benefits; after arriving at the amount of dollars and cents benefit we proportioned it by dividing by the value of the unit; in determining the proportion of benefits to the Chicago, St. Paul, Minneapolis, & Omaha, the Great Northern, the Chicago, Milwaukee & St. Paul Railroad Companies we followed the same procedure; the basis for our determination of the benefits with reference to the highways, streets, water supply, water plant, Sherman Park and Phillips Park in the City of Sioux Falls was as I have stated to you before; it may seem [arbitrarily] but in regard to county highways for instance, we knew pretty well what it would take to keep them in good passable condition in seasons when there was any overflow and in seasons when there was no overflow; in regard to the streets and basements that have been flooded each year I made an estimate as to how much it would damage a basement if filled with water; same way to the streets, same way to the parks; If you had ever had a hearing those things would all have been adjusted. I wouldn't say absolutely that we did in 1921 the same as we did in 1919 with reference to the city; we had the same idea in mind when we gave it reconsiderations and wherever we saw we could improve, we did it to make a more equitable proportion; in my judgment and in the judgment of the commissioners the last proposition is better than the first one; I don't want to say we absolutely followed the methods of the first instance or we followed any particular practice in the last instance; it may be we did and possibly we didn't; in arriving at the determination that the benefit to the Hydro-Electric Co. plant of the Northern States Power Co. was about $50,000.00, we based our determination upon the following facts; in the first place we have a stream that tends to give a steady flow of water around the bend so that it will not go over the spill-

way; in one certain place about 3 miles northwest from
298 town outside of the ditch proper, the river broke through and would eventually have cut across the bottom and into the spillway and we dammed that up; then we took into consideration the high water backing up and filling up the gorge below their plant so that at certain times the water power would not be serviceable and that it would cost them fuel and other items to a great extent and then primarily, any water which overflowed would be apt to sweep out everything around that electric plant if they should have an overflow like 1881.

Q. You say there was danger of some ditch cutting through and diverting the water out of the river?

A. Yes sir.

Q. State whether or not that was the Ditch No. 1 or ditches Nos. 1 and 2 which were constructed by the Board of County Commissioners, the records of which have been placed in evidence here.

A. Those ditches were established and built before my time on the Board and that might possibly have been that it was cutting into Ditch No. 1 and making that immense excavation, but I would not say. But it was necessary to have it dammed up according to the orders of the hydro-electric engineer; the ditch I refer to must have been probably the terminus of ditch No. 1; the engineer gave orders it had to be dammed up absolutely.

Q. In just what manner did you arrive at the fact that this alleged benefit to the Northern States Power Company amounted in dollars and cents to approximately $50,000.00?

A. After taking these things into consideration, that was our best judgment. We might have itemized it and added it up; I don't remember that; but according to our best judgment that would be reasonable assessment upon the water power company.

We based that judgment upon these benefits I have
299 stated to you; giving them a uniform flow of water in dry seasons and protecting them from overflow when we had an overflow season; I have stated practically everything that was taken into consideration in determining that the Northern States Power Co. was benefitted $50,000.00. if I remember right.

Q. I call your attention, Mr. Risty, to the alleged benefit in your apportionment of 1921 to the Chicago, Milwaukee & St. Paul Railway; benefits to right-of-way, tracks, embankments, bridges and grades across sections 4, 9, 16, 21, 22, Township 101 Range 49, and across sections 4, 9, 16, 21, 28, 33

Township 102 Range 49, and across sections 5, 8, 17, 20, 28, 29, 33 in Township 103, Range 49, and ask you to tell the court what you took into consideration in determining that the Chicago, Milwaukee & St. Paul Ry. Co. was benefitted 1678.9 units.

A. We took into consideration what it would damage the tracks—what the damage would be if those tracks washed out and the expense to rebuild them, and with the assistance of a competent railroad engineer we arrived at those figures that we have given there.

We assumed that except for this spillway these tracks of the Chicago, Milwaukee & St. Paul Railway would wash out and be under water for a certain period; I have seen the Milwaukee road under water 8 or 10 days at a time when they had to run their trains around to Pipestone on other railroads; I don't remember what proportion of its tracks we assumed would wash out; the distance used is about equal to the lands that overflow; those lands that overflowed and had the tracks on; of course it would overflow the tracks; I don't remember how many miles we estimated that to be; we tried to figure it out and our engineer worked it out and that was the number of miles; the tracks were on land subject to overflow, that is what determined the distance; with reference to the bridges of the Chicago, Milwaukee & St. Paul Railway in arriving at this benefit—I don't remember whether there is any more bridges on the Milwaukee; yes, there is two; we took
300 into consideration that by diverting the great volume of water from the river into these ditches, their bridges would be less subject to destruction by the ice gorges and by high water and that they could be made smaller when they come to build new ones because they would not have such high waters; the water would be divided between the river and the ditches; in arriving at that feature of the benefit in dollars and cents, we figured out with our engineer what it would cost to build and maintain bridges of the size they have now and what it might cost to build them smaller and their
301 relief when they were subject to overflow and ice gorges; these were the elements we had in mind.

After the filing of the Blackman petition in 1916 when it was decided that the spillway was to be repaired we employed engineers to go ahead and investigate that and it took about a year and a half before all of the preliminaries were taken care of so that we went to actual excavation on the structure; we employed a competent engineer and he laid the plans and we let the contract to a contracting company here, they were

to have a percentage for their work; they proceeded to sink that shaft and make the channel of the spilling basin; to put it all in shape that it is at the present time; on the river we straightened a number of bends, made cuts across bends and straightened out the river to facilitate the flow of the water; I think Ditch No. 2 was cleaned about as far as Renner; then the time arrived that the ditch warrants did not sell any longer and we had no means to complete the work; there always were control gates at the head of Ditch No. 2; we made no change at the head of Ditch No. 2 after the filing of the Blackman petition if you call the end of it up there near Baltic where the ditch begins; it crosses the river at one certain place up there and if you have reference to where this lower part is started, there we built a small dam of willows
302 and earth to keep the water from coming out of the ditch entirely and doing damage that way; the route of the ditch was left the same as the route of Ditch No. 1 and Ditch No. 2, the old ditches; no changes were made in the initial point or terminal points of either ditch.

(Cross-Examination).

Prior to the attempt to fix the proportion of benefits in 1919, no topographical survey was made or thorough investigation upon which to base the assessments or fix the benefit. In order to save money we thought the old survey would answer; in making the proportional benefits we took the old figures and old survey to avoid expense; we didn't get far enough to make any assessment on any particular tract of land; the Board abandoned that attempt to fix the proportion of benefits because of an error in adopting three units instead of one; after that time the Board caused a full topographical survey to be made by Chenoweth & Rettinghouse of this city and a thorough investigation of the benefits that would accrue to the various properties within the drainage area; Mr. Rettinghouse reported and explained to us the conditions which he found generally throughout the drainage area and the property that was benefitted; in making that report he stated to us the various elements that he considered as benefits and submitted to us the facts upon which he based his conclusions; Mr. Rettinghouse as our engineer made the computation with reference to this apportionment of benefits and the plans and we talked it over and he was practically the one that planned how it should be done; he did all the figuring and the computations; before we adopted the resolution of June 10, 1921, we had been fully advised as to the topographical situation and the elements that went into the fixing the proportion of bene-

fits against each of the various pieces of property that we deemed to be benefitted; the board made a personal investigation of all the property within the drainage area and
303 determined the benefits before we adopted this resolution; we selected as a unit an acre of land about three miles north of town in the district between the river and the ditch and visited that unit in company with Mr. Rettinghouse; we determined that in our judgment that unit was benefitted by the improvement 25%; in reaching that conclusion it seems to me we valued the unit without the drainage at $100 and with the drainage at $125.00; it being our judgment that the real benefit to that unit was the sum of $25.00; after determining the value of this unit we proceeded to equalize and fix the proportion of benefits among the other property; the engineer accompanied us and had with him various figures and maps he had made showing these tracts, we referred to the map right along as we traveled; the Board proceeded to investigate the whole territory proposed to be assessed on this basis investigating first upon the east side of the river and then on the west side and then around the bend clear in through town; we looked over the railroad situation and other properties including the power plant, city streets, parks, and water system that in our judgment were affected; my judgment and the judgment of the board coincided almost entirely with the report of the engineer, Mr. Rettinghouse, with reference to these various proportions of benefit; after having made our investigation and having had the elements of benefit explained to us by the engineer, the board exercised its judgment and concluded that these properties were actually benefitted relatively or approximately as the engineer had reported them, we considered as a basis for making assessments on these various properties the acreage of the right-of-way within the drainage area; with reference to the Great Northern Railroad property, Mr. Rettinghouse gave us the facts as to the area within the various territories; he pointed out to us that certain bridges would be benefited by reason of it, that certain bridges might be shortened
304 by reason of having the water by-passed through the ditch; all of these facts together with the betterment or saving in maintenance on the roadbed were considered by the Board in determining and fixing the proportion of benefit as against the Great Northern Railroad; in like manner the engineer explained the amount of acreage of right of way of the Chicago, Rock Island & Pacific within the drainage area would be protected and benefitted the same as the adjacent farm lands; he pointed out that there was a certain length of

its track that would be affected in having its maintenance cheapened by the drainage and that certain of its bridges might be shortened and were protected by reason of this drainage ditch by-passing the portion of the water that would come down the river; those amounts were all taken into consideration and passed upon by the Board in determining the amount of benefit our judgment indicated the Chicago, Rock Island & Pacific received; the Chicago, Milwaukee & St. Paul Railway extends almost the full length of this ditch and adjacent to it; in some places the track is right along the ditch and in other places it runs pretty close to the ditch all the way; it might possibly be 80 rods away where the ditch crosses the river at Renner; he explained the amount that this railroad benefitted upon the same proportion that the farm lands adjacent thereto; that the embankments, tracks and roadbeds were benfitted in the same manner by being made more substantial and requiring less upkeep; that there was a certain number of bridges that could be shortened and a certain bridge might be abandoned by reason of by-passing this water; these matters were all taken into consideration by the Board in determining the amount of benefit that we fixed against the railroad for its proportion and the amount of benefit was figured out by Mr. Rettinghouse for us in the manner in which I have testified on the basis of maintenance
305 and upkeep; the Chicago, Minneapolis & Omaha Railway extends directly across the project in two places and Mr. Rettinghouse explained to us that its right of way would benefit the same as adjacent land and that its roadbed was benefitted by being more easily maintained; that there were a certain number of bridges over the Sioux River and adjacent thereto that were protected by the drainage; that a certain number of trestles might be shortened or abandoned and that by reason of these benefits the railroad company was actually benefitted a certain amount and it was in our judgment; we took all these matters into consideration and exercised our judgment in determining the amount to be fixed as against these various properties.

Mr. Rettinghouse, as our adviser, explained to us the number of miles or blocks of streets in the city of Sioux Falls that were within the drainage area and would be benefitted by being protected and drained by this drainage; also the benefits that would accrue to the two city parks and to the Sioux Falls water system and the elements of such benefit; the Board took all these elements into consideration in exercising its judgment and determining the amount of proportional benefits which it fixed against the city of Sioux Falls.

At the same time, Mr. Rettinghouse explained to the Board and the Board considered the elements of benefit which would accrue to the Northern States Power Co. by reason of the drainage; we went through that very thoroughly; the facts that the dam was put in adjacent to the river near Schjodts, about three miles north of the city of Sioux Falls and that the controlling works in the nature of wiers were put in at Thompson's about ten miles north of the city were considered as elements of benefit to the Northern States Power Co. by reason of holding the water in the river and permitting to flow down and over its power plant; to by-pass the flood water or a portion thereof through the ditch and save the
306 retarding effect of permitting that flood water to pass over the dams of the power company and pile upon and retard the whole power produced at the power plant also was considered an element of benefit; all of these matters were taken into consideration by the Board in determining the amount of benefit that should be fixed against the Northern States Power Co. The construction of this drainage project, several river cut-off channels, were put in up the river north of Sioux Falls, and in determining the Northern States Power Co. benefit the Board took into consideration the effect and influence of these cut-offs in hastening the flow of the flood water down the stream and shortening the time of floodage upon the power plant. All of these matters were taken into consideration by the board in exercising its judgment of the amount that should be fixed, in the first instance as against the Northern States Power Company.

The work that the Board did upon this drainage project consisted of constructing the spillway, cleaning and widening and deepening the ditch between here and Renner, diking the ditch and putting in the dam at Schojdts and controlling works at the Thompson Bridge, and putting in these numerous river cut-offs.

The Court: Where is the Thompson Bridge?

A. Up where the ditch ends and turns into the river, and crosses the river and goes up on the other side.

The Court: How far is the Thompson Bridge from Sioux Falls?

A. About 12 or 14 miles.

The Court: How far is Renner from Sioux Falls?

A. 8 miles.

Q. Do you know the approximate present width of the ditch as it extends from Sioux Falls to Renner, or
307 thereabouts?

A. No, I don't. That would be a mere guess.

Q. Isn't it in the neighborhood of 80 to 100 feet?

A. It probably is as far North as Renner.

Where we diked the ditch had taken the channel of the creek; there hadn't been dirt enough taken out to make a dike and when the floods came it backed up on the farm lands to the west of it; we diked there probably five or six feet high; and protecting those farm lands from overflow from the ditch after that; the dam at Schojdt's covered the break in the bank of the river about 150 feet wide and had the effect of keeping the water from the river from flowing in the bayou that is tapped by the ditch.

After the attempted assessment made in 1919, some work was still to be done in cleaning a portion of the ditch from Renner to the railroad tracks; settlement for this work had not been fully made.

Q. And this dam at Schjodt's that has finally been made to stand was not in at that time?

A. No, it was not.

Q. And some repair work has been done on the spillway since that time, has it not?

A. Yes, the control work at the bridge at Thompson's was put in since that time, but at the initial point of the ditch we haven't made any change.

Exhibit "1" is a copy of a map of the territory affected by drainage ditch No. 1 and 2 submitted by Mr. Rettinghouse to the Board as a part of his report.

We had a map similar to this upon which the percentages were marked before us when we made the inspection of the drainage area before making the apportionment of benefits, on Punt 10th last.

Exhibit "1" offered in evidence by defendants and received in evidence.

308 Q. Mr. Risty, in applying and using this unit as explained by Mr. Rettinghouse to you, and as followed by the Board in fixing these apportionments of benefits of the various properties affected, you stated that you determined what the actual benefit to the unit selected was, and that its value was twenty-five dollars? A. Yes sir.

Q. Did you use that value of twenty-five dollars as the

actual benefit to the unit in determining the apportionment of benefits which each of the various classes of lands aside from farm land should be assessed in this drainage proceedings?

A. We did. This was in regard to farm lands.

Q. And your engineer figured out the total benefit to each of these various pieces of property and divided that benefit by twenty-five, the value of the unit, to determine the number of units to be fixed against these various pieces of property?

A. Yes, that is the way we determined the number of units.

Q. That applies generally to all of the plaintiffs in these actions? A. Yes sir.

Q. Your understanding is that in determining the amount of the assessment upon this basis, that the total number of units are added together to determine the number of units, and the total cost of the ditch is computed and the total cost is divided by the number of units to get the actual assessed valuation of a unit? A. Yes sir.

F. W. WARD recalled on behalf of plaintiffs testified as follows:

The plaintiff's Exhibits "B" and "C" are part of the files and records of my office.

Exhibit "B" was offered in evidence by plaintiff and received in evidence. It is the resolution of the County
309 Commissioners of Minnehaha County fixing the proportion of benefits on drainage ditch No. 1 and 2, dated June 10th, 1921; it is not printed here because it describes the same property, names and same persons, and fixes the same units as are described, named and fixed in Exhibit "C" printed as a part of the bill of complaint herein.

Exhibit "C" was offered in evidence by plaintiff and received in evidence. It is the same as Exhibit "C" printed herein as a part of the bill of complaint and for that reason is not reprinted here.

H. E. BARLOW, called and sworn on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am civil engineer of the Chicago, St. Paul, Minneapolis & Omaha Railway; the Sioux Falls-Mitchell branch of the Omaha enters the City of Sioux Falls from the west, crossing

the big Sioux River and the bottoms approximately three miles west of the city. The line then swings somewhat to the south and enters the city on the southeastern corner again crossing the Big Sioux River and through the station grounds runs approximately north and south; the spillway is a couple of miles north of the line of the Omaha; in the west portion of the City of Sioux Falls there is a spur track known as the west side spur, which branches off from the main line a short distance west of the westerly course of the Big Sioux River, and runs approximately north and south for a distance of about a mile; the Omaha railroad has no agricultural lands in the City of Sioux Falls other than its right of way and depot grounds or in the drainage district involved in this controversy; all of its property consists of its railroad right-of-way, station grounds and appurtenances and is used exclusively for railroad purposes.

I know Mr. Rettinghouse, the engineer of the County
310 Commissioners in this drainage ditch matter; I called upon him at his office in Sioux Falls and had an extended conversation with him during which he very kindly outlined the method by which he had arrived at the amount of benefits; this conversation was in February or March last; the information was given me by Mr. Rettinghouse but not in confidence; the method he used in arriving at the total benefits deals primarily with the question of bridges; at the point where the Omaha crosses the bottoms west of town, we have in addition to a hundred foot steel span over the main channel, an approach bridge approximately 233 feet long, and two other bridges east of the main river bridge, one 126 ft. and one somewhat shorter; in addition to these bridges we have a small one span pile bridge considerably west of these bridges which takes care of local drainage only and is not concerned in this question; Mr. Rettinghouse has figured that by reason of the diversion of a certain amount of flood waters of the Big Sioux River by means of the spillway constructed by the County authorities, the Omaha Railway would be justified in filling in certain of these approaches, particularly our bridges known as 129 and 130, aggregating 239 feet in length; those are the bridges a mile east of the main bridge over the river west of town about three miles out; he has figured that it would cost to rebuild these bridges about $25 a foot or $5975; he has assumed that it will be necessary to rebuild these wooden structures about once in ten years; he has therefore figured that the average annual expenditure would be one-tenth of $5975; he has capitalized this amount at 7% arriving at $8536; then he has deducted the cost of

filling these bridges and the riprap necessary to protect the dam; he has used this at $2000, which deducted from the $8536 makes a net of $6536 benefit on account of filling bridges
311 129 and 130; in a similar manner he has figured that we could fill the approaches to the two steel spans we have here in town, where the amount of pile bridging is 166 ft. going through the same proposition and capitalizing the annual expenditures and deducting the cost of filling he has arrived at $2930; these bridges which we have here in town are what are known as through bridges; the supports are above the track, and Mr. Rettinghouse has figured that if the Omaha Company thought it desirable it might rebuild those bridges and substitute the deck built character construction which is a cheaper type construction, and by using shorter girders and necessitating two additional piers, this type of construction could be used, and he has planned that to reproduce these bridges as through structures would cost $45,500 and with the deck plate girder type would cost $25,500, making a difference of $20,000; then there is one other item which relates to the maintenance of the roadbed of the mile and ¾ length of track we have west of town in the district; this track has an embankment varying from 3 to 4 ft. to 10 or 12 ft; he has figured that on account of the diversion of a part of the flood waters, the embankment would be less, consequently the amount of labor that would have to be expended in keeping up the track would be less by an amount equal to $100 per year; he has capitalized this $100 at 7% arriving at $1400; in summarizing all of these items he arrived at the total benefit of $30,866; now the assessment of the Omaha is fixed at 839.45 units; if 1 unit is approximately $9.50, the total assessment would be $7975; the total amount of benefit divided by the total number of units would make an average value of about $36 for the unit; he has assessed us at approximately 25.8% of the total benefits; figuring the one unit as $9.50.

The situation at the west crossing is that we cross the valley approximately at right angles; the valley is quite wide at this point; the track is on an embankment and has
312 these 4 openings; three of them are at a distance of about ¼ of a mile; the land north of the track on the upstream side is cultivated to a considerable extent, not in the immediate vicinity of the bridges, but a short distance each way from the river the land is cultivated; in a time of normal high water this land is flooded and on account of the likelihood of holding this water an unnecessary length of time on this bottom land if we don't have considerable open-

ing there through our embankment and taking into consideration the danger to the roadbed that might result if we closed the opening, it is my opinion that we would be unjustified in reducing the size of our openings or the length of them; in my opinion there are absolutely no benefits resulting to those bridges west of the city or to the railroad west of this city by virtue of this drainage ditch construction.

Referring to the bridge west of the depot in the City of Sioux Falls and taking up the question of the substitution of the belt girders for the trestles, the fact of the matter was that the Omaha Company has no intention of making any changes in these bridges; the bridges are amply strong for the locomotives we are now running or which we anticipate we will run in the future; there is absolutely no reason for disturbing the bridges at all; furthermore, if we should decide ever to substitute the plate girders we could do so and still have the light iron at about the high water of 1881.

There is one other point that has not been covered and that is in regard to filling the pile approaches; there are short approaches at each end; the west approach is 62 or 63 feet; and the east approach is 103 ft; we have felt that we could fill both of these approaches whenever we got around to it and could at any time; as a matter of fact it would involve considerable expense and we have felt it would
313 be better economy to maintain that type of approach; as to the filling of those approaches the drainage ditch construction has no effect one way or the other.

I have figured up the acreage the right-of-way of the Omaha Railroad in the drainage district amounts to; we have 22 acres on the main line, 21.2 of which is on the west bottom and 5.89 acres on the west side spur previously described; these figures, include .8 of an acre in the vicinity of the bridge out here in the city and includes all the right-of-way within the drainage district sought to be assessed.

314 (Cross-Examination)

I have been in the business of civil engineering something over 22 years and have occupied my present position since the first of March 1920; it is a fact that water in flood seasons permitted to stand along side of the embankment which supports the tracks of the railway has a tendency to weaken that embankment and it necessarily requires a greater outlay of

money to keep the bank in solid form; as a general proposition the more water standing there the more effect it has.

Q. Do you know when these bridges were built west of town?

A. I think our records disclose that they were built about 1880 or 1879, along in there.

Q. Then these extra full bridges were built at a time when all water was coming down the river?

A. Yes sir; the engineer building the bridges would naturally have in view that they would take care of all the water that came down the river; if the evidence should disclose in this case that from 1/3 to ½ of the water that comes down the river was diverted and does not pass under this bridge, it would not be the reasonable conclusion that at least part of the bridge could be done away with; I don't know how much water stood out there last year north of those bridges on the uphill side of those embankments; I don't know how much water there was the year before or the year before that.

Q. You do not know any of the data, but you are willing to swear you got no benefit, notwithstanding the fact that you do not know how much water stood there?

A. Yes, I am willing to say that.

I think it had no effect whatever; if only ½ of the water came down the river last year that previously went under the bridges there would have been no benefit to our embankment in the solidity of the same and in the cost of the maintenance of it; it would make no difference how much water comes down the river unless it should go over the track and begin to wash the bottom out; I stated as a general proposition that when the embankment stood in water it had a tendency to weaken it and make a higher cost of maintenance; this fact is not true at this place and our embankment would stand all amounts of water; there is a peculiar reason why it should.

It is not a fact that we cannot run over that bridge the same class or weight of engines that bring our trains from St. Paul and Minneapolis to Sioux Falls; that bridge would not have to be changed if we wanted to run the same class or weight of engines to Mitchell; my company has not put in any different trestles since this spillway has been constructed; I have been in Sioux Falls several times; I think I was here in 1919; I think I was here in 1917 or 1918, and went over the ditch matter at that time; our former chief engineer had at one time under consideration the question of the shortening of the bridge just east of here; my understanding is that the

spillway is designed for 2000 second feet and could take an overload of 500 more, making a total of 2500.

315 (Redirect Examination)

The special reasons why water standing by this railroad embankment did not affect it is that this particular embankment is very wide and deep and very heavily overgrown with vegetation and sod; in the vicinity of the river course where any washing has ever taken place are thoroughly protected by rip-rap; for this reason I believe that water standing along this particular embankment would have no effect on it in so far as the labor that would have to be expended in maintaining the tract is concerned; that is the answer that I would make to the claim of benefits made by Mr. Rettinghouse in regard to saving $100 a year maintenance; my understanding is there has been no decrease in the force employed on the section since the construction of the spillway in 1918 and that would be the determining factor as to saving in maintenance account.

The reason why trains the same as come from St. Paul to Sioux Falls cannot be run to Mitchell is that we have other bridges between here and Mitchell which would not permit of the running of heavier locomotives; the bridge in Sioux Falls is restricted in our time card; we do not permit our heavier engines to go over it at the present time; as a matter of fact there is no reason why the heavy engines that operate down here cannot go over this particular bridge although it is restricted in our time card; there is no reason why the heavier engines should run any further than Sioux Falls if they cannot go clear through to Mitchell; Mr. Rettinghouse the engineer of the drainage district, was the former chief engineer of the Omaha road who had under consideration the question of changing the bridge at Sioux Falls.

C. GEELAND, called and sworn on behalf of the plaintiffs, testified as follows:

316 (Direct Examination)

I am road master of the Chicago, St. Paul, Minneapolis & Omaha Railway from Worthington to Mitchell and from Luverne to Doone, and I have been since August 15, 1905; prior to becoming roadmaster, I was section foreman and extra gang foreman; I was section foreman at Montrose; I started working for the Omaha in April, '80, and was employed by that road during 1881; I remember the flood waters of 1881; I

was in Sioux Falls when the water was the highest; I am familiar with that portion of the Omaha Railroad in the City of Sioux Falls and west of the City comprised in the area sought to be assessed for the construction of drainage in this drainage district No. 1 and 2, and have been familiar with it since 1908; there is very little noticeable difference in the water conditions along that line of the Omaha railroad subsequent to the construction of the new spillway in 1918; I realize that more water has come down and stood on the bottoms, but it spread out such a wide territory across the bottoms that it didn't raise it very much; I wouldn't say that there has been more water on the bottoms west of the city and north of the Omaha Railway track since the construction of the spillway than there was before, but to my knowledge there is fully as much; I have seen the water conditions each year beginning with 1918 and have visited that part of the line and know how much water there was; the water that has collected in the field north of the track does not seem to have had any bad effect, that is, it doesn't seem to make any more particular work across the bottom; I can't say it has a bad effect one way or the other either before or after the construction of the spillway; the construction of the spillway and other works in Drainage Ditch No. 1 and 2 has made no apparent difference
317 one way or the other as to the flood waters of the river and as to the line of railroad of the Omaha west of the city and east of the river; I can't say that there is any particular noticeable difference in regard to the water conditions at the bridge in the city of Sioux Falls before and after the construction of the new spillway; I am familiar with the course of the river through the City of Sioux Falls and have seen it each year since I have been roadmaster; so far as effects the maintenance and operation of the railroad, the difference is very little; in fact so far as the operation of the railroad is concerned, it doesn't affect the river being a little high or low west of the depot; it never has had any effect before or after the construction of the spillway with the exception of one year, that was 1881; that was the year there was an ice gorge formed in the southeastern part of the city; that gorge held the water back and when the ice gorge broke there was a flood which flooded the track about the location of the present station; the Omaha has never been troubled with water at its station or at its bridge west of the station since 1881.

318 (Cross-Examination)

I have been familiar with this particular part of the river between here and Montrose since 1880; in my travels back and forth over this road from year to year I have never set any permanent structure to indicate the course of the water at any particular year; when I say that the water is the same now as 5 or 10 years ago, that is the best of my judgment; in 1881 it washed out the whole line; in 1907 the waves had cut down into the bank and there was some riprap put there for fear it might wash; the water caused us additional expense and maintenance that year; if the water should pile up in the same way as it did in 1907, it would not be necessary to put riprap in again.

319 Q. You say the [heighth] of this water has been practically the same every spring? Were you advised of the fact that from one-third to one-half of the water coming down the valley had been diverted from your railroad?

A. Yes sir.

Q. Still the [heighth] of the water remains about the same each spring as to your railroad track?

A. Not the same every spring.

The [heighth] of the water as to the railroad track varies with each season but is relatively the same; if there should be an increase of 30% to 50% of the amount of water coming down the Sioux River the effect upon the track would be very little, if any; it would not require any more riprap and would stand up just as well as it does now; we would not need any greater flood bridges than we have now; we did need them in 1881 but it was then fixed out there to take care of the flood water we have kept the same amount of lineal feet of flood bridges since 1881 to take care of the flood waters even since the spillway has been put in.

(Redirect Examination)

The riprap which was put in in 1907 was put in on the west spur which is possibly 400 ft. west of the main channel; it was on that branch or spur which runs north of the main line and the water has never since made any trouble; no other riprap has been put in.

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320 B. A. WAITE, called as a witness on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am B. A. Waite of Des Moines, Iowa; am assistant Engineer of the Chicago, Rock Island and Pacific Railway. I have been Assistant Engineer of the Dakota division coming into Sioux Falls frequently. I became connected with the line that runs into Sioux Falls in 1907; from then down to the present time I have been on this division, five or six years, and while I was working in Chicago and in Davenport I worked on this territory part of the time. Am a Civil Engineer, practicing that profession since 1892. Am familiar with the right of way and the bridges and railroad tracks of the Rock Island Railroad within this drainage district. I have here a map showing the property owned by the Chicago, Rock Island & Pacific Railway within the City limits of Sioux Falls, marked Rock Island Exhibit "1". That is a correct blue print representing the right of way, the property owned by the Rock Island Railroad within the City limits of the City of Sioux Falls. The red pencil mark outlines the property owned by the Rock Island Railway.

Rock Island Exhibit "1" is offered in evidence by the plaintiffs and received.

I have computed the number of acres of property owned by the Rock Island Railroad within Drainage Districts No. 1 and 2, and as far as I can tell it is about thirty acres (30) or a little less. There are two bridges on the Rock Island across the Big Sioux River, one two miles east of town and one just north of the depot. The Rock Island comes into Sioux Falls from the southeast, crossing the river the first time two miles southeast of the City. It then comes up the west side of the river into Sioux Falls. It then crosses the river again within
the City limits at the foot of 9th Street; that is a spur
321 known as the Bismark spur. The trains do not cross
this bridge. The Rock Island station is on the west side of the river on 10th Street. The Rock Island Railway Company has no property within this Drainage District that is used for agriculture and none of it has even been so used. All of its property is used for railroad purposes, location of side tracks, industrial tracks, station grounds, roundhouse grounds and right of way of the main line. The Rock Island has no more property within the City of Sioux Falls or within this drainage area than is necessary for railroad purposes. The first half mile of the track from the east bridge toward the City is about eight feet above the average water of the Big Sioux River and is practically level with the adjoining

ground near all the rest of the distance, and inside of the City limits it is above the level of the river about fifteen to twenty feet. That is true throughout the course of the line, except at the east end over the bottom where it is about eight feet above the river. Neither the track nor the embankment of the Rock Island has ever been reached by high water within my knowledge, and neither the track nor the right of way has ever been affected by high water from the Big Sioux River since I have known it. I have here a blue print of a cross section of the bridge about two miles southeast of town marked Rock Island Exhibit "2". I have checked the measurements over at this time and it is correct. There is in the center of this bridge a true span made of steel and then it has piled approaches. The approach on the east end is ninety-seven feet (97) and on the west end one hundred ninety feet (190), making a total bridge, including approaches, of four hundred nineteen feet (419). From the top of the tie to the bottom of the river is twenty feet.

Rock Island Exhibit "2" is offered in evidence and received.

322 I also have a cross section of the Bridge at 9th Street inside the City of Sioux Falls marked Rock Island Exhibit "3". This shows the construction of the bridge, with the exception of the pile portion, which has been re-built since that plat was made. The plat was made in 1913 and part of the piling on the east end has been filled in since then. It was filled in gradually, took several years from 1913 to 1915 and the land on either side of the bridge was filled in as we filled in the approach. The shore line has been filled out on either side of the approach so the approach was of no use there.

The exhibit is offered and received in evidence.

In regard to the bridge southeast of town, we have never had any trouble with that bridge from high water to my knowledge, either before or after the building of the spillway. As an engineer I would not dare to fill in any of the bridge or any of the approaches at the present time, because at the present the waterway is no more than would be required according to our way of figuring the waterway required. We figure the drainage area on Dunn's tables and a certain proportion of that is the waterway required according to the area drained, and under such computation we have no more waterway under this bridge than is required for the area drained. The approaches to this bridge have not been in any way

effected by the building of the spillway and the spillway has had had no effect upon the bridge that I know of.

In regard to the bridge in the city at 9th Street, I understand it is proposed by Mr. Rittenhouse to eliminate one section of that bridge, that is the south or east one hundred ten feet (110) steel span truss. The bridge now is three hundred seven (307) feet long. If that span was taken out the bridge would be one hundred ninety-seven (197) feet long. I
323 would not dare to cut that bridge down to one hundred ninety-seven feet. The bridge as it is now is about the same length as the other railroad bridges on this stream. I believe that they have two one hundred foot (100) spans, and if we eliminate one hundred ten (110) feet this bridge would be shorter than the other bridges. This bridge on 9th Street was raised by the Rock Island before I came here. This span that is contemplated to be eliminated by the drainage engineer is filled in about half way. There is no water under it at the present time, the current is under the other end of the bridge. This was caused by the building out of approaches and driveways, pushing out the shore line. The spillway has nothing to do with the filling of this river on either side. It has been caused by the buildings being extended towards the river. There is at the present time a garage known as the Homan Garage directly west of this span in the bridge and extending out at least half of the length of the approach, so that a line from the warehouse on the east side of the bridge to the corner of the garage would strike the middle of this span. I would not consider that it was reasonable engineering to eliminate any of this bridge. Since I have known this property the water of the Big Sioux River has never been over any of the track in any place, and I have known it since 1907.

(Cross-Examination).

It is twenty feet (20) from the rails on the bridge two miles south of town to the bottom of the river. This bridge was built in 1886. Either this bridge or replacements of it. Since 1907 it has been in the same condition. I have never compared this with the Great Northern Bridge down the river. I have never observed this bridge at extreme high water. From the area of the waterway required I would say that none of the approaches to this bridge could be filled in. I asked Mr. Rittenhouse in regard to the waters shed in this drain-
324 age area, and I think he said it was 4500 square miles. This was the whole watershed. I do not know the slope of the land from north to south per mile. I do not know the velocity of the water, but from our rules we could not reduce

the length of the bridge. The steel span in the center is 127 feet with pile approaches. These piles are treated and should last 20 to 30 years. We do not know just how long creosate piling will last.

I said that one of the approaches to the bridge within the City had been filled in gradually along about 1914. It has not caused us any trouble since then. Where the filling is there was formerly a trestlework. Under the present condition of the river since 1914 it has not been necessary to have as much approach to the bridge as when it was constructed. The shore line that I spoke about from the Homan Garage to the warehouse, that is in a bend in the river. I do not know the difference in elevation of the two bridges and I do not know the velocity of the water at either one of them.

Q. And still upon this information that you don't seem to possess as to the fundamentals as to how much water this river carries, the slope of the land, or the difference in the [heighth] of the land, you still wish to be understood that it would not be safe, in your judgment, to shorten these bridges?

A. Yes sir.

I do not know what would be the effect on the bridge here in town if the amount of water flowing down the river should be increased thirty to fifty per cent. I think the one east of town would be all right, but I am not sure about the one here in town. The high water has never reached our embankment that I know of. I do not believe that the water has ever crossed our right of way. I do not remember of it. I have not been here very often for the last year, once be-
325 fore in the last six months, but have been here before. My headquarters are at Des Moines. I have been here at high water periods. I could not tell you just what year, but I have been connected with this end of the railroad intermittently. I could not remember the year that they had high water when I was here.

(Redirect Examination.)

In regard to the filling in of the piling on the bridge in the City known as the Bismark Spur, the land adjacent had been built out to the end of the piling so there was nothing but dead water that stood under it. The water could not flow under the piling on account of the land having been filled in on each side.

C. E. DEAN Called as Witness on Behalf of the Plaintiffs Testified as Follows:

(Direct Examination.)

I live in St. Paul and am a bridge foreman on the Chicago, Rock Island & Pacific. I am a bridge foreman upon the division running into Sioux Falls. I began work here in the fall of 1893 and left this division in 1913, so that from 1893 down to 1913 I have known this railroad running into the City of Sioux Falls, with the exception of the years 1905, and 1906, when I was with another railway. From 1893 to 1897 I was a bridgeman. From 1897 to 1905 I was bridge foreman, and from 1907 to 1912 I was master carpenter on this division. I was familiar with the two bridges on the Rock Island within this drainage district at the time I was here and down to 1913. I remember when the bridge across the Big Sioux at the foot of 9th Street in the City of Sioux Falls was raised. It was raised about four feet on the two spans, but the old approaches were left alone. That was just before or about the time of the breakup of the ice in the spring. We contemplated a flood. The report came that there was an ice gorge
326 up the river, we expected it to break loose and have heavy water. It had been a hard winter and the ice was heavy, but it did not materialize. We had no trouble from it. The bridge was lowered a little after that, but not put back where it was originally. I think the permanent raise was about two and one-half feet and the ends dropped down to their original position. During the time that I was on the division we never had any trouble with the bridge southeast of town. I was here in 1907 when the spillway was put in, was master carpenter. I never have noticed any perceptible change in the condition of the water flowing under these two bridges before or after the building of the spillway. I have no record of high water marks myself. The building of the drainage ditch and the spillway has never benefitted these bridges in any way that I know of. From an engineering standpoint I cannot say but from a practical standpoint I would not fill in either of these bridges at the present time. I base my opinion upon the fact that the engineers as a rule do not give enough waterway. I have taken many an opening —for instance—four foot opening I put in once on the engineer's orders and afterwards had to be a seventy foot opening. During the time that I have known the Rock Island property within the City of Sioux Falls the railroad track has never been under water. The water has never been up on the embankments at any place to my knowledge.

(Cross-Examination.)

I was here in the high water of 1911. There was no damage that I know of. I have not been here at any other time of high water except in 1897. I have never made any definite measurements of the water in the river. I do not know the amount of watershed that the river and the ditch drain, I do not know the elevation of the land from our right of way north and I do not know how fast the water flows. I do not know the amount of water that comes down the river, or that comes down the drainage ditch. If the water was in-
327 creased fifty per cent I do not believe the bridges would stand it. The present bridges represent the same length of span that was here in 1893. Only the spans have all been renewed. There have been piers put in. The piles we are using now are creosoted piles. Piles not creosoted last about ten or twelve years, and this is true of hard wood culverts.

S. O. PERKINS Called as a witness on behalf of the plaintiffs testified as Follows:

(Direct Examination.)

I am an inspector on the Rock Island Railroad. I have been connected with the bridge and building department as bridge foreman and master carpenter. I was master carpenter on the division running into Sioux Falls from January 1, 1913, to June 1, 1920. During that time I was familiar with the two bridges on the Rock Island in the City of Sioux Falls. During that time there never was any high water that damaged or threatened to damage these two bridges in any way. The water has never been upon the embankment of the right of way of the Rock Island at any time to my knowledge. I have worked upon these bridges more or less. As a bridge man I would not think it safe or advisable as a railroading proposition to fill in any part of these two bridges. From my experience I have been obliged to put in several larger openings at different points where we have had similar openings. We have had to increase the length of the openings on account of high water, and I would not think it safe to close up any of these openings.

(Cross-Examination).

I do not know the number of acres of watershed drained by this ditch or by the Big Sioux River or the elevation of the land or the excessive or average rainfall for a year in this drainage district, and I do not know the capacity of the spill-

way to take care of the water from the ditch, but I want the court to understand that these spans could not be safely shortened. That is based upon the fact that several times I have had to make openings larger and that is the foundation of my testimony.

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328 A. F. PILCHER Called as a Witness on Behalf of the Plaintiffs Testified as Follows:

(Direct Examination).

I am general agent of the Rock Island Railroad at Sioux Falls. Have been here since June, 1890. I was the agent of the Rock Island until 1914 and since then the general agent. I have been familiar with the property of the Rock Island within this drainage district for thirty-one years. The Rock Island has no property within this drainage district that has ever been used for agriculture and none of it is used for agriculture at the present time. It is all used for railroad purposes, roundhouses, stations and railway tracks. It has no land that is not necessary for railroad purposes at the present time. The right of way and the rails upon the track in the city are about 20 feet above the water in the Big Sioux River at ordinary times. Two miles south of town, at what is known as The Cherry Creek bridge, they are about eight feet above the water. The right of way has never had any water standing on it in the Big Sioux River since I have known it, that is since 1890. None of the roadbed of the railway has ever been washed by the Sioux River. There has never been any difficulty with the bridge southeast of town in handling floods. In regard to the bridge at the foot of 9th Street in the City, in 1897 there were rumors that an ice gorge had formed and as a precautionary measure we raised this bridge at the foot of 9th Street but we found out it was not necessary. The high water did not develop. The Big Sioux River has never been out of its banks here in the City of Sioux Falls since 1890.

(Cross-Examination).

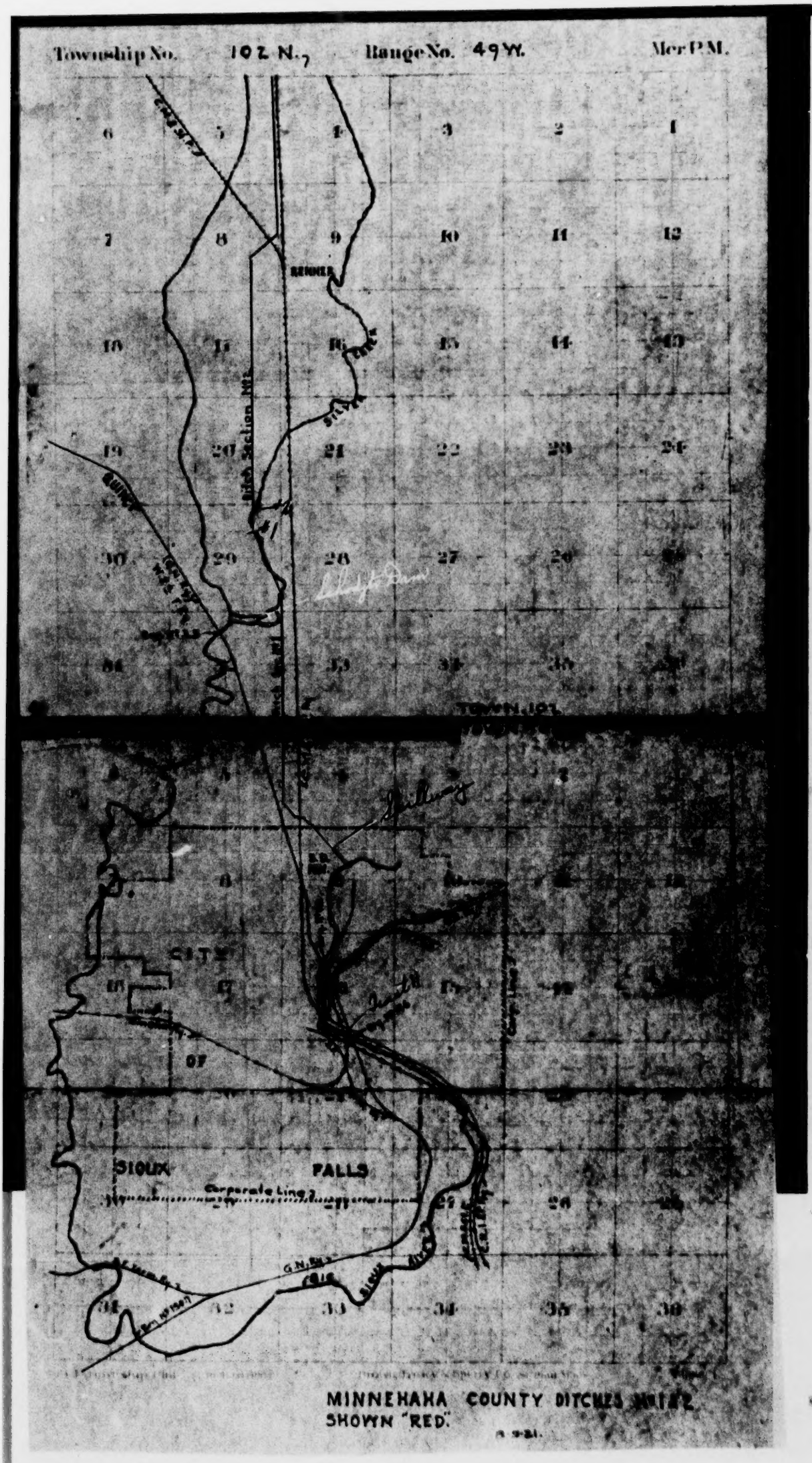
I live in Sioux Falls and worked for the Rock Island Railroad Company in 1916, 1917 and 1918 and at that time knew about this new ditch going in. I saw the publications in the newspapers. I knew it was being constructed. I went over to the spillway and saw it in the course of construction. I know of no reason why the land of the Chicago, Rock
329 Island & Pacific Railway Company could not be used for agricultural purposes if not covered with the railroad tracks. It has agricultural land as a basis.

C. M. BASSETT called and sworn on behalf of the plaintiff trestified as follows:

(Direct Examination)

My name is C. M. Bassett; I live in Sioux City; I have been a civil engineer 24 years; I am assistant engineer of the Great Northern Railway Company; I have been in its engineering department 9 years; at the present time I have jurisdiction of the entire Sioux City Division, including all of Minnehaha County, South Dakota; I have been in charge of that Division since the spring of 1916; during that period of time I have made frequent trips to Sioux Falls, and over the lines throughout Minnehaha County; for two years 1916-17 I was in Sioux Falls practically all the time; since then I have been here practically every week. I am familiar with what is known as drainage ditch Number 1 and 2, and the spillway; I am also assistant engineer of the Watertown and Sioux Falls Railroad Company; its line is located along the ditch for about 3½ miles; every spring I have been to the spillway; then I have been over the entire line of the ditch and looked at the various head-works and retaining dams; the line of the Great Northern enters the city of Sioux Falls from a northeasterly direction at a point about a mile and a half from the mouth of the spillway; that is the nearest point on the line of the Great Northern to the mouth of the spillway; the course of the line of the Great Northern as it goes through the city of Sioux Falls and around south of the City and down through Section 31 is as follows: We enter in a northeasterly direction and then through town we go practically north and south and then we swing southeasterly towards Yankton; Exhibit 1 is a plat I prepared or caused to be prepared, showing the location of the line of the Great Northern over the area referred to and the general location of a portion of drainage ditch Number 1 and 2 and the
330 location of the bridges along the line of the Great Northern within the area referred to; the plan is drawn to scale, 1 mile to the inch.

Plaintiff offered and it was received in evidence, Great Northern Exhibit 1. It is as follows:


Township No. 102 N. Range No. 49 W. Mer P.M.
SIOUX FALLS
Corporate Limits
MINNEHAHA COUNTY DITCHES NO 1 & 2
SHOWN "RED"

332

The acreage of the right of way and station grounds of the Great Northern Railway within the area in question, Sections 16, 27 and 31, Township 101, Range 49, is 27.14; the acreage of the station grounds included in that is 6.09; tract 11 consisting of approximately one and one half acres is not included within the 27 and a fraction acres; tract 11 lies at the north end of our bridge 146 and on the west side of the main line; it is between the Omaha and Great Northern rights of way and the Milwaukee is on the north; it is just south of Tenth Street; it would be on the Eleventh Street if it were extended out; it is an irregular tract; it was originally purchased for station grounds and is part of the station grounds of the Great Northern; it is bounded on the east by our grade; on the north, the Great Northern and Milwaukee connection; on the west the Omaha grade and on the south the river; the tracts of the various railway companies bounding it I would say are about ten feet above the natural surface of the ground; tract 11 has never been used for agricultural purposes; I would not consider it agricultural land; it is not accessible; it is bounded by the river and three railroad rights of way on there is no road into it; no one could get into it to farm it; it is not feasible for that purpose. I am familiar in a general way with the channel and banks of the Big Sioux River from a point near our bridge in the city of Sioux Falls; the North bridge down to and through Section 31; to the south of town the banks of the river are well defined; there is a deep channel there and the river is confined to that channel, through town there is a greater chance; the channel is wider and the banks are

333 not so steep; as you go further north the channel again deepens and it is confined, the valley is narrowed considerably south of town; I am acquainted with Mr. Rettinghouse; I had a conversation with him in reference to the manner or basis upon which he based his opinion and report to the Board of County Commissioners with reference to the alleged benefit to the right of way, bridges, tracks and embankments of the Great Northern Railway from Drainage ditch No. 1 and 2 and the spillway in question; the first conversation with him was in early spring of this year; the last one was about ten days ago, I think it was last week; during the first conversation Mr. Rettinghouse stated that he had figured we could shorten our bridge and had figured out the cost of renewing those and the cost of filling and made deductions and based his figure on that amount capitalized at

seven per cent, and divided by twenty-five per cent, was what our assessment came to—the number of units.

"Q. In your conversation approximately ten days ago, did he go more into detail with reference to the subject?

A. Yes sir.

Q. State the substance of that conversation.

Objected to as not binding upon the defendant commissioners.

Overruled.

A. We have two bridges within the area, and he stated bridge 150-7 that that bridge was about the right size, and bridge 146-0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures, and figured on the amount saved by the shortening of the bridge.

Counsel.

334 At this time, if the Court please, the defendants object and ask that the question be stricken, and objects to the testimony on behalf of the plaintiff company, and to the proposition of whether or not the plaintiffs are benefitted or not, or the extent thereof, by the drainage project, for the reason the same is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction in the same matter in these proceedings, and proceeded with the construction and repair of the ditch in question. For the further reason that this Court has no original jurisdiction of a bill in equity to reject or control proceedings of the Board of County Commissioners of Minnehaha County in the construction or reconstruction and repair of this ditch. And that the plaintiffs have a plain adequate and complete remedy at law, by appeal from the equalization arising from the proceedings taken by the Board of County Commissioners. For the further reason, it calls for evidence of a fact, the determination of which is in the exclusive jurisdiction of the Board of County Commissioners, and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action, and with no allegation or proof of fraud or arbitrary action on the part of that tribunal. Is not within the issues of the case and not a

proper subject of inquiry in these collateral proceedings, and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these proceedings attacking the question of whether or not they are or are not benefitted by the ditch proceedings?

335 The Court: Yes, the motion is denied. The testimony is received subject to objection.

Mr. Rettinghouse made no statement to me with reference to any other element of benefit to the Great Northern Railroad than the shortening of the north bridge within the city limits; basing my answer upon my knowledge of drainage ditch No. 1 and 2, the spillway, the location and construction of the tracks, bridges and embankments of the Great Northern Railroad Company, and my knowledge of the waters in the Big Sioux River; in my opinion no benefit result to such right of way tracks, bridges, embankments or station grounds from drainage ditch No. 1 and 2 including the spillway; no part of the right of way, tracks or bridges within the area in question to my knowledge have ever been flooded by the waters of the Big Sioux River; we have a plan drawn up for a new steel bridge at bridge 146 which provides for shortening of fifty feet of that bridge and putting in deck girders which are much lower and nearer the water; we considered that owing to the fact that we are lowering the steel we would have to provide practically the same opening we have there now; in planning to shorten the bridge fifty feet we did not take into consideration the existence of the drainage ditch; the present height of the track on this bridge above what I understand to be the high water mark of the Big Sioux River, according to our best record is eleven feet; if I were planning to construct new the bridges in question on the Great Northern, or to rebuild them, in determining the sizes of the openings from an engineering standpoint, I would not take into consideration the existence of drainage ditch No. 1 and 2, because my observation has been that before when the spillway went out in 1916, and the water conditions have been just the same; I consider there is great danger as the spillway is constructed now of its going out, and there is danger that they will have to close the ditch and turn the water back into the original channel; I would not take it into consideration even if the

ditch and spillway were working at capacity; I don't think it takes enough water out of the river to make any
336 material difference; I would plan new openings without considering the ditch and considering the highest possible water in the river; I would consider it bad engineering to plan otherwise.

I observed the flood waters that entered the ditch coming out of the ditch north of Sioux Falls and re-entering the Big Sioux River; on the Watertown and Sioux Falls we are flooded every year just south of the city pumping plant at the top of the hill; the water comes out of the ditch and goes over our track; it has every year I have been here; we have probably over six inches over the top of our track; the water stands in there, sometimes for probably ten days on the Watertown and Sioux Falls line.

The length of the north bridge is 615 feet; I do not think it would be good engineering or safe for us to shorten that bridge more than fifty feet under any conditions; as I have stated, for some period of time we have contemplated the construction of a new bridge and of a different type, and shortening it fifty feet; as constructed at present the bridges are supported by a truss above, and in contemplating the new construction we had in mind what we called a deck girder, and that support is below the rail which makes a difference; our plan will be to lower it five or six feet due to the use of deck type girders instead of the truss now used; in planning this new bridge we did not take into consideration the possible effect of the drainage ditch.

(Cross-Examination)

When we lower five or six feet, the girders I have mentioned which are in the nature of I beams probably five feet thick, will still be underneath the track; the elevation of the track would remain the same as the bridge work is all underneath the track; from my observation I say that during the last five years the water from the south bridge and north to the termination of our line in the city has remained
337 about the same; during this same time the water has been high enough up around the penitentiary where the Watertown track goes to flood its tracks some inches of water every year; the water that came over the Watertown & Sioux Falls came out of the ditch; I have been told and know approximately the amount of watershed in this drainage project; I couldn't say off hand how much it is; I haven't

the figures with me; I do not know how much water really falls in the watershed when we have high water here; I know generally the topography of the country north of Sioux Falls through which this water is collected and conveyed by the river and ditch south; I have been pretty well all over it; I do not know the number of cubic feet of water the river carries per second when it is banked full at flood time, nor the whole capacity of the ditch and spillway; I was up there when they were building the spillway in 1917 and have been watching it; I didn't like the construction; I saw them repairing the ditch on north and throwing up embankments on either side; I am still of the opinion that the spillway isn't what it should be; I have seen it every year since then; I know of no reason why if the tracks were not upon the right of way and station grounds, those premises could not be used for agricultural purposes, except our station grounds which are right on top of rock; Section 31 and 27 could be used; Tract 11 I don't think has any soil to amount to anything on it; the bridge south of town is 304 feet long and takes care of the water; the bridge in town is 615; since I have been on the division there has been no new bridge put in; these bridges have been constructed for some years and before the spillway project was put in; I judge that they were put in to take care of the water that came down the Sioux River at the time; the water has come out of the ditch every year since the spillway was put in; north of the city at level siding
338 the water has come out of the ditch over the tracks of the Watertown & Sioux Falls Company right at the city pumping plant; it comes through the dikes in the ditch.

(Redirect Examination).

Along the right of way south of town we have an embankment about 1800 feet long; bridge 150-7; it is about 16 feet deep; side slopes approximately one and one half to one, approximately fifteen feet high; the toe is protected in some places with rip rap, and it is now overgrown with grass and weeds; that embankment is so constructed as to withstand any possible flood condition in this neighborhood.

THOMAS SIMPSON, called and sworn on behalf of the plaintiff, testified as follows:

339 (Direct Examination)

My name is Thomas Simpson; I have lived in Sioux Falls twenty-seven years; I am general agent of the Great Northern Railway Company at Sioux Falls, and have been its agent for

twenty-seven years; I am familiar with the line of the Great Northern included within the area in questions here in Section 16, 27 and 31; during such twenty-seven year period no part of the tracks, bridges or right of way of the Great Northern Railway within that area has been flooded; we have had no trouble during that period of time from high water; the station of the Great Northern is east of the river; I have lived on the west side of the river twenty-seven years; the depot has been located where it is now approximately fifteen years; during that time I have crossed the Big Sioux River several times a day and I have not observed any appreciable difference in the flow of the Big Sioux River before and after the construction of the spillway.

(Cross-Examination).

During the time referred to in my testimony the height of the river has fluctuated, but there has been no floods; the height during flood periods has been at about the same level; I do not know how much water the spillway takes care of or how much the river banks carry; I heard about it when they put in the spillway.

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340 ANDREW NELSON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination).

I am section foreman for the Chicago, Milwaukee & St. Paul Railway between Baltic and Renner. Renner is six miles and Baltic fourteen miles north of Sioux Falls. I have been section foreman there twenty-seven years and was foreman in 1916. There is a place on my section where the drainage ditch is just outside of the right of way. I think they diked it there four feet just outside of the right of way. From a point about four miles south of Baltic the ditch is on the west side of the railway, and from that point down to Renner it runs close to the track. The Ditch runs between the railroad and the river and the ditch and the river are both on the west side of the track. In 1916 at a point four miles south of Baltic the dam went out of the river and the river let the water in the ditch. The ditch couldn't carry the water and it went over the bank and washed the dike out, and a few miles further south it washed the track and let all the water out over the farms around. It flooded the farms around there and washed back on the track. This water came from the ditch. The ditch is constructed with a dike and the water broke

through that dike. Before the water came out of the ditch there was no water east of the track. The water came into the ditch and went out of the ditch and washed all the track out and flooded the ground. The water in the ditch came from the river. I did not have any trouble with the water in 1919 and 1920. It came out of the ditch at several places, but not enough in those two years to hurt the track. In 1919 and 1920
the water came out and went up to the track and the
341 ditch was full of water. It came to the bottom of the
railroad track but didn't cut in much or wash. At the time the water came through and flowed up to the top of the bridge there was no water east of the railroad track. There was no flood water between the ditch and the river until the water ran out of the ditch. It ran out of the ditch and filled up between the river and the ditch too. It went over the dike on the west side of the ditch. The origin of that water was the river. In 1916 the water remained on the lands that were overflowed about ten days or two weeks. In 1919 and 1920 it stayed over two weeks. It stayed a little longer in 1920 than in 1916. The point at which the ditch protects the track is about a half mile south of the Thompson bridge. The ditch comes to the right of way at the Thompson bridge and runs nearly four miles down the track. The water comes in the ditch where that bridge is built. There has always been a bridge there. They built a cement bridge there a year ago. It is a highway bridge. At the point where I said it washed out we had to put in [riff raff]. We had to build a bridge there temporarily and afterwards we lled it with [riff raff] and it is [riff raff] now.

(Cross-Examination).

The water will wash the track out the way the bridge is put in there. The water in 1916 washed out part of the track but not at the place where the bridge is. That was the year the old spillway went out and there was high water that year. I have no idea of the amount of rain or water that was carried by the river or the ditch in 1916, 1919 or 1920. In 1897 the track was washed out south of Renner. In 1916 the water did not cover the abutting lands before it went through the track; then it covered all over the east side after it got through the track, but it did not cover half as much ground as it did in 1897; if the dikes were raised a foot or two they would keep more water in than they do now; our track was not injured in 1920.

342 NELS OLESON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am section foreman for the Chicago, Milwaukee & St. Paul Railway Company. I started in 1887 as a laborer. The most of the time I have been employed as section foreman I worked in the yard five miles south of Sioux Falls. I have been continuously living here and working for the railroad company since 1887. I have not noticed any injury to railroad property or to railroad property covered by waters from Sioux River south of here during that time, and none in Sioux Falls. I do not know of any water doing any damage on J. L. Phillips' Addition and on the Millspaugh's Addition near the roundhouse, or east of the roundhouse, or north of the ice house. I do not know of any flood waters doing any damage to railroad property since I have been here. There are five tracks in the new yard in what they call Daniels' Addition and Millspaugh's Addition in the vicinity of the ice house east of the depot. I do not know of any damage being done there. There has been no interference with any of these tracks by the waters of the Sioux River since I have been here. There has never been any difficulty or damage on account of the flood waters at the roundhouse property.

(Cross-Examination).

The ice generally comes down in the spring and goes over on the east side and over the rocks there. There is a current through the east side of the channel of the river and it lifts the ice right around the roundhouse. The water comes close to the roundhouse but never does any harm. It does not come out to the banks by the ice house very much. I never saw water standing in the ditch alongside the track on the ice house side.

"Q. You don't know, Mr. Oleson, whether or not the amount of water that has been gathered into the Sioux
343 River and the ditch above Sioux Falls in the past five or ten years has increased or not, do you?

A. I couldn't tell you about that.

Q. And so if there is twice as much water coming down this valley as previously came down, you couldn't say that was true or not?

A. If the water raised five or ten feet I could tell.

Q. You don't know the actual amount of water?

A. No, I don't know nothing about that."

WILLIAM SHEA Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am general road master of the Chicago, Milwaukee & St. Paul Railway Company, and have been such about four years. Prior to that time I was district general road master and division road master. I have been in these divisions for the railroad since 1890. Prior to that time I was track laborer and section foreman and construction foreman. We have many miles of railroad built across river bottoms and creek bottoms where we have to maintain grades that will guaranty us that we can operate our railroad during high water. The Chicago, Milwaukee & St. Paul have many lines upon which heavy traffic is carried upon which they have tracks to maintain under such a situation. I have been over the line between here and Baltic and have noticed the material of which the grade is constructed. From what has been my experience and observation I would state that adjacent water standing alongside of and extending against the grades has no effect upon the maintenance of the grade or the stability of the track upon it, for the reason that we used our track embankment in many cases as the bulkhead to our reservoirs of water for engine supply. We do not hesitate to use our track bank for that purpose. We have many of them on our railroad and we do not notice that we have any bad results from it.

344 No additional expense of up-keep is occasioned by that situation on embankments twenty years old or over. We prepare our property for the purpose we are going to use it for by building up a track bank. In this particular instance, it would cost from $800 to $1,000 an acre for us to build up the track bank and make the line serviceable for our purpose, which in this case is about what that cost up there. I do not believe the farmers ever went to any expense worth mentioning in that community to prepare their properties that way. I didn't notice anything of the kind. The overflow upon this embankment or alongside the embankment would have no effect whatever upon the railroad bridge. If the flood remained two or three, or five days, upon the adjoining agricultural land I think it would ruin their crops.

345 (Cross-Examination.)

It would cost $800 to $1,000 per acre to prepare our right of way for railroad purposes, and if the embankments would wash out it would cost something like that to replace it. It has not been our experience in washouts that the damage to

the right of way of the railroad would be greater than it would be to the farm land. When the water goes over it generally breaks through the embankment and cuts out a short piece, or whatever is necessary to carry the overflow of water from one side of the track to the other. After the water would get over our track it would not take our entire roadbed out, just break through and make openings similar to the kind we have in other places known as arches. It would not necessarily take out our entire embankment. Yes, when this embankment is taken out and is washed away it does hold up our traffic and cuts off our income during that time just the same as the farmers. It costs about twenty-five dollars a cubic yard to put the dirt back in the washout.

I am familiar with this branch of the railroad running north and going through the drainage district. I pass over it and inspect it in different ways three or four times a year. We have had no washouts for the last four years, other than that the water got up on the track in 1919 and 1920. This [—] didn't come over the track but it got very close to it. We possibly delayed our traffic. I came over on this line in 1918.

WILLIAM E. WOODS Called and Sworn on Behalf of the Plaintiff Testified as Follows:

346 (Direct Examination)

I am assistant district engineer of the Chicago, Milwaukee & St. Paul Railway and have been in the employ of that company about thirty years in the engineering department. I am familiar with the lines of the Chicago, Milwaukee & St. Paul Railway described in the notice of assessment published in the Daily Argus Leader dated July 13, 1921. None of the land of the railway company is used for agricultural purposes. The width of the right of way is usually one hundred feet, being 50 feet on each side of the center line of the main track. We have a little piece of right of way in Sioux Falls 50 feet wide, being 25 feet on each side of center line. There is approximately 198 acres of right of way in the drainage district, none of which is agricultural land. I am acquainted with the lands described as Lots 13, 14 and 15, of Block 28 of Millspaugh's Addition to Sioux Falls. That property is near the ice house property south and east of the town. It is used for new yard tracks. The main line lies between the trackage of this yard and the river. These tracks are lower than the main tracks. The main track was built in 1879. It has never been disturbed by high water. It remains in the same posi-

tion as when originally constructed. Block 9 of Daniel's Addition to Sioux Falls is just east of Millspaugh's Addition and is used in the same manner. Lots 5, 6, 7, 8, and 9 in Block 25 of J. L. Phillips' Addition to Sioux Falls is used for roundhouse and ice tracks and turning table. This property is situated on the west bank of the Sioux River about 18 or 20 feet above the surface of the water.

347 (Cross-Examination)

The Chicago, Milwaukee & St. Paul Railway Company have 198 acres altogether in the drainage district. That includes what is known as the right of way of the north branch and also includes same going south. A very small portion of that 198 acres is taken up by the roundhouse grounds and the yard out near the ice house. The most of it is right of way. If there were no railroad through the most of it it could I presume be used for agricultural purposes.

A. G. HOLT, called and sworn on behalf of the plaintiff testified as follows:

(Direct Examination)

I am assistant chief engineer of the Chicago, Milwaukee & St. Paul Railway Company and have held that position about eight years. I am a civil engineer by profession and have been connected with the railroad company in a professional capacity about thirty years. I am familiar with and have made a study of the matter of locating lines of road. In turning the line of road from one point to another the character of the country generally determines or controls the location of the line. In locating a line of road through the Sioux Valley an engineer would necessarily have in mind as one of the elements the cost of construction. He would have in mind the height of embankment to be constructed and maintained on account of flood waters. That would be an important feature. In making a location it is a part of the duty of the locating engineer to find out the height of the flood waters of the various streams he crosses. The grade line is usually established with reference to the high water. The engineer gets as much information as he can in regard to the elevation that the high water reaches in the valley. He gets the information partially from the people who live there and partly from his observation of high water marks as they are shown on trees and washes in the sides of the valley. He then deter-
348 mines largely the height of the grade from past experience as indicated by the information he has received. In determining the openings and bridges the engineer makes

what is called a ravine section. That is a chart showing the elevation of the valley. Then on this chart he shows the elevation of the high water and from that he computes the size of the bridges and the openings, that will be required to carry that water. There are certain rules adopted by railway companies upon which these computations are made, and they are made as an engineering proposition. I have recently examined the territory put into the drainage district. In locating a new line of railroad through the Sioux valley occupying the place where the Milwaukee railroad now has its track you would have to take into consideration the fact that the drainage ditch was there. You would have to provide a bridge to span it. In providing the openings in bridges and other provisions in the line for overflow of water I would not make any deductions on account of that ditch, because I would figure that at the time of the flood the entire valley would be covered with water and this ditch would be simply a wrinkle in the valley. When the flood waters were the highest they would cover the ditch up.

(Cross-Examination)

I do not know the amount of cubic feet of water the river carries per second. I do not know the cubic feet per second the ditch carries, yet I think the ditch is a wrinkle. In computing the spaces I have testified about which I would make for a bridge, I do not think the speed of the water in passing a given point would make any difference if you had a high water mark that was dependable. If subsequent to the time I had that high water mark something was done to increase the speed of the water in passing a certain point I would have to take that into consideration.

It is stipulated that the mileage of the Great Northern within the drainage district in question, to-wit: Sec-
349 tions 27, 16 and 31, is 3.04 miles.

It is stipulated that the mileage of the Rock Island Railroad within Minnehaha County is 4.3 miles and within the district sought to be assessed 3.5 miles.

THOMAS HARDIMON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination)

I have lived in the City of Sioux Falls since April, 1879. I am a member of the City Commission and am in charge of the

roads, streets and highways of the City. I have been a City Commissioner of the City of Sioux Falls for nine years last October. Since 1879 my occupation has been constructing and road work a great deal of the time. Some of the time I have done bridge work on railroads. I was in Sioux Falls in 1881 at the time of the big flood. There was an ice gorge out on the south side right over where the bridge runs on the Coats farm. When it came through the City it took all the bridges but one and swept up the mills and lumber yard on the east side. The only thing left on the east side was the Omaha railroad bridge. With the exception of that flood which was caused by the ice gorge there has never been any high water since I have been here that has done any damage to the property of the City. The Coats farm is about two miles southeast of here. I think the west line of the farm is in the neighborhood of Eleventh or Twelfth Avenue. It is probably eighteen miles from the spillway following the course of the river around. I am familiar with the topography of the channel of the river from Sherman Park down through the City. As you leave Sherman Park the most of the shore line is fairly level on one side. On the other side it is higher and goes up further from the river. For several miles there is a high plain on the [hand] hand side as you go down the river. The banks on the left side are fairly high too in places.
350 From the time you leave Sherman Park until you get down below where the ice gorge formed in 1881 you have a very decided embankment on each side of the river. The river through the territory I have mentioned is much narrower than it is up above Sherman Park. The ice gorge at the Coats farm held all of the water that collected there, except what ran in the channel until the ice gave way. It gorged different places there. It kept creeping along there for probably two or three days before it came down here. The waters did not spread out on either bank of the river. There was no gorge close to the neighborhood where the Milwaukee roundhouse is now in 1881.

I was here when the Great Northern bridge was built that crosses the river about Seventh Avenue and worked on that bridge. During the past nine years my duties in regard to city property have been overseeing it and attending to it, and also attending to the bridges across the river through the City and matters of that kind. From the experience which I have had during a residence of over forty years here I should say the results would be very unsafe of narrowing the bridges and lowering them in case of extra high water. This would

be on account of the volume of water, and in case of ice gorges would leave it too narrow underneath. If a flood took one it would probably take all of them and form a gorge.

The east side of Sioux Falls is thickly built up with business places, wholesale places and residences, lumber yards, and institutions of that kind. The City pumping station and the City electric light station are situated half or three quarters of a mile north of First Street. The pumping station is south and west of the spillway. The electric light and water plant is south and west of the pumping station. The spillway runs to the north and east of our property. The water
351 plant and the electric light plant are a little north and west of the Penitentiary. I observed conditions of the water around the electric light and water stations during the years 1919 and 1920. I was up there on different occasions when there was any danger or any prospect of water. My official duties required me to be there and investigate those things from time to time. The water around the City electric light plant and pumping station was greater in 1920 than it was any year prior to that excepting 1881. I do not remember so much about it in 1919. We were up there quite a number of times in 1920. When we went in there the water was over the tracks of the two railroads there and there was also a flood down almost to Russell Street and from there down to Covell's Lake. The high water subsequent to 1881 has done no damage to speak of that I know to the City property in the City of Sioux Falls. The water went over Minnesota Avenue in 1920 but not enough to amount to anything. It took a few loads of cinders to patch it up. I never saw the water on the West Sioux Falls road, with the exception of 1881, any higher than it was in 1920. Each street there is two and one-half or three feet above natural ground. In 1920 it went up to just about where it could go over. Then the bridge there carried it down to Covell's Street bridge and it flowed away. Phillip's Park runs along the east bank of Covell's Lake and goes up very abruptly to the east, all except a little piece down at the First Street bridge. There is a little corner there that is a little low, but the balance of it runs up to the east and slopes quite sharply. It has some fruit trees and some other trees on it and has been terraced up in the shape of a park. It is quite broken and is not agricultural land and is not used for agricultural purposes.

352 Sherman Park is very low and all timber and is in where the river bends around considerable. The west

side runs quite flat but the east side goes up very abruptly. No part of Sherman Park is agricultural land. Sherman Park overflows pretty nearly every year. The bed of the stream forms a circle in the Park for probably three quarters of a mile. I do not know that the spillway and those ditches have ever been of any benefit to city property. It is pretty hard to state whether or not the spillway materially [effects] the flow of the water through the City, because when the water is high it overflows a lot which comes down in the spillway and almost directly east of the pumping station. Then it comes out through a little ravine and into Covell's Lake and finally into the river.

The City has a park known as Lien's Park near where the spillway empties into the river. It has practically put the park out of commission. The water practically keeps it covered and washed out considerable. There has been an attempt to rip rap or dam it up, but it has been of no avail. That condition did not exist prior to the establishing of the spillway.

In the City pumping station and electric light plant there are five wells, four of them are 25 to 50 feet in diameter. The last one is U shaped and is 16 feet. The furtherest one west is close to a mile west of the station. The City has a piece of ground that surrounds the well directly north of the pumping station. As I remember, there are about twelve acres in it. It is planted to young willow trees. Well No. 1 is located on this tract and well No. 2 is right close to it and directly west. Then follow each well after that up to No. 5. It is probably 30 or 40 rods running east and west at right angles west of the road. The tract is enough as the population of the City increases from year to year for the establishment of
353 additional wells as the needs of the people require.
All of the property other than I have described that is the three parks, the City pumping station and the electric light station, that is included in the assessment is the streets.

(Cross Examination)

There was high water in 1920.

"Q. Did you not testify in the case of Gilseth vs. County Commissioners, that if this ditch had not been reconstructed and the river had been permitted to take its then course
354 over the bluff it would have destroyed the waterworks of the City? A. It might."

The water was high twice that year; in the first place when the spring rains came and the snow went off, and then along about the first of June there was a heavy rain in the neighborhood of Flandreau that reached us a few days afterwards.

"Q. And the water was so high that year that it contaminated the city wells and it was necessary for your department to place certain notices in the city papers, in which you informed the patrons of the water company that they should boil all water before using it?

A. The commissioner of water might have done that. Never anything of that kind came before the Board that I know anything about.

Q. As a matter of fact the water did come into the wells in 1920, surface water?

A. I don't know. I would not want to say one way or the other." The city owns a plat of land known as Sherman Park within the drainage area, it is owned and kept by the city for park purposes; it is practically overflowed every spring; I do not recall whether it was overflowed in the spring of 1921; I was not there that spring; the water does not need to get up but a little ways because the land is very low; the river forms the letter S just around it. Pos-
355 sibly anything that tends to divert a portion of the water that comes down the Sioux Valley and keeps it out of the river as it goes through Sherman Park would be a benefit to that park; there is none of the Covell's Lake Park, excepting a little piece of ground just by First Street Bridge, that would be overflowed; I do not think the water would cover one whole lot; we have 125 miles of street, and some of them cost more for up-keep and some of them cost less; I think the up-keep would be somewhere in the neighborhood of $100 per mile; in 1920 during the high water, the water came up on the [wides] of the West Sioux Falls road, but didn't cross it; the roadway is much higher than the surrounding ground;

"Q. That is true when Sherman Park floods, isn't it. The refuse from the river [funs] up on the banks and is left there, and a very healthy crop of mosquitos is produced?

A. There is a very good reason for that. Sherman Park is filled with little ravines and is very much shaded. It is much better now than it was because many of the trees have been cut out.

Q. Directing your attention to the Park again, those conditions are true every time that it floods, that it causes an unsanitary condition there?

A. I presume it does to a certain extent."

We have abandoned Lien's Park on account of the water, which has practically cut out the park; it has been kept open, and there are some picnics held there, but it is practically abandoned; it is a little north and east of the Pententiary, and just a little west of the spillway.

356 In my judgment it would be unsafe to change the lengths of the railroad bridges and other bridges across the Sioux River in town. The Omaha bridge is some wider than the Eighth Street bridge, I think. They have filled some of the trestles of the Omaha. It is not so wide as it was before. As the Eighth Street bridge now stands, I think it has always served its purpose of letting all of the water of the river pass underneath it. I do not know the amount of water that comes down the Sioux Valley. I know that the elevation of the land north of the spillway is about two and one-half to three feet to the mile from Thompson's bridge down to where it enters the present spillway. The amount of water shed varies very much. It would be pretty hard to tell the amount thereof.

(Re-direct Examination).

The channel of the Big Sioux River that passes through the city has been infringed on very much in the past twenty-five years; Since I came here in 1879—the river covered much more territory then than it does now and was very flat. When we got a heavy rain the stream flowed out and later would narrow down to a smaller stream again. During the years 1919 and 1920 the water in the river has been the highest that I can recall, and especially up around the city water plant and electric light plant, than at any time prior to that, since 1881; there has been no damage by high water to the city property since 1881; the Cascade Mill dam was built I think in, 1878; they were finishing it in the spring when I came here.

F. E. Spellerberg, called and sworn as a witness testified as follows:

(Direct Examination.)

I am and have been since March 1916, superintendent of parks of the city of Sioux Falls; only a very small part of one end of Covell or Phillips park and about half of Sher-

man Park and about half of Lien Park are affected by
357 high water; Lien Park is situated a little east of the spillway; since the spillway was put in, the Board has taken out practically all the improvements at Lien Park that could be used at other parks and merely cut the grass and keep it available for use at such times as people can go in there when it is dry enough; we took out the improvements because we could use them at other places and they were practically abandoned and of no use at Lien Park on account of flooded conditions from the river overflow from the spillway; the city has practically abandoned Lien Park as a park since the spillway was built; prior to the building of the spillway the city had started in to improve it; the spillway empties into the river above Lien Park and then flows down past it.

The high water does not affect Phillips Park to amount to anything; it overflows a small area at one end where the ditch overflows and comes down to Covell Lake; Phillips Park is practically all high ground bordering on Covell Lake with the exception of a small flat area at one end; it is rough land and cannot be used for agricultural purposes.

The lands of Sherman Park cannot be used for agricultural purposes; that park has overflowed every year except one since I have been here; it did not overflow in 1921; with the exception of that year it has overflowed every year for five years; in 1919 the overflowed condition started in the latter part of May and continued for two weeks into June and then dried up for a short time; the park was [useable] on the 20th of June and then overflowed once more in the middle of July; in 1920, we had practically no use of the lower part
practically all season, the lower part of the park is on
358 the west side of the river; in the years 1919 and 1920 the river came up the highest it has been to my knowledge and the overflowed conditions continued longer those years than in any prior year.

(Cross-Examination).

"Q. The length of those periods would indicate to your mind that there was more water came down the Sioux Valley those years, would it not?

A. I am not sure I am competent to judge.

Q. You would naturally arrive at that conclusion?

A. I might.

Q. Anything that would tend to divert that water would be to the advantage—If a certain amount of water came down the Sioux Valley and you could keep part of it or divert it

from Sherman Park, it would shorten the period that Sherman Park would be covered with water would it not?

A. I would sooner not answer that. I don't know that I am competent.

Q. Say yes or no.

The Court: I don't think he can".

There are 52 or 53 acres in Sherman Park; only about 20 or 25 acres are on the lower level; if the land was not occupied for park purposes, it would not make a good pasture as there is not enough grass there; the land around there is used for pasture, but it is higher; the land north of the park is used somewhat for cultivated crops and they are taking their chances on it; the acre and a half or two acres at Phillips Park could be tilled or turned into pasture or produce hay after a fashion; they would have to wait until after the
359 flood had come down; it makes a late crop proposition.

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359 O. S. THOMPSON, called and sworn as witness testified as follows:

(Direct Examination)

I reside in Sverdrup Township and was born there in 1875 and have resided there ever since; about 10 miles north of Sioux Falls; I own 503 acres in the Big Sioux River Valley where I live; within the drainage district there is close to 300 acres; I have farmed my land since 1897 and was residing there when ditch No. 2 and also ditch No. 1 was constructed; I think ditch No. 1 was constructed in 1909 and ditch No. 2 was constructed the following year; ditch No. 2 starts about 1 mile northwest of Baltic; it starts right in the river at a point about 15 miles north of the spillway near the penitentiary; from the point where ditch No. 2 starts to where it joins ditch No. 1 is about 11 1/2 miles; the length of ditch No. 1 is 3 1/2 miles; the width of ditch No. 1 at the top is about 90 feet; the top width of ditch No. 2 is 45 to 50 feet; it is possible that at the very north end it is down to forty feet; the average depth of ditch No. 2 is about 6 feet and of ditch No. 1 about 6 feet; the present spillway was finished in 1918; the old spillway was washed out in 1916; the present spillway is a little less than 12 feet in diameter; the intake of the spillway is the lower end of ditch No. 1 and is rip rapped, then there are two gates leading into a hole that

goes down through the ground about 40 feet; the shaft is perpendicular for about 40 feet; at the lower end of it a channel is run out towards the river towards the east sloping downwards so that it comes out just above the river level on the lower end; there was nothing that prevented all of the water that was gathered by these ditches No. 1 and No. 2 at the outlet or spillway to prevent all of the water going over the hill; since the new spillway was put in, I have lost more crops than I did before it was put in and after the
360 construction of ditches No. 1 and No. 2 my losses have been considerably more since the new spillway was put in than they were before it was put in and after the ditches were constructed.

Defendants were thereupon given permission by the Court to make the witness their witness for the purpose of identifying certain exhibits and he thereupon testified in behalf of defendants as follows:

Defendants' Exhibit 2 is a petition to the County Board asking for the establishment of what is known as Covell Lake cut-off. The first signature attached thereto is mine. I signed that, and I had that presented to the County Board for the purposes set forth in the petition. I own land in the vicinity of Drainage Ditch No. 1 & 2 that is affected by that ditch. I evidently furnished the bond designated as Defendant's Exhibit 3.

Defendants' Exhibits 2 and 3 were offered and received in evidence as part of defendants' case.

FRED H. REED, Called on Behalf of the Plaintiffs and Sworn Testified as follows:

(Direct Examination.)

(It is stipulated that Northern States Power Company is the successor in interest of the Sioux Falls Light & Power Company in and to the property involved in this action.)

My name is Fred H. Reed; I have lived in Sioux Falls
361 since 1899; my occupation before coming to Sioux Falls was farming; since coming to Sioux Falls I have been looking after farms, real estate and other properties; I was the Secretary of the Sioux Falls Light & Power Co., and of the Sioux Falls Improvement and Development Co's interest in certain properties in the vicinity of the Queen Bee Mill at one time; I had charge for Mr. E. W. Coughran

and various of his associates of properties in the vicinity of the present hydro-electric plant of the Northern States Power Co. for a long period of years and since about 1900; my office is in the Lacotah Building between 8th and 9th streets and between Phillips Avenue and the Big Sioux River on the east side of Phillips Avenue and the west bank of the river in Sioux Falls; it is in the rear of the building facing the river; at the time I came to Sioux Falls there were three dams across the river in the vicinity of the present power plant; the Cascade or upper dam, the Queen Bee dam, and what was known as the Bennett dam; the Cascade dam is the dam below 8th Street and is still in existence; the Sioux Falls Light and Power Co. was organized in 1907 and constructed the present hydro-electric plant of the Northern States Power Co., completing it in 1908; prior to the construction of that plant the Sioux Falls Light & Power Co., acquired in the spring of 1907 and operated the Cascade mill property; I first became associated with the property which is now the property of the Northern States Power Co. and the Queen Bee Mill property and the other ground in this immediate vicinity in 1900; I am familiar with the nature and character of the present real property interests of the
362 Northern States Power Co. including tracts 6 and 7 of the County Auditors subdivision of the Northeast of Section 16, township 101, Range 49, Lots B and C of Sioux Falls Light & Power Co's subdivision, tract 2 of the County Auditor's subdivision of the Northwest Quarter of said section 16, and also the property upon which the hydro-electric plant is now located; I don't know that there is any soil on that real property; it is rock, granite, come to the surface; that is true with reference to all of that tract of land in there; in my opinion it would not be possible for any part of that land to be used for agricultural purposes; the hydro-electric plant of the Sioux Falls Light & Power Co. now the Northern States Power Co., was operated partially under my supervision as one of its officers; I was familiar with its construction at that time; at the time of its construction the question of constructing it in such manner as to withstand all flood conditions of the Big Sioux River and prevent any damage to the property or its water power from flood conditions was [discusses] and taken into consideration; the hydro-electric plant was so designed under the instruction of our company as to guard against such flood conditions and was so constructed; at that time our engineers had data with reference to the flood waters of the Big Sioux River; no part of that property down there now owned by the Northern States

Power Co. has been flooded since 1900; I have observed it every year since then; the largest flood that I recall; I think was prior to the year of 1907, the time the ditch was first constructed; at the time no part of this property was
363 flooded; the hydro-electric plant of the Northern States Power Co., is east and some south of the spillway of ditch No. 1 and 2 and north of the Cascade dam and the city of Dell Rapids is north of the spillway; I think the hydro-electric plant is about 1/2 mile from the mouth of the spillway; the foundation or lower part of the hydro-electric plant is made right in the solid rock; the rock was blasted out for a distance of something over 30 feet deep; that part would be solid ground and the part from the granite on up with cement concrete; for the first story it is in granite; the dam was so constructed as to take care of the flood waters; I have observed from my office window the condition of the river at various times during all these years; I have not observed any appreciable difference in the volume of water flowing down the Big Sioux River since the construction of the spillway; the Lacotah building property is never flooded and the water never got into the basement.

(Cross Examination)

At the time I was connected with the company I was familiar with all the Northern State Power Co. equipment and machinery and with the three dams; the dam which the Northern States Power Co. now has is the same dam the original company put in; that was Queen Bee property at one time; the Bennett dam was below the Queen Bee property; it is not there now; it was about 16 feet in height and I think has all been blasted out; when the dam was taken out I think the tail race of the Northern States Power Co. was lowered; I suppose on a level with the river below the dam. probably 16 feet; that would help the water get away
364 from the wheels of the plant and produce more power; I think the Sioux Falls Light & Power Co. had a seven foot flume; I don't know whether the Northern States Power Co. has changed the flume or not; the property north from the dam to the present hydro-electric plant of the Northern States Power Co. is mostly granite.

O. A. ROFELTY Called on Behalf of the Plaintiff and Sworn testified as follows:

(Direct Examination)

My name is O. A. Rofelty; I live in Sioux Falls, South Dakota; I am Manager of the Northern States Power Co. and have general charge of its business and the operation of its property including this district; I have been in that position since November 27, 1918; the plant consists of Hydro and steam plants for the generation of electric power; that is essesntial; it is quite necessary for us to have the steam plant to supply the demands for electricity in the city of Sioux Falls; the water plant has not sufficient capacity; in the past, during the year 1921, there has never been a day but when we kept the steam plant going all the time, not even an hour, day or night; it was necessary to do that in order to serve our customers; we operate the two plants together as one unit for generating and selling electricity when we have any water; it does not make a particle of difference in the operating expense of this plant such as labor and help whether the steam plant is required to produce a larger or smaller part of the load; I am familiar with all the ground or land owned by the Northern States Power Co. down there; I would describe it as a large pile of stone; it is not level; it is
365 piles of stone here and there, a topsy turvy condition; the stone is what they call a red granite; there is not any soil on any of the Power Company's property there sufficient to be used for cultivation of crops of any kind.

(Cross Examination)

The capacity of our steam plant is about 5000 kilowatts; the rated capacity of our water plant, I believe, is 1400 to 1500 kilowatts; if the water is low or for any other reason we can't put the water over our turbines and have to produce this current with steam, it costs more money; what current we make by steam costs more than what we would make by water; there are times in the year when the water is not sufficient to produce any current; I have been manager down there since November 27, 1918; the company has not lowered the tail race since I have been there; we only cleaned it out; we never intend to lower it; I understand that our company succeeded to all the rights of the Sioux Falls Light & Power Co; Defendants' Exhibt "6" looks to me like a fair representation of the river and the location of our plant upon the river; I am unable to say positively whether the drop of our water from the top of our flash boards at our dam down the tail race was substantially as represented by this map or about 55 to 60 feet, but I think so; I think the size of our

flume is about 7 feet; Exhibit "7" looks like a fairly good picture of our hydro-electric plant where the water enters the same by our flume, going through the turbines and discharging it into the tail race; I do not know of the lowering of the bottom of the driving tube or the tube carrying the water from the turbines into the tail race; the only thing we did was to clean out the loose dirt and stone that had fallen into it; we concreted that block of stone on the east side of the river in 1920; we did that for the purpose
366 of keeping the flood waters from carrying down the loose rocks that had gathered up there; the gorge you have mentioned north of our power house was full of water in 1919 and 1920; at the time of high water our tail race was up more than when the water is low; that is natural; the water outside was not as high as our lower power room; the water to the north of our building was not higher than the openings into our tail race; the water at that time did not get high enough to cover the solid granite wall on top of which our company has thrown its loose stone; it was still out of the water; I do not know how deep the water was in the tail race, that is pretty hard to say because t is just a matter of guess; I imagine we have about 25 feet of cement in there; that runs down to almost the level of the falls between those two walls; I do not think the tail race extends over fourteen feet below the concrete; in 1919 the water went about 3 or 4 feet on the rocks which are now covered by cement, during that time our hydro-electric plant could and did run at full blast.

"Q. Do you know the height of the gorge of your tail race?

A. No, I could not answer that.

Q. About forty feet?

A. That is a pretty good guess I should say.

(Redirect Examination)

I should say the difference in cost per kilowatt an hour between generating electric current by steam and water power is possibly 2 mills per kilowatt.

J. WILLIAM LINK, called as a witness on behalf of plaintiff and sworn testified as follows:

367 (Direct Examination.)

My name is J. William Link; I reside in Chicago; I am a hydro-electric engineer employed at the present time by the

Byllsby Engineering & Managing Corporation; next February I will have been in its employ 12 years; my first experience in hydro-electric work was with the Missouri River Commission; I was with them for five years on the Missouri River Work; subsequent to that I was for five years on the Metropolitan Water Works in Boston; following that I was with the Niagara Falls Power Company for 4 years; I think it was; and then with the former resident engineer of that company, who opened an office for himself and I took charge of his office for him for a year or 18 months; I then was
368 with the City of Columbus, Ohio, for two years; following that I was with the Long Soo Development Company of the St. Lawrence River for two years, and with the Passaic Valley Sewage Disposal Commission for three months; I then came with Byllsby & Co., and I have been with them ever since; I should say the experience I have outlined covers pretty well the filed of hydro-electric engineering; I have had a good deal of experience in the designing and construction or superintendence of construction of hydro-electric plans and water plants, particularly plants for the generation of electric current; I have had experience in the installation and inspection of water wheels and water machinery; I have not had experience in the designing of water wheels; that is a specialty; I have installed that kind of work and written specifications for them and designed what kind of wheels should be installed, etc; since I have been with Byllsby interest I have had complete charge of their hydro-electric plants in the different parts of the country; these plants are scattered pretty well over the country; we have 5 plants in Minnesota in the vicinity of the twin cities and southwest of there; we have two plants in Wisconsin; we have two plants in California; a plant in Oregon and a plant in Montana, and the plant here in Sioux Falls; I think that covers the water power plants pretty well; I have examined the drainage ditch and its course; I have made a study of the hydro-electric plant in this city operated by the Northern States Power Co.; that was constructed before my connection with the Byllsby interests; the Byllsby interests constructed that plant before they acquired it, for other parties, the plant referred to being the hydro-electric plant in question here; I would call the construction of the plant very massive; I have investigated the stability of the dam, its capacity to withstand flood waters, and after examining the whole
369 plant, I should say that it is particularly well designed and constructed to withstand floods or anything of that nature; the massive walls I speak of are of con-

crete material; I have made a study of the flood conditions in the valley of the Big Sioux River; my sources of information have been government reports and the information I have gleaned from newspaper accounts and talks with various parties who have been on the ground and know the floods; the nearest I can judge, according to the information I have obtained, the greatest flood that there is any record of in that valley was the flood of 1881; I think the design and construction of the plant down here would be sufficient to withstand the flood stages of 1881; I think it would do that if there were no spillway or drainage ditch because the plant was constructed before the spillway was, and so far as I can find out no account was taken of the spillway at all; independently of that, the nearest estimate that I could make of the probable volume of the flood of 1881, the dam would discharge that without even raising the water any higher than we carry it ordinarily; in my judgment, the company operating this plant would absolutely not be justified in the expenditure of any money for the construction of the drainage ditch, and spillway that has been talked about here on the basis of benefits to the plant in any way; it is my opinion that there is no appreciable benefit to the plant of the construction of the improvement out there.

(Cross Examination)

"Q. Mr. Link, you made for the County Commissioners of this county a hydro survey at one time, of this territory, did you not?

A. I don't think I made a survey.

Q. You made a report to the Board? A. Yes.

Q. And the data you testified about? Your attorney asked you on what data you based your opinion and you said upon government reports.

A. And some survey data taken by the Board's engineer.

Q. And you made a report as to the feasibility of this drainage project did you not?

A. The feasibility? In what way do you mean? I don't quite get your idea.

Q. That it was feasible from an engineering as well as a financial standpoint?

370 A. It was feasible to build it, yes."

In that report I stated that the maximum flood liable to occur in the reaches of the Big Sioux River under consideration which has this ditch construction, will probably not exceed ten thousand second feet. This condition was probably approximately as it existed in 1881; and that the floods which

occurred in the spring of the year 1916—the amount of water that came down the river and the ditch at that time did not exceed six thousand or six thousand five hundred second feet. It seems to be the amount of water that went through the old spillway in 1916 was 1400 cubic feet per second; I am not sure; I recommended to the Board that the spillway be constructed to take care of approximately 2500 cubic feet per second; in my judgment the amount of water that was carried down the Sioux Valley during the freshet of 1916 was approximately 6000 feet per second; that was the spring that the spillway washed out; I do not know that you call the 1916 flood an ordinary flood; I have not been able to find any record of flood stages in the river and I am not sufficiently familiar with the floods from year to year to know whether that flood would be considered an
371 ordinary flood or not; I would rather say that it was larger than the ordinary flood; that is if by the ordinary flood you mean the intensity of flood that occurs most frequently; the amount of water that came down the Sioux Valley in the year 1881 is probably the maximum; I do not remember whether in that report I recommended to the Board that the opening which had occurred at what we have been calling Schotz, about 3 miles north of town, a dam be placed in there to keep the river in its old channel and to keep it from coming down through the ditch; I would recommend it; at the time I made this report I was employed by the Byllsby Co., Byllsby & Co. manage the Northern States Power Co., but it isn't the same company by any means, we do the managing for the Northern States Power Co.; I am familiar with the plant of the Northern States Power Co. and the improvements made since 1910; I was familiar with the construction of the old plant through the drawings and inspecting of the plant, etc.; defendant's Exhibit "7" was prepared before my time; in a general way I should say it substantially represents the plant here; it looks to me more like a picture plan than it does like a working plan; it was signed by the chief engineer, so I presume probably it was one of the construction plans; I do not remember the distance between the bottom of our turbine and the outlet in our draft tube; but I would say in the vicinity of 18 or 20 feet; the Northern States Power Co. had to lower their tail race to take advantage of the head at the Bennett dam; we destroyed the Bennett dam and lowered our tail race to take in that head; that lowering gave us more head; the lowering of the tail race does not give us more power; the head we had before was sufficient to run the generators full capacity with the wheels flooded; the lowering of

the tail race enables us to pull a larger load with less water; we got no more power out of the units than we got before; they have a certain fixed output; the increasing of that head only conserved water; it didn't increase the output of the plant at all; the higher the head the less water you use, but if you have a machine in there with a fixed output, it
372 doesn't make any difference how much head you put on it, you can't get any more power out of it; it will burn up if you do; what I mean is that the lowering of our tail race, we could only turn out 6000 kilowatts from each unit, but we could get that 6000 from a smaller supply of water and consequently when the river is low we are able to get current longer than we could before; the capacity of the plant is fixed by the units in there; they could be run approximately 6000 kilowatts each; there are three units; the result of piled up water on our tail race is to lower the head but with those units not to produce less power; the head is the total fall; I don't think I have any positive information as to the length of time that the floods last here, but the general impression I have gotten from the data is that the maximum conditions only last for two or three days; the flood itself, the river in flood stage I imagine for a considerable longer period of time; I think I am familiar in a general way with the general topography near our plant; Exhibit "5" fairly represents the condition from the northwest corner of the plant toward the old falls for a short distance; Exhibit "4" I am unable to identify; defendants' Exhibits "8" and "9" fairly represent the condition at our tail race; if a dam were put in at Schotz up here which was outside of the drainage ditch project, which kept the river in its banks, permitting the water to flow around the city to our water plant instead of going through and coming into the spillway, it would benefit the Northern States Power Co. to the extent that it would not deprive them of what they had a right to; I would not call it a benefit because we
373 have a right to that water; the benefit would be to give us the water that we have a right to here and which was taken away by the ditch; if there were controlling works placed in this ditch at Thompson's bridge some 12 miles up the river which maintained the level of the water in the river and will not permit the river water to go into the ditch until it reaches a certain height, which is flood condition, that would benefit the Northern States Power Co. in just the same way.

(Redirect Examination)

Q. From your examination of that region up there at the time you made the report as representative of H. M. Bylls-

by, I wish you would tell the court what that ditch and improvement is with regard to lands down here in the city and particularly in regard to the region down about the Northern States Power Co. property; what is the proper term for it?

A. It acts as a flood water bypass; there is no drainage; by flood water bypass I mean that it takes flood waters out of the river and passes them around and back in again; it relieves flood water conditions a certain small extent in certain stages of the river; I would say that that ditch is not a drainage at all in this section down here; in my judgment the power plant of the Northern States Power Co. as now constructed would be sufficient to withstand a flood equal to the flood of 1881; as I stated before I would think it would pass such a flood without raising the water higher in the dam than we ordinarily carry by means of flash boards; those flash boards should be removed at times of floods; the Bennett dam was destroyed under my supervision; it was de-
374 stroyd to get advantage of more head water or unite that head with ours in one plant.

Q. Something was said here by another witness about the cleaning out of that tail race or some part of the same. I wish you would tell just what was done in that regard and why.

A. The construction superintendent without asking permisison or without my knowledge, built the spoil right on top of the excavation, which was contrary to my intentions, and built it with practically a vertical face, and without very much arrangements of the stones; consequently the first flood that came down washed out some of the stone at the bottom of the piles and started the disintegration of the spoil, and subsequent floods I presume did more, and the elements helped it along, frost action, and a great deal of this spoil had fallen back into the tail race until it raised the level about 4 feet; this work that was done in 1920 was simply to clean that out, and in order to put it so it would not fall back again we moved it back on the west side about 10 feet from the edge of the ledge; on the east side we put a concrete facing on it because there we had used the top of the spoil bank which had been leveled off for an outdoor sub-station, and this was so close to the edge of the spoil bank that we had to make it sloping to hold the substation and some transmission line poles there, and we felt that without a concrete face it might slip in again so we put a concrete face on that side in order to prevent it; that was the reason for that work; the proposition was to restore the tail race.

375 (Recross Examination)

This bypassing of the water I have mentioned would tend to relieve the Sioux River from the point where it took the water from the river to where it deposited it back in the river; it would relieve the river of the amount it carried.

Q. Doesn't that ditch up through there also drain agricultural lands?

A. As I saw it when I inspected it, I should say to very small extent as I understand drainage; there were only 3 or 4 inlets I could see where the farmers could take advantage of the drainage.

(Redirect Examination)

If I were designing a hydro-electric plant on the present site of the plant here today, knowing that the ditch and spillway had been constructed and are there as they are, as I know the ditch and its history, I would not take the ditch and spillway into consideration at all in the designing that plant, particularly with a view to resistance to floods or possible floods.

A. G. RISTY, recalled and examined by the Court, testified as follows:

The northern end of this ditch No. 1 and 2 was one mile north of Baltic; the end of the ditch opens into the Sioux River; there are no artificial laterals; if there are heavy rains on the lands adjoining this ditch which runs north and south in a general direction that flood the lands on either side of it, it is the intent and purpose that the ditch shall take care of such flood waters.

376 Q. How will it get into the ditch?

A. It slightly slopes into the ditch?

Q. How could it get over the embankment without laterals?

A. There are pipes at certain places to let the water in through the embankment into the ditch, and that you can adjust running out into the farm lands; there are pipes here and there along the ditch to let waters in when the bottom lands overflow, and it has also been proven that these ditches drain the bottom lands, because there are farms all along and it has lowered the water in their wells to a very considerable extent since the ditch was dug, so it shows it drains the lands; they propose to have gates in the embankment so that when the pressure was from the inside it would close the gates and if the pressure came from the outside it would open them within this service pipe.

Q. Then the real purpose of this ditch as I understand it is to take the water from the Sioux River in flood times and conduct it down to the spillway and into the river at the mouth of the spillway.

A. And preventing the overflow to a great degree from spreading over the farm lands.

Q. And the purposes of the ditch, the effects that
377 the ditch is to perform, the thing that you intended when you were constructing was that it should be an [auxiliary] to the river and relieve it of the surplus flood waters?

A. If the Court please, I was not on the Board when the ditch was constructed; only when we repaired the spillway, it has been my understanding always that it was to help carry off the flood waters.

Q. It is rather to take the water from the river at its maximum capacity and thus relieve the river of that water rather than to drain the lands along the sides; in other words, it is to keep them from being overflowed with this water?

A. That has always been my understanding.

Plaintiff rests.

Motion to Dismiss

The Counsel:

At this time, Your Honor, at the close of the plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these actions and set aside the restraining order heretofore issued, for all the reasons and upon all the grounds urged in the motion made at the opening of these cases.

And for the further reason that the record now shows that notice of an opportunity to be heard upon the amount or proportion of benefits these plaintiffs have received and the amount or proportion of assessment that will be made against their property for such benefits, has been given to them and the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessment to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases,

based upon their judgment of values and benefits con-
378 ferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred, by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason the record now shows the Board of County Commissioners of Minnehaha County, charged by the law of this State with the execution of the provisions of the drainage ditch law, has jurisdiction to proceed in respect to the property within said drainage area including the property of the plaintiffs in these actions, and if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs or otherwise, and the record does not indicate upon its face any gross departure from the requirements of the statute, therefore this Court cannot inquire into these collateral proceedings, and the same are not questions presenting a federal question.

The Court: The motion is denied pro forma.

The defendants, to maintain the issues on their part, called as a witness F. L. BLACKMAN, who being duly sworn testified in substance as follows: My name is F. L. Blackman. I resided in the city of Sioux Falls on July 15, 1916, and at that time had property within the drainage area of Drainage Ditch No. 1 & 2. Defendants' Exhibit 10 being a petition dated July 15, 1916, addressed to the Board of County Commissioners of Minnehaha County, South Dakota, signed by the City and others, the name of F. L. Blackman appearing thereon, was signed by me.

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379 GEORGE W. BURNSIDE, in behalf of defendants, being duly sworn, testified:

As mayor of the City of Sioux Falls, I signed defendants' Exhibit 10, being a petition addressed to the board of County Commissioners of Minnehaha County, dated July 15th, 1916; at a special meeting of the city commission, they decided to ask the County Commissioners to protect the destruction of the drainage ditch in order to protect our water plants.

F. E. WARD, being recalled as a witness on behalf of the defendants, testified in substance as follows:

Defendants' Exhibits 10 to 32, inclusive, are records and files in my office as County Auditor of Minnehaha County, with reference to the establishment of Drainage Ditch No. 1 and 2. Defendants' Exhibit 10 is the petition of the City of Sioux Falls, F. L. Blackman, et al, for the establishment and construction of Drainage Ditch No. 1 and 2. Defendants' Exhibit 11 is the bond accompanying and filed with the petition. The material portion of said Bond, being defendant's exhibit 11 is as follows:

380 "Bond on Petition for Drainage.

Whereas, the parties whose names are signed hereto have prepared and executed and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition to reconstruct and improve drainage ditches Number 1 and 2, in Minnehaha County, South Dakota, and to construct a new spillway or outlet to the said drainage ditches numbered 1 and 2, and to pay therefor by an assessment upon the property, persons and corporations benefited thereby, a copy of which petition is hereto attached marked Exhibit "A" and made a part hereof.

381 Now, Therefore, we F. L. Blackman, E. D. Clark, W. Brady, Dan Donahoe, Den Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, as principals, and Inter State Surety Company as surety, do hereby undertake, promise and agree to and with the County of Minnehaha, of the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or in case the said petition is denied on appeal.

F. L. Blackman, E. D. Clark, W. Braley, Den Donahoe, Dan Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary C. Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, Inter State Surety Company, by A. B. Fairbank, Its Attorney in Fact.

This bond approved August 1, 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 12 is the order of the Board of County Commissioners for filing said petition and bond. Defendants' Exhibit 13 is a letter of transmittal of said petition with

reference to Drainage Ditch No. 1 and 2, to the State Engineer at Pierre, the material portions of which are as follows:

"August 4, 1916.

Homer M. Derr, State Engineer,
Pierre, South Dakota.

Dear Sir:

I enclose herewith new drainage petition with reference to Drainage Ditches Numbers 1 and 2 and the spillway thereof, which have been ordered filed and transmitted to you. It is the especial wish of the County Commissioners that you view this drainage proposition with them at your earliest
382 convenience, as it is necessary that this improvement be made soon, so as to avoid further damage. The parties have agreed to abandon the Covell's Lake extension terminus, in case the drainage proposition is established in accordance with this petition, or a modification thereof.*****

Please give this matter your immediate attention, and advise as to when you can view this drainage proposition with the Commissioners.

Yours truly,

EOJ:M
Enc.

County Auditor."

Defendants' Exhibit No. 14 are the minutes of the Board of County Commissioners of August 3, 1916, of adjournment from that date to August 14, 1916. Defendants' Exhibit 15 are the proceedings of the Board of County Commissioners, under date of August 14, 1916. Defendants' Exhibit 16 is the resolution of Board of County Commissioners for a survey of the territory to be drained by Drainage Ditch No. 1 and 2. Defendants' Exhibit 17 is the Surveyor's Report, the material portions of which are as follows:

"Report of Preliminary Survey of Said Proposed Drainage Ditch for the Territory now Partially Covered by Drainage Ditches Numbers 1 and 2, Sioux Falls, South Dakota.

To the Honorable Board of County Commissioners, Minnehaha County, South Dakota:

In accordance with the resolution of your Honorable Board dated August 14th, 1916, authorizing and directing a survey of the proposed drainage of the territory covered by drainage ditches numbers 1 and 2, as now established, and direct-

ing that the exact line or lines of said proposed drainage be established under the supervision of the State Engineer, I took up the work, and, as per your request, file here-
383 with a limited report of the survey of such territory showing the exact line of the proposed drainage ditch as follows, to-wit:

Section One

Commencing at a point 58 feet West and 1035 feet North of the Southeast Corner of Section 29, Township 102, Range 49, West of the 5th P. M., running thence South *****, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number one as now established and constructed.

Section Two.

Commencing at a point 1035 feet North and 58 feet West of the Southeast Corner of Section 29, Township 102, Range 49, the same being the commencement point of Section 1, hereinbefore described, running thence North *****.

Section Three.

Commencing at a point 1640 feet East of the center of Section 18, Township 103, Range 49, running thence North ******, the said line being the center line of said proposed drainage.

That in addition thereto, the Big Sioux River is to be straightened in Sections 17, 18 and 20, Township 103, North of Range 40, in order to afford better means of communication between the lower end of Section 3 of said ditch, and the upper end of Section 2 thereof, the same being intended to cover the exact location of drainage ditch number 2, as now established and constructed.

I further recommend that the Big Sioux River be straightened *****.

All of the above cut offs to have a bottom width of 60 feet, and side slopes of one and one-half to one. A right-of-way 100 feet in width and one-half each side of the above described center lines will be required. The plans and specifications for the proposed spillway on Section 9, of
384 Township 101, Range 49, will be furnished later.

Dated this 13 day of September, A. D. 1916.

Respectfully submitted, L. E. Stevens, Deputy State Surveyor. Filed in the office of the Auditor of Minnehaha Coun-

ty, S. D. this 13 day of September, 1916, Harry H. Howe, County Auditor, by E. H. Shenkle, Deputy.

Defendants' Exhibits 18 and 19 are the proceedings of the Board and the resolution of the Board fixing the exact line and width of Drainage Ditch No. 1 and 2, of September 13, 1916. Defendants' Exhibit 20 is the drainage ditch notice for Drainage Ditch No. 1 and 2. Defendants' Exhibit 21 is the affidavit of publication of drainage ditch notice, the material portion of which is as follows:

385 "Affidavit of Publication

C. L. Dotson, being first duly sworn, deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a Daily Newspaper of general circulation, printed and published in the City of Sioux Falls, in said County and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper and in charge of the advertising department thereof, and has personal knowledge of all facts stated in this affidavit, and that the notice and advertisement headed Drainage Ditch, a printed copy of which is hereunto attached, and made a part hereof, was printed and published in the said newspaper for ..... issues.

That the first publication of said notice in said newspaper aforesaid was on Saturday, the 16th day of September, A. D. 1916, and that the succeeding publications were
386 severally on Saturday, the 23rd day of September A. D., on Saturday, the 30th day of September, A. D. 1916; that the fees charged for the printing and publication of said notice and advertisement in said newspaper, as aforesaid, were ..... dollars and ..... cents, and for this affidavit, Twenty-five cents, and that the said fees for the printing and publishing of said notice and advertisement and for this affidavit, as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper, as provided in Session Laws of 1903, and amendments thereto * * * * * Filed

in the office of the Auditor of Minnehaha County, S. D., this 30th day of Sept. 1916 Harry H. Howe County Auditor.

Defendants' Exhibit 22 is a Certificate of Posting said Drainage Ditch Notice. The material portion of which certificate of posting Drainage Ditch Notice, is as follows:

'I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby certify that on the 21 day of September, A. D. 1916, I posted three copies of the annexed Notice in three public places near the route of the proposed drainage mentioned therein, as follows, to-wit: One on the bridge on North Minnesota Avenue crossing Drainage Ditch Number One, in the City of Sioux Falls; one on the bridge in Berwick's Addition to the City of Sioux Falls, crossing Drainage Ditch Number One near Fifth Avenue; and one on the bridge crossing Drainage Ditch Number One on Section 29 of Mapleton Township; that I also posted one of said copies at the South Front Door of the Court House in the City of Sioux Falls, all in Minnehaha County * * * * * *

387 Filed in the office of the Auditor of Minnehaha County, S. D. this 23 day of Sept., 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 23 are the minutes of the Board of County Commissioners in relation to Drainage Ditch No. 1 and 2, of October 2 and 3, 1916, the material portions of which are as follows:

"October 2, 1916.

At the meeting in the County Court room, the Commissioners listened to arguments presented by those in favor of the drainage ditch, and the straightening of the Big Sioux River, and also to arguments against the straightening of said Big Sioux River, there being no objection to the establishment and construction of the main ditch project. The State Engineer, Homer Derr, recommended that the main drainage ditch, as petitioned for, be established and constructed with proper controlling gates and a sufficient spillway.

Claims for damages were filed as follows:

Kittery Realty Company	$2000.00
Margaret Finnegan	1000.00
James L. Finnegan	8000.00

The whole afternoon was taken up in the discussion of the drainage project, and the suggested straightening of the Big

Sioux River. At the hour of five o'clock P. M. an adjournment was taken until ten o'clock A. M. on Tuesday, October 3, 1916."

"October 3, 1916.

Pursuant to adjournment, the Board convened at ten o'clock A. M., and in company with the State Engineer, Homer Derr, visited the site of the proposed spillway and control gate, at the head thereof. The Board then returned to the Commissioners' Room, and held a conference with the State Engineer with reference to said proposed drainage. Mr. C. T.
388 Charnock then moved the adoption of the resolution establishing said drainage, and that the vote be taken by districts. Mr. J. E. Johnson seconded the motion. Upon roll call

A. G. Risty, District No. 1 voted yes.

J. E. Johnson, District No. 2 voted yes.

J. L. Fritz, District No. 3, voted yes.

C. T. Charnock, District No. 4, voted yes.

J. A. Jensen, District No. 5, voted yes.

The Chairman then declared the resolution adopted. The State Engineer was then requested to prepare and submit plans and specifications for the necessary spillway and control, or headgates, at his earliest convenience. * * * **

Mr. C. T. Charnock moved that the hearing on damages occasioned by the establishment of Drainage Ditch No. 1 and 2, be adjourned until Friday, October 6, 1916, at ten o'clock A. M., and be made a special order for that date. Motion seconded by J. A. Jensen, and carried unanimously."

Defendants' Exhibit 24 is the resolution of the Board of County Commissioners establishing Drainage Ditch No. 1 and 2 upon the petition of the City of Sioux Falls, F. L. Blackman, et al. Defendants' Exhibit 26 are the minutes of the Board of County Commissioners for October 6, 1916. Defendants' Exhibit 27 is a resolution of the Board of County Commissioners of October 6, 1916, assessing damages as compensation for lands taken in the construction of Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch No. 1 and 2.

Resolution Assessing Damages.

Whereas, the matter of assessment of damages caused by the establishment and construction of Drainage Ditches No. 1 and 2, was, on Tuesday, October 3, 1916, at a regularly adjourned meeting of the Board, deferred to and made a special order for Friday, October 6, 1916, at ten o'clock A. M., and the Board having met on said last named date,
389 and having heard and considered the claims for damages, and having taken into consideration the fact that the principal portion of said drainage ditch has already been constructed, and assessments for damages therefor having already been made and paid in the original construction of said Drainage Ditches No. 1 and 2, and that the principal part of the work to be done consists of building a proper spillway, flood or control gates, cleaning, deepening and widening the channel of the said drainage ditches as now constructed, building levees and dikes where deemed advisable, and other improvements to said drainage system;

Now, Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the damages arising from the establishment of Drainage Ditch No. 1 and 2, including compensation for the lands to be taken for said drainage, be and they are assessed and awarded as follows, the same being in accordance with plats thereof, filed in connection with the original construction of Drainage Ditches No. 1 and 2:

To the Kittery Realty Company, for damages to Tract One (1), etc. * * * * *

Be It Further Resolved, that it is the judgment and determination of this Board that in consideration of the fact that damages were assessed and paid in the original construction of Drainage Ditch No. 1 and Drainage Ditch No. 2, for all damages sustained by each tract of land, or other property, through which the said drainage ditches and the present drainage ditch pass, as damages and compensation for the land taken by the route of such drainage, that no damages will accrue, or should be paid, by reason of the establishment and construction of said Drainage Ditch No. 1 and 2, except as hereinbefore provided, and that the claims of Margaret Finnegan and James L. Finnegan for damages by rea-
390 son of the recommended straightening of the Big Sioux River, which straightening has not been considered and determined, be and the same are hereby disal-

lowed, without passing upon the merits of said claims, in case it is determined to straighten said Big Sioux River, and said claims are refiled, and that no other damages will accrue to any person or property by reason of the establishment and construction of said Drainage Ditch, except as herein awarded.

Be It Further Resolved that a fund to be known as "Drainage Ditch No. 1 and 2 Fund", be and it is hereby established, and that the proceeds of any assessment, or assessments, hereafter to be made in this proceeding be and they are hereby pledged to such fund, and when such assessments are collected, it is ordered and directed that they be deposited to the credit of such fund, to be applied in the payments of the warrants to be issued on such fund, in the order of the registry of such warrants with the County Treasurer. It is ordered that the warrants to be issued on such fund draw six per cent., interest from date of issue. It is further ordered that, if any of the persons entitled to damages under this resolution will accept a warrant or warrants on such fund in lieu of money, then that warrants on such fund for the proper amounts be issued therefor to the persons entitled thereto, to be signed by the Chairman and countersigned by the Auditor, but if any person or persons will not accept a warrant upon such fund in payment of the damages herein awarded, then the Chairman of this Board, and the Auditor, are authorized to issue warrants on such fund, in such sums as may be found advisable, and to sell the same at not less than par, and out of the proceeds thereof, to pay the damages herein awarded, taking the receipts of the persons entitled thereto therefor. It is further ordered that all expenses in connection with said Drainage Ditch No. 1 and 2, hereafter to be incurred up to the time of the letting of the contract for the construction of said ditch, be paid by warrant upon such fund.

391 Be It Further Resolved that in case any person herein awarded damages will not accept the same, the Chairman of the Board is directed to tender him the amount thereof, and in case of his non-acceptance thereof, to deposit the same in the Sioux Falls, South Dakota, to the credit of such person, and to give such person notice of such deposit.

Approved this 6 day of October, A. D. 1916, by the Board of County Commissioners of Minnehaha County, South Dakota.

By A. G. Risty, Chairman."

Attest:

County Auditor.

Defendants' Exhibit 28 are minutes of the Board of County Commissioners of December 16, 1916, relative to Drainage Ditch No. 1 and 2, passing a resolution fixing the exact line and width of drainage ditches straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, and fixing the time and place for hearing thereon, and defendants Exhibit 29 in said resolution, the material portions of which are as follows:

392 "Resolution.

Whereas, on September 3, 1916, this Board, by resolution duly adopted, established Drainage Ditch No. 1 and 2, but expressly reserved for further 'consideration and determination the question of the straightening of the Big Sioux River at the several points recommended in said Engineer's report, without passing upon the merits thereof, for some later date when the straightening of the Big Sioux River will be given more complete consideration covering the points recommended and other points requested at the hearing': and

Whereas, the Engineer, L. E. Stevens, has filed his supplemental report with reference to the straightening of the Big Sioux River, recommending narrower ditches than previously recommended, and also recommending the ex-
393 tension of the straightening of the said Big Sioux River, and thereby varying the route of said drainage, together with maps and profiles; and

Whereas, the Board has personally inspected the route of said proposed drainage, as described in said petition for Drainage Ditch No. 1 and 2, and as described in said Engineer's reports;

Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of the ditch straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, be and the same is hereby fixed as described in said Engineer's original report, as amended by his supplemental report, and that the requisite right-of-way of said drainage ditch and dump

space, be and the same is hereby fixed as described in said Engineer's report; and

Be It Further Resolved that it is deemed practicable and necessary to vary the route of said drainage occasioned by the proposed straightening of the said Big Sioux River, so that it will pass through other lands than those described in the original notice of hearing; and

Be It Further Resolved that the further consideration and hearing of said matter be adjourned to Saturday, the 30 day of December, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of said County, in the City of Sioux Falls, South Dakota, and the same is hereby fixed as the time and place for the hearing of the said petition with reference to the straightening of the said Big Sioux River, as recommended in the said Engineer's original and supplemental reports, and that notice thereof be given in accordance with the provisions of Sections 4, 5, 28, of Chapter 138 of the Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota. * * * * *

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394 Defendants' Exhibit 30 is a notice of hearing on the Sioux River cut-offs on Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch Notice.

Sioux River Cut-offs on Drainage Ditch 1 and 2.

Notice is hereby given that Saturday, December 30, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, filed August 3, 1916, for the establishment and construction of a drainage ditch pursuant to the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909, insofar as said petition refers to the straightening of the Big Sioux River, as prayed for in said petition, and as recommended by the Engineer's original and supplemental reports. The consideration whereof having been deferred for further consideration, when Drainage Ditch No. 1 and 2 was established, and said meeting having been adjourned for that purpose. The exact line

and width of said ditch was determined by the action of said Board on December 16, 1916, and in general terms is as follows: * * * * *

The tract of country likely to be affected by the establishment and construction of said proposed cut offs in the Big Sioux River is in general terms described as all of the lands and property affected by the construction of Drainage Ditch No. 1 and 2, as established by resolution in these proceedings under date of October 3, 1916, and of record in the office of the County Auditor of Minnehaha County, South Dakota.

395 The separate tracts of land through which said proposed drainage will pass, and part of which will be required therefor, and for dump space, and the names of the owners of said tracts, as appears from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, on August 3, 1916, that being the time of filing said petition, are as follows: * * * * *

(Note. Plaintiff is not named nor is any of its property described in this notice.)

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have, why the said drainage should not be established and constructed, and all persons deeming themselves damaged by said proposed drainage, or claiming compensation for the lands proposed to be taken for said drainage, are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 16 day of December, A. D., 1916.

396 BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY, SOUTH DAKOTA,
By A. G. Risty, Chairman."

Attest:
Harry H. Howe,
County Auditor.
(Seal)

Defendants' Exhibit 31 is the certificate of posting the aforesaid notice, the material portion of which is as follows:

"I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby specify that on the 20 day of December, A. D. 1916, I posted three copies of the annexed notice in three places near the route of the proposed drainage mentioned therein, as follows, to-wit:

One on the bridge over the Sioux River between Sections 29 and 32, in Mapleton Township; One on the bridge over the Sioux River on the North Half of Section 8, in Mapleton Township, and one on the bridge over the Sioux River between Sections 29 and 32, in Sverdrup Township; that I also posted one of said copies at the South Front Door of
397 the Court House in the City of Sioux Falls, South Dakota, all in Minnehaha County, South Dakota. * * * *

Defendants' Exhibit 32-A is the affidavit of publication of the aforesaid notice, the material portion of which is as follows:

"C. L. Dotson, being first duly sworn deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a daily newspaper of general circulation; printed and published in the City of Sioux Falls, in said County, and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper, and in charge of the advertising department thereof, and has personal knowledge of all the facts stated in this affidavit, and that the notice and advertisements headed Drainage Ditch Notice No. 1 and 2, a printed copy of which is hereunto attached and made a part hereof, was printed and published in said newspaper for ..... issues. That the first publication of said notice in said newspaper aforesaid, was on Wednesday the 20th day of December, A. D. 1916, and the succeeding publications were severally, on Wednesday, the 27 day of December, A. D. 1916. That the fees charged for the printing and publication of said notice and advertisement in said newspaper as aforesaid, were Ten Dollars and ....cents, and for this affidavit, Twenty-five Cents, and that the said fees for the printing and publishing of said notice and advertisement, and for this affidavit as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement, inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or

understanding for the division thereof has been made
398 with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper as provided in Session Laws of 1903, and amendments thereto. * * * *

The defendants' Exhibit 32 is the minutes of the Board of County Commissioners of August 10, 1917, adjourning said hearing until August 11, 1917, at which time the Board passed a resolution establishing said river cut-offs, a material portion of which resolution is as follows:

"Commissioners' Proceedings.

August 10, 1917.

Pursuant to resolution of July 27, 1917, adjourning and fixing the time of hearing upon the straightening of the Big Sioux River, under the petition upon which Drainage Ditch No. 1 and No. 2 was established, all members of the Board being present, and a delegation of farmers and property owners interested, Engineer L. E. Stephens having made and filed his report of the exact line and location of the several cut offs suggested and recommended, and the Board having heard the protests of those objecting thereto, and the petitioners in like manner having been heard, and the Board having heard the argument of counsel thereon, the further consideration thereof was adjourned to August 11, A. D. 1917, at two o'clock P. M."

"Commissioners' Proceedings.

August 11, 1917.

Pursuant to adjournment, The Board of County Commissioners convened at two o'clock P. M. All members of the Board being present, and after taking up and considering the project of straightening the Big Sioux River upon the petition for the establishment of Drainage Ditch No. 1 and 2, heretofore established, and the Board being fully advised
399 with reference thereto, it was moved by C. T. Charnock, and seconded by J. A. Jensen, that the following resolution be adopted:

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, pursuant to the resolution of this Board of October 3, 1916, establishing Drainage Ditch No. 1 and 2, and reserving the consideration and de-

termination of the question of the straightening of the Big Sioux River at several points recommended in the Engineer's report, that it is the determination of this Board that it will be conducive to the public health, convenience and welfare, and that it is necessary and practicable for the drainage of agricultural lands within the drainage area of said drainage ditch No. 1 and 2; that the hereinafter described ditches straightening the Big Sioux River be established and constructed as a part of the drainage system hereinbefore established, and designated as Drainage Ditch No. 1 and 2.

Be It Further Resolved that the said ditches straightening the said Big Sioux River be, and the same are hereby established, with a bottom width of 20 feet; and a depth not to exceed the depth of the main channel of said Big Sioux River, with a right-of-way for ditch and dump space of 100 feet, one-half on each side of the center line along the lines of hereinafter and particularly described as follows * * * * *."

All of the foregoing Exhibits were offered and received in evidence.

Mr. Ward, as County Auditor of Minnehaha County, identified Defendants' Exhibits 2 and 3, and 33 to 42, both inclusive, as records and files of his office in relation to this drainage ditch proceeding, all of which were offered and received in evidence.

Defendants' Exhibit 2, being a petition signed by O. S. Thompson et al, to abandon the outlet of old Drainage Ditch No. 1 and for the establishment of a new outlet thereto, the material portion of which is as follows:

"To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

The undersigned petitioners respectfully represent that they are all residents of the County of Minnehaha, South Dakota, and that each of them is the owner of certain lands situated in said County, in the Valley of the Big Sioux River, all of which lands will be affected by the drainage herein mentioned and proposed.

Your petitioners further represent that it is necessary for the drainage of agricultural lands in the said Big Sioux River Valley, including all of the lands affected by Drainage Ditches No. 1 and 2, as the same have been established and constructed, that said ditches be repaired and put in proper con-

dition and that the same be cleaned, deepened and widened, and that the Levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary in order for said ditches to carry off the surplus water and properly drain the lands affected thereby;

That it is also necessary to permanently close said Ditch No. 1 above the present spillway, or outlet, thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, in Township 101, of Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a Southeasterly direction, and to extend said ditch from such point, running thence in a Southwesterly direction, through Covell's Lake in the City of Sioux Falls, across the Southeast quarter of Section 5, the East Half of the Southwest Quarter of Section 8, the West Half of Section 17, the East Half of the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, about 40 rods
401 north of the bridge across said river commonly known as the "12th Street Bridge", situated on the section line between said Section 18 and Section 19.

Your petitioners further represent that the proposed maintenance and repair of said drainage ditches No. 1 and 2, and the extension of said Ditch No. 1, are necessary for the reasons that the present spillway and outlet of said Ditch No. 1, as now constructed and used, is impracticable for the purpose for which it was intended, and if allowed to remain in its present condition, will probably cause large damage to the owners of property adjacent thereto and affected thereby; that it is impossible to put said spillway or outlet in a condition to carry off the surplus water and properly drain the lands affected by said drainage ditches, without causing great damage to the owners of property as aforesaid; that for these reasons it is necessary to establish and construct a new outlet for said drainage ditches, which can be done by establishing and constructing the extension herein proposed.

Your petitioners further represent that the proposed repair and maintenance of said Drainage Ditches No. 1 and 2, and the establishment and construction of said proposed extension of or outlet to Drainage Ditch No. 1 will be conducive to the general health, convenience and welfare of the City of Sioux Falls, and of the inhabitants of the Big Sioux River Valley between the Cities of Sioux Falls, and Dell Rapids, and will prevent the annual loss of many thousand

acres of crops in said valley, and will prevent great damage to the lands in said territory, and to the buildings, bridges, highways and other improvements thereon.

Your petitioners further represent that the territory likely to be affected by the proposed repairs to and maintenance of said drainage ditches, and the establishment and construction of the proposed extension to or outlet of said
402 drainage ditch No. 1 includes all of the lands in said Big Sioux River Valley that are affected by said Drainage Ditches No. 1 and 2, as the same have been established and constructed, and all of the lands in said valley between the cities of Sioux Falls and Dell Rapids that are subject to overflow by the Big Sioux River.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold."

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403 Defendants' Exhibit 3, being the bond accompanying the petition of O. S. Thompson, the material portion of which is as follows:

"Whereas, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold have prepared and executed, and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition for drainage, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof;

Now, therefore, We, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold, as principals, and R. J. Huston and Iver R. Peterson, as sureties, do hereby undertake, promise and agree to and with the County of Minnehaha, in the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or the same is denied on appeal.

Dated at Sioux Falls, South Dakota, April 8th, 1916.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold, R. J. Huston, Iver R. Peterson.

I hereby approve the foregoing bond and the sureties thereto.

HARRY H. HOWE, County Auditor."

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404 Defendants' Exhibit 33, being the order for filing the petition of O. S. Thompson, et al, the material portions of which are as follows:

"Order for Filing Petition for Drainage.

Whereas, O. S. Thompson, and others, of the County of Minnehaha, South Dakota, have this day presented to this Board a petition for the drainage of lands in the Big Sioux River Valley, which lands have heretofore been drained by drainage ditches Nos. 1 and 2, as hereinbefore established and constructed, in which said petition is represented that it is necessary to permanently close said drainage ditch No. 1, above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast Quarter of Section 5, in Township 101, Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a Southeasterly direction, and to extend said ditch from such point running thence in a Southwesterly direction through Covell's Lake in the City of Sioux Falls, and across the Southeast Quarter of Section 5, the East Half and the Southwest Quarter of Section 8, the West Half of Section 17, the East Half and the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of said Section 18, about forty rods North of the bridge across said river, known as the Twelfth Street Bridge, situated on the Section line between Sections 18 and 19, all in said Township and Range, and said petition having been by this Board examined, and being found sufficient in form, and being accompanied by a proper bond, with sureties approved by the County Auditor;

Now, Therefore, It Is Ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that said petition be forthwith filed with the County Auditor, and a copy thereof be transmitted by said County Auditor
405 to the State Engineer."

Thereafter, on April 12, 1916, a copy of said petition was transmitted to the State Engineer at Pierre, South Dakota, and on May 3, 1916, a resolution was passed by the Board ordering a survey to be made for this proposed extension, and ordering the surveyor to report to the Board upon the length, size, width and depth of the ditch required for this proposed outlet. On May 24, 1916, the surveyor reported his survey, the exact line and width of the ditch, and the amount of right-of-way, together with the estimated cost of the same, and on June 9, 1916, the Board of County Com-

missioners, by resolution, fixed the exact line and width of the proposed outlet of Drainage Ditch No. 1 and designated the time and place for hearing the same, and designated June 29, 1916, as the time of hearing thereon, and ordered notice to be given. On June 10, 1916, notice dated on that day was published and posted as required by law.

Defendants' Exhibit 42 is the resolution of the Board establishing a drainage ditch as an outlet of Drainage Ditch No. 1 and the abandonment of the old outlet of Drainage Ditch No. 1, and the repair of Drainage Ditch No. 1 and Drainage Ditch No. 2, the material portions of which are as follows:

"The matter of the petition of O. S. Thompson, and others, representing that it is necessary that drainage Ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, Township 101, Range 49, and that such ditch be extended from such point running thence in a Southwesterly direction through Covell's Lake, and terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in said Township, and that it is also necessary that drainage ditches No. 1 and 2 be repaired and put in proper condition, coming on to be heard by the Board
406 of County Commissioners at a meeting of said Board on Thursday, June 29, 1916, pursuant to notice theretofore given, and written objections thereto having been filed by the City of Sioux Falls, the South Dakota Central Railway Company and Catherine W. Peck, and others, and such objections having been presented orally by counsel for the various objectors, and the said petitioners having appeared personally and by counsel in support of said petition, and various parties having filed claims for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet, and said hearing having been adjourned to this 8th day of July, 1916, and this Board having fully heard and considered said petition and all matters, evidence and arguments presented in opposition to and in support of the same;

Now, Therefore, Be It Resolved that the repair and maintenance of said drainage ditches 1 and 2, and the establishment and construction of said proposed extension to or outlet of drainage Ditch No. 1 will be conducive to the public health, convenience and welfare, and it is necessary and practicable for draining agricultural lands, and it is so found.

Be It Further Resolved that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point on the West bank of Drainage Ditch No. 1, 1610 feet North and 58 feet West of the Southeast Corner of Section 5, Township 101, Range 49, where said drainage ditch swings Southeasterly from a Southerly direction, and that a new extension to or outlet of said drainage ditch, commencing at said point and running thence in a Southerly direction through Covell's Lake in the City of Sioux Falls, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in Township 101, Range 49, as described in the resolution adopted by the Board June 10, 1916, be constructed, and that such extension or outlet be and the same hereby is established.

407 Be It Further Resolved that drainage ditches No. 1 and 2 be repaired and put in proper condition, and that the same be cleaned, deepened and widened, and that the levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary, in order that said ditches may carry off the surplus water and properly drain the lands affected thereby, the amount and extent of such repairs to be determined by this Board after an inspection, and, if deemed necessary, a survey of said drainage ditches.

Be It Further Resolved that this Board proceed to consider the claims presented and filed by various persons for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet; that before the assessment of damages this Board personally inspected each tract of land or other property through which said extension or outlet will pass, and that the damages sustained by each tract of land or other property through which said extension will pass, and damages as compensation for the land taken for the route of such drainage be assessed by this Board at a regularly adjourned meeting.

Dated this 8th day of July, 1916.

* * * * * * * *

The material portion of the judgment in the case of Oluf O. Gilseth vs. A. G. Risty, and others, as County Commissioners of Minnehaha County, South Dakota, et al, Defendants, and Minnehaha National Bank of Sioux Falls, South

Dakota, et al, Intervening Defendants, rendered by the Circuit Court of Minnehaha County, South Dakota, upon the 19th day of July, 1921, offered and received in evidence, is as follows:

"The Court having heard and considered the evidence introduced on behalf of the parties, and having heard the argument of counsel, and being fully advised in the premises, and having made and entered its decision in writing, con-
408 sisting of Findings of Fact and Conclusions of Law;

Now, Therefore, on motion of Messrs. E. O. Jones, R. H. Warren, and Porter & Bartlett, representing the defendants and interveners,

It is hereby Ordered, Adjudged and Decreed that the plaintiff's complaint herein be, and the same is hereby dismissed on its merits."

LEONARD BOYCE, being called as a witness in behalf of the defendants, testified in substance as follows:

My name is Leonard Boyce. I have lived in Sioux Falls for about fifteen years. In 1917 and 1918 I was connected with the Sioux Falls Construction Company, as Superintendent of the construction of the spillway on drainage Ditch No. 1 & 2, constructed by the County Board. As such Superintendent, I made arrangements with the Water Department of the City of Sioux Falls, by which it furnished water to be used in
409 the construction of the spillway on Drainage Ditch No. 1 & 2. The City put in a meter in front of the Penitentiary in a manhole where the main runs into the Penitentiary. We ran a line from there down to the spillway. They knew at the time they put the meter in, the purpose the water was to be used for. We used the water from that connection upon which they furnished the meter in the construction of the spillway. The City rendered bills from month to month, or from time to time for the water so used. These bills were presented to the County Board, and allowed, and warrants were drawn in favor of the City of Sioux Falls, or its water works department, for the amount of these bills, which warrants were delivered by me to the City.

As Superintendent of this work, I had certain steel reinforcing material delivered for that work. Some of it came in on the Milwaukee Railroad, and some on the Great Northern Railroad. There is a spur or sidetrack that extends to near the spillway North of the Penitentiary. I made arrange-

ments with the officers or agents of the Chicago, Milwaukee & St. Paul Railway Company and the Great Northern Railway Company, in the City of Sioux Falls, to have this freight spotted or delivered to us out near the end of this spur near the spillway, and such freight, several car loads, was in fact delivered to us on this spur near the spillway.

During the construction of this spillway in 1917 and 1918, electrical power was used in the work of construction. The Northern States Power Company furnished power or electricity used for power in such construction work. They had a power line that ran by or near the work of construction
410 of this spillway. The agents of the Northern States Power Company made the connections for us so that we used this electrical power which they furnished. They rendered us statements from time to time of the electricity which we used, which statements were presented to the Board of County Commissioners and by them audited and allowed. I think the warrants were drawn direct to these parties.

During the time that I was Superintendenat of construction on the spillway on Ditch No. 1 & 2 I saw the City Commission up there looking over the work as it progressed. The whole Commission was together.

Cross-Examination.

My recollection is that they were up there in the Fall of 1917 when we were working on the West side of the bridge on the highway. Possibly October or November, 1917.

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411 JOHN A. JENSEN, being called as a witness in behalf of the defendants, testified in substance as follows:

My name is John A. Jensen. I am one of the defendant County Commissioners, and was such during the year 1916. During that year I had a conversation with the local agent of the Chicago, Milwaukee & St. Paul Railway Company regarding the hauling of certain supplies to be deposited along their track about three miles North of the City at what is known as Schjodt's, and other conditions about the ditch. I told him we needed some assistance up along the ditch and along the river.

I had a conversation with the agent of the Chicago, Milwaukee & St. Paul Railway Company relative to transporting material and men up the river, up their right-of-way, to be deposited near the drainage ditch. I told him we needed this

help there, and he said he would take it up with the Superintendent at Sioux City. The reason he had to take it up with him was the stop between stations. We took rock up there and we wanted to dismantle the bridge where the water was coming in, and had to put in a dam there to hold it back into the river, and we wanted them to stop the freight train for us right between Baltic and Renner. I had a gang of prisoners there to unload the rocks while they were holding the train, and worked there after the train was gone. Up to Schjodt's dam they ran it with a switch engine, but they couldn't take the switch engine beyond the first station out, so they ran up with the switch engine three miles, and I had the same gang there working in the rock.

412 I also had a conversation with Mr. Beardsley, the Superintendent of the Chicago, Milwaukee & St. Paul Railway Company. He came up to look over the water situation here because a lot of track had washed out up North of Sioux Falls, and he told me I could get anything I wanted to help to control this water. Subsequent to that, I worked a gang of men up there several days, and the Chicago, Milwaukee & St. Paul Railway Company took them up on their passenger train. I gave them an order on the County for the tickets. They stopped the passenger train between Renner and Baltic to let us off in the morning, and coming back in the evening about five o'clock they stopped and picked us up and brought us gack to Sioux Falls. They rendered bills for the tickets, and we gave them a warrant. The dam, we were working on was at Schjodt's. There was no dam there under the old ditch proceedings.

Before the old spillway went out in April, 1916, and under the old drainage ditch No. 1 project there was no dam at Schjodts; there was a kind of a slough or something went into the river there; it kept on washing out so that the last time we were there it was about sixteen feet deep and the water went down in the cutoffs that we made west of there and came back up the river for about a quarter of a mile and went down into a ditch.

I had a conversation in the Summer of 1918 with the then Manager of the Northern States Power Company, Mr. Rofffelty. He asked if they could not put in a temporary dam up at Schjodt's, and keep the water they were losing there, and he did put in such a dam. Later he asked for a
413 longer one. In 1919 and 1920 we put in a dam together. He drove the piling for us. He had a pile driver up

there, and I had some plank. Some he put in himself. We got in a dam and got team and scrapers afterwards and filled up the dam and made it about sixty feet on the bottom and forty feet on the top, in width.

Exhibits 43 to 50, inclusive, are the bills which I have testified about that were rendered by the Chicago, Milwaukee & St. Paul Railway Company, and O. K'd by me, and presented to the Board of County Commissioners, for work done on Drainage Ditch No. 1 & 2.

These are orders that I gave to them for passenger tickets. From the date which they bear, it is apparent that the work was done in 1917.

Cross-Examination.

Mr. Rofelty called me up and asked for permission to put a dam in the ditch to keep the water in the river. It was washed out up there and the water ran up the river and down into the ditch instead of following the course of the river down.

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414 W. R. LARSON, being called as a witness in behalf of the defendants, testified in substance as follows:

My name is W. R. Larson. I had the contract with the Board of County Commissioners to deepen and widen these drainage ditches in controversy. The work was done in 1918 and 1919. We started in May, 1918, at the Minnesota road bridge, about one thousand feet from the water works, right across the Sioux Falls & Watertown Railroad, with a trenching machine shipped from Chicago over the Great Northern Railroad into Sioux Falls. It was shipped to their freight depot, and then I made arrangements with their agent here to have it spotted to the side-track over by the water-works. From the bridge we worked North towards Renner, up until about September. In the process we widened, and deepened it, and threw up an embankment on one side. There was a dike on the other side. The following year we did work on this ditch with another machine brought from Sioux City over the Chicago, Milwaukee, & St. Paul Railway, and delivered at Renner. There being no agent at Renner, I arranged therefor, and paid the freight through the Sioux Falls Agent. Those machines extend up, in the air about thirty feet, and this ditch is about 1000 or 1500 feet from the Chicago, Milwaukee & St. Paul right-of-way, or line of railroad. (p. 253)

Stipulation.

At this time make the record show that it is stipulated between the respective parties to these actions, that the intervening defendants are the owners of ditch warrants drawn on Drainage Ditch No. 1 & 2 to the amount alleged in their answers, which have been issued and are now unpaid. (Tr. p. 253).

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415 C. T. CHARNOCK, being called as a witness on behalf of the defendants testified in substance as follows:

My name is C. T. Charnock, I am one of the defendant County Commissioners in these actions; have lived in Sioux Falls about twenty-five years, and am familiar with the value of farm land in the vicinity of Sioux Falls. I have been over and am familiar with all the lands within the area of Drainage Ditch No. 1 & 2. Prior to fixing the apportionment of benefits thereon on June 10, 1921, I accompanied the Board of County Commissioners in making a personal inspection of all of the lands within the drainage area. The Board selected and determined the benefit to the unit adopted, which unit is situated about three and one-half miles North of Sioux Falls. We placed a value upon this land without the ditch, and a value upon it with the ditch. The difference between these values was the sum of $25.00 which, in our judgment, was the real beneficial value to this unit produced by the construction of this drainage ditch. The Board applied that unit to all the lands within the drainage area, and used the same method of determining the number of units of benefit to all of the lands affected. In applying this unit towards fixing the proportion of benefits to the Chicago, Milwaukee & St. Paul Railway Company, we first took into consideration the land belonging to the railroad company, the acreage, and we assessed that practically the same as abutting lands, and then we took into consideration the benefits to the grades and the culverts that could be done away with, and to tracks and bridges, etc. That was figured out by our Engineer. The amount or number of units was arrived at by figuring it out in dollars and cents, and then dividing the total amount by the benefit to the unit or twenty-five, thereby obtaining the number of units of benefit which was, in our judgment, received by this railroad company.

416 We pursued the same course in fixing the number of units of benefit to the Chicago, St. Paul, Minneapolis & Omaha Railroad Company; also to the Chicago, Rock Is-

land & Pacific Railroad Company; also to the Great Northern Railroad Company. We used the same method in arriving at the proportion of benefits which, in our judgment, the Northern States Power Company received from the drainage ditch. In fixing the proportion of benefits to the Northern States Power Company there were a number of different elements taken into consideration. First, was the dam at Schjodt's. We put that in to control the water there in the river, and also controlling gates or wiers at Thompson's, and the cut-offs of the river. We also took into consideration the property here in Sioux Falls known as the hydro-electric plant. These benefits, were arrived at by the same process of figuring the total benefit and dividing the same by the value of the benefit to the unit. The number of units which were fixed against these various plaintiffs in these actions represented the judgment of the Board in fixing the proportion of benefits upon the showing that was made, and the computation of our Engineer. We adopted the same process in arriving at the number of units which were fixed against the City of Sioux Falls for benefits. We used the same process all the way through on all the property that was taken under the ditch here.

Cross-Examination.

The unit we used was one acre of agricultural land. In determining the benefit to the Northern States Power Company, the Board took into consideration the dam at Schjodt's, the purpose of which was to prevent the water from the Big Sioux River, where the River had broken through into the ditch, from being diverted into the ditch. The Power Company was objecting to the ditch taking its power. The same con-
417 dition is true with reference to the controlling gates at Thompson's. The agricultural land had a value placed upon it, and was computed by the acre. I don't mean to say that all the land was assessed at one price. They vary in price according to benefit. Referring to the property of these plaintiffs, the method pursued was to figure the benefit in dollars and cents. The property now before the Court was not computed on the acreage plan. When we were making this assessment, we placed everyone the same value on it.

We did not make any difference whether the property belonged to the City or individuals. In assessing the railroads, we took the land that the railroad companies owned into consideration first, then the railroad itself, and then the culverts and bridges. The acreage that the railroad companies owned was only one element taken into consideration, and it was all

assessed upon the unit plan. We took in mileage but mileage was not the only element taken into consideration. We did not use the valuation of the railroads, but we used the valuation of the benefits that we thought the railroads would receive from it. The Board went over the proposition with the Engineer, and he figured out the method to use and it was approved by the Board. We accepted his figures. The Engineer figured the proportion of bridges that could be saved by diverting the water through the spillway, and that was computed in dollars and cents, and divided by twenty-five, which made so many units. The whole system was figured on that plan. All of the different elements of benefit were figured up and added together. The Engineer showed us what benefits this would be, what it would amount to, and that is the way we handled it, by the $25.00 unit, the same as we did the farms.

418 It was all figured out for us on paper. Then we took the map and travelled over the entire system. The Engineer figured the savings to the bridges, the benefit to the road-bed, and the culverts and the land owned by the railroad. That was all taken in. Those are all the elements I remember.

Q. Now, Mr. Charnock, what was the basis upon which the streets of the City of Sioux Falls were figured on. What were the elements that entered into that?

A. If I remember right they were taken in about the same value as the property abutting.

Q. You mean that all of the streets within the drainage district were figured by the acreage and also other benefits?

A. We didn't figure the lots by the acre.

Q. I am not talking about lots, I am talking about streets?

A. When you get to the streets they are in where lots are laid out.

Q. I am asking about the city property or streets?

The Court: As I understand the witness, they did not consider that upon the acreage basis at all. Am I right?

The Witness: Yes sir.

Q. Upon what basis was the benefits figured?

A. It was figured on the valuation.

Q. Valuation? A. Yes.

Q. Upon the acreage valuation?

A. We figured if you kept the water off this lot you had benefitted it so many dollars.

Q. I am asking about the city streets.

A. I am telling you that we took the streets by the same value.

Q. And figured them in acre valuation?

A. No, not in acre valuation, lot valuation.

Q. Upon what basis?

419 A. I don't know as I can explain it so you can understand it.

Q. What benefits did you figure out that the city would derive to their streets from this spillway and ditch?

A. The drainage. Keeping the water off of them would be certainly a benefit to the streets as well as abutting property.

Q. Upon what basis, what theory?

A. I cannot tell you just how much.

Q. Upon what basis did you figure, for instance, Sherman Park?

A. I believe Sherman Park was run in by the acre.

Q. As agricultural land?

A. Somewhere near that.

Q. Was the streets that you just referred to also figured upon the basis of agricultural land?

A. Whenever they were on that, they were assessed along about the same as the property where the street was located.

Q. As agricultural land?

A. You wouldn't call city lots agricultural land?

Q. I am asking you what you done?

A. I am telling you we assessed the street along with the property where it laid.

Q. As agricultural land?

A. No, not as agricultural land.

Q. What about Phillips Park, how did you assess that?

A. There is only a portion of Phillips Park, I think, taken in. That was the same way.

420 Q. Upon what basis did you put that?

A. That was the same way.

Q. In fact, you assessed the city property, all of it, the same way you have described it here?

A. I think so.

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421 HERMAN RETTINGHOUSE, being called as a witness on behalf of the defendants, testified in substance as follows:

My name is Herman Rettinghouse. I am a civil engineer and reside in Sioux Falls. I graduated in 1881 and came to the United States in 1882, and in the following year engaged in engineering work; was employed by the Milwaukee, Mitch-

ell and Western Railway, which is now a part of the Chicago & Northwestern system, as an assistant and gradually advanced into higher positions until 1893, at which time I engaged in private work in Ashland, Wisconsin, where I was city engineer for three years. Also was engineer for two railroads and in the fall of 1897 again engaged with the Chicago & Northwestern Railway as assistant engineer and was promoted to superintendent of bridges and building on the same road in 1900, in which capacity I served for five years; and from 1905 to 1907 was employed by the Wisconsin Central Railway Company as division engineer; had charge of the engineering construction work and maintenance of the entire road, and on January 1, 1907, again engaged with the Chicago and Northwestern as division engineer of the Northern Iowa and Sioux City Divisions, which position I held until the spring of 1913, when I was made division superintendent of the Iowa and Minnesota division of the Chicago & Northwestern. I remained there until November, 1913, and was then promoted to chief engineer of the Chicago, St. Paul, Minneapolis and Omaha, a part of the Chicago & Northwestern system. I retired from that service on March 1, 1920, at which time I was placed on the pension roll because of my impaired health. Since April 1, 1920, I have been a resident of Sioux Falls and have engaged in private practice as consulting engineer and senior member of the firm of Chenoweth & Rettinghouse, up to the present time. My first experience in public drainage work was in 1905 in a project which was affecting the Wisconsin Central Railway and another similar project in Southern Wisconsin; January 1, 1907, while in the service of the Chicago & Northwestern as division engineer in Iowa, which comprised practically the entire state covered by that railroad, the drainage work was very extensive. It was the principal part of my duties to make myself familiar with and handle the drainage problems which came up constantly. During this time we had from one hundred to one hundred fifty drainage problems of various magnitudes. When I became chief engineer of the Omaha Railway, we had a number of drainage problems in the states of Wisconsin, Minnesota, South Dakota and Nebraska. It was my duty as chief engineer to make myself very familiar with them and to cover all the phases of the problems as to benefits, damages and the manner of assessing benefits and damages. In November, 1920, my firm was engaged by the Board of County Commissioners of Minnehaha County, to make a topographical survey of the district covered by Drainage Ditch No. 1 and 2 for the purpose of preparing a correct map and furnish-

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ing data to the Board as would enable it to place the proportional benefits on the land and interests affected. Defendant's Exhibit 1 is the map prepared by my firm, which shows the topography of the country adjacent to and affected by Drainage Ditch No. 1 and 2 of Minnehaha County. Drainage Ditch No. 1 and 2 at its initial point is not exactly in the Sioux River. A small creek connects with the Sioux River near the Southwest corner of Section 29, Township 104, Range 49. The initial point of that particular section which we term section No. 3 is located at that point, a matter of five or six hundred feet from the river proper. There are controlling works and gates there which enable the ditch to be closed off from the river or from the creek, or opened and at flood time part of the water taken out of the river. Section No. 3 is located along the lowest land west of the Sioux River. The
423 land is naturally down lower than the banks of the river proper, a great deal in some instances. The land west of the ditch gradually rises as you go away from the ditch until you get to the foothills. The surface water on the outside of this ditch can most assuredly get into the ditch. The ditch was constructed for the prime purpose of draining this section of the country and inlets have been made at various points, at roads and intervening points, to permit this surface water to drain into the ditch.

This third section terminates in connecting with the river on the east and west line of Section 18, Township 103, Range 49, about a thousand feet west of the east line of Section 18. This ditch connects with the river as stated and the river from that point to a point on the southeast quarter of Section 20 has been straightened at various points, being practically canalized. At the point spoken of there is a bayou or an old portion of the river bed, which is partly filled up along the north, due to the fact that the river has been straightened to the west of it, and Section No. 2 connects, with this bayou about eight hundred feet east of the river proper. The ditch then extends parallel to the Milwaukee railway to near the junction point of the South Dakota Central line. At that point it diverges to a distance of about sixteen or seventeen hundred feet, running practically that distance parallel and in a southerly direction until it intersects the old bed of Silver Creek. It then follows Silver Creek in a southeasterly direction, cutting out all bends in it until it reaches a point at or near the Section line between Section 28 and 29, and runs in a southerly direction about a thousand feet parallel to the Milwaukee railway again until it reaches a point about a quarter

of a mile north of the city limits, from which point it runs in a southeasterly direction to its terminus in the spillway. Throughout Section 2 which is described, the ditch runs in the lowest part of the country east of the river and serves the purpose of a drainage ditch as well as for an overflow
424 from the river. It was put in for the dual purpose of serving as an overflow and as a drainage ditch. You will notice on the map that Silver Creek runs in a very circuitous route along the ditch and it terminates in this ditch, so that the waters of Silver Creek are more quickly disposed of than before and it therefore assists in draining the land adjacent to the ditch and Silver Creek and the same is true of the lands between the ditch and the river. The ditch assists in draining territory which is tributary to Silver Creek, which has its source north of the initial point of Section 2 of the ditch. The dam at Schjodts is about eight hundred feet from the former end of the lateral ditch constructed there. This dam is about thirteen hundred feet from the present cutoff channel of the Sioux River. There are two controlling works; the one mentioned composed of a gate at the initial point of Section 3. At the initial point of Section 2 there is a concrete bridge with a wier under the same which permits the water to rise to a certain point before it enters into the ditch and thereby is retained in the river proper. This was installed for the purpose of controlling the rise of the water in the river. In making of the survey of which I had charge, I made frequent trips
425 over the territory in order to familiarize myself with all the elements that might come into consideration and particularly as to the relative benefits derived, bearing in mind that it was necessary to arrive at some certain basis so as to be able to make the proper recommendations to the Board. In going over the territory, I came to the conclusion that at the location of this unit, it was about as good an illustration as could be found along the entire district, and I selected this unit for my recommendation to the Board. On Section 2 of this district, which terminates in the Sioux River, there are openings left at all necessary points to drain off the surface water and carry it into the ditch. After we had made our report
426 to the Board and I can best illustrate it by reading the sentence, "We also submit as an aid in your work of equalizing the benefits, a complete list of all the lands with the acreage of each parcel and proportionate benefits. We have made a thorough investigation and have minutely looked over all of the affected lands. In consideration of the proportion of benefits, we have selected a particular tract for a unit, one acre, more particularly described later, in the west

half of the northwest quarter of Section 29, Township 102, Range 49". Together with that report we submitted a recommendation as to the proportional benefits and after the board had received this report, we made a trip over the entire district lasting several days. We had one of the maps with us and we viewed all the lands and all of the other points where other benefits were to be proportioned. The particular percentages of the different parcels of land came under consideration and were pointed out, and if a dispute arose as to whether or not it was the proper amount of percentage, it was corrected and agreed upon right there by the Board, so that at the conclusion of our inspection the Board was familiar with all of the facts of the situation as I was myself. We used this unit selected as one and compared the other real estate with it. It was decided by the Board that the acre in question was worth one hundred dollars prior to the improvements and that it was worth one hundred twenty-five dollars subsequent to the improvements. Therefore the actual value of benefit to the unit selected was twenty-five dollars. All the agricultural land was assessed in relation to this unit. Many of the lands were only 30 or 40% depending upon the amount of benefit derived, as compared with this unit, being one hundred per cent. There were other lands that were as high as three hundred and three hundred fifty per cent of this unit. I am familiar with the cost of construction and upkeep of highways. In arriving at the benefit to the highways within this drain-
427 age area we estimated the benefits in this way. There is a certain amount of annual maintenance necessary for any road, and there is more than that amount necessary under flood conditions. That is to say, a road that is periodically flooded as against a road that never is flooded. The difference in the estimated cost of maintenance was capitalized, or represented the interest on a certain sum of money, and we consider the capitalized portion as a real benefit. We then, after obtaining that result after making a great many calculations, taking into consideration the various locations, some of them benefitted more than others.

We divided the amount arrived at by the value of the unit of $25, thereby obtaining the number of units as a proportional benefit for these roads. The sum we divided by the unit represented the capitalized value to that part of the highway; we applied the same method to the streets and highways of the City of Sioux Falls. We did not apply the acreage basis to the city property, excepting possibly the grounds where the water works are located. In applying the benefit to the unit

and what the Board took into consideration as elements of benefit to the Milwaukee Railway Company, we took into consideration the fact that in the first place there were practically three elements. First was the right-of-way on the acreage basis, which was estimated in proportion to the adjacent lands. Second, that it was possible to shorten or abandon certain bridges. In order to determine the benefits derived therefrom is simply a mathematical proposition. It costs a certain amount of money each year in order to maintain a bridge, whether it is a pile bridge or a steel bridge. We know how long these structures will last. We figure the cost of a bridge and divide it by the number of years in order to get the amount that is necessary to be expended each year for replacement. Taking the amount in dollars and cents multiplied by the length of the bridge and divide that and capitalize that at 7%,
which is the usual rate of interest, and that determines
428 the amount of benefit. This was the second element.
The third element is the fact that by reason of the flooding of the territory in which railroads are located, washouts often occur. We obtained data and from my personal knowledge and experience I have a very good idea of what it costs to repair washouts periodically appearing and we estimated as close as possible how much it would amount to every year and capitalized that amount again.

Again as an additional element, a road-bed is solidified or made stronger by not being subject to floods. A road-bed that is constantly or for great lengths of time subjected to submersion is certainly weakened, and again, so far as humanly possible, we figured the amount of benefits in dollars and cents and after getting all of these results or capitalized amounts, we divided that by twenty-five as our measure and determined the number of units of benefit. That system and general method and plan was used to determine the amount of benefits that each railroad received from these separate elements. There were three elements of benefit so far as the Northern States Power Company is concerned. One of them was the fact that through the construction of the wier at the initial point of section 2 and through the construction of the dam commonly known as Schjodt's dam and I believe some dike work done at other points, the power company was assured of a constant flow of water or a normal stage of water. The second element, that through the diversion of a part of the water of the Sioux River through this drainage ditch, which has been estimated at from twenty-six hundred to three thousand second feet, as against a total flood condition of six

thousand feet, and all the way from 6000 to 10000 second feet, a benefit was created in that much water being taken away from the tail race and lowering the available head at
429 the power company's plant. In determining what proportion that would be, I was largely guided by the report made by Mr. Link, in which the results of his investigation were given and the amount of second feet of water in flood stages of the river at certain periods mentioned. I was also dependent upon the information and investigation made by M . Shenehon, who designed the spillway, and I came to the conclusion as a fair proportion of the waters diverted, we could assume one-third of the entire river from the end of section 2 in lowering the head of the hydro electric plant, through the flood waters; also the lay of the land opposite the hydro electric plant is such that all of the flood waters, after passing over the dam, must pass through the tail race. All these elements were considered in the determination of the benefits accruing to the Northern States Power Company.

Q. Just a moment, let me call your attention to certain cut-offs in the river. What if any?

A. I said there were three elements and I only mentioned two. The other is the straightening of the river which has been done to a large extent between the upper end of Section No. 2, at this point clear down to this point near the Watertown & Sioux Falls Railway. The velocity of the water was greatly increased of the waters flowing through the river, and it thereby shortened the flood period, in that the water passed through the river much quicker than it did before. The total amount of water that is collected in the initial point of these cutoffs is hastened down the river past the Northern States Power Company's Plant. The ditch takes one third out of the river. I have estimated it as closely as humanly possible at one-third, it may be more. These were the elements we considered in apportioning the benefits to the hydro electric plant. Using these elements, we estimated the amount that would be saved by the power company through the fact
430 that the head was not lowered to that extent and capitalized that amount. The power company, by by-passing these flood waters, would have a constant aggregate output of hydro electric power and in season other than flood seasons the controlling works and dams keep all the water in the river that should be there and pass it around over the power company's turbines, insuring to them a constant flow even at a low stage of water in the river. (Tr. p. 285) The Great Northern had 2.4 acres of right-of-way which the Board

considered benefited by reason of this ditch. They have one-fifth of a mile of track, two bridges protected, and 315 feet approximately of bridge that might be abandoned. The Chicago, Rock Island and Pacific has 12-1/8 acres of right-of-way that is benefited, one mile of track and two bridges benefited to be shortened, together approximately 230 feet. The Chicago, Milwaukee and St. Paul Railway has 172 acres of right-of-way, 14.2 miles of track, two bridges protected, one bridge shortened one hundred feet and one bridge of 176 feet abandoned, all benefited thereby. The Chicago, St. Paul, Minneapolis and Omaha has two and one-fourth miles of track, 27 acres of right-of-way, 405 lineal feet of bridges abandoned and two bridges protected. These items I have mentioned, in my opinion, were benefitted by the construction of this ditch and the diverting of the water as I have testified. There were three elements in regard to the assessment of the city of Sioux Falls. First, the streets, estimated at about 14 miles of streets within the drainage district. They are benefited in the same manner as I have explained in regard to the county and town roads, although the benefits were more varied on account of the streets being built of different character.

The second item was the parks. We figured that from
431 the diversion of the flood, the annual maintenance of the parks was reduced, that is to say there was less work to maintain the grounds as compared with the ground that was flooded. Another item was the benefit to the water works. It seems to be a fact that through the placing of the spillway the life of the water works was saved, insofar as productiveness of the wells is concerned. Another item is that during flood conditions, the water works were unproductive. We have estimated a certain number of days each year that the water works were out of commission. These wells were flooded by surface water and made them unsanitary and unfit for drinking purposes. We figured the amount that that would bring and capitalized the amount same as the capitalization of the streets and parks and divided that amount by twenty-five in order to arrive at a certain number of units. From my experience and the facts and data that I have been able to gather, the benefits that I have mentioned are direct benefits to the railroad companies and their properties by reason of the construction and maintenance of this ditch; and the benefits which I have outlined to the city and Northern States Power Company were direct benefits to them. After determining the amount of the units and actual amount of money necessary to be raised, that amount is divided by the number of units to produce the value of a unit; and by that

process we reduce the actual value of the unit down proportionately to each party affected.

432 Q. You reduced the valuation down proportionately to each property affected whether it was railroad or ranch property? A. All treated alike.

Q. And that, in the final analysis will be the assessed benefit after being equalized? A. It will.

Q. Calling your attention to the fact that the river continues around the city for some miles beyond the outlet of the spillway, what is the effect of by-passing this water upon adjacent lands, starting at the city limits on the north around this city until the ditch dumps the water back into the river. Is that a benefit or not?

A. It constitutes a direct benefit. The same benefit as to lands farther up the river.

Cross-Examination,

433 By Mr. Campbell:

When I speak of the ditch diverting something like three thousand feet of water, I have reference to the discharge capacity of the ditch at its lower end; I couldn't tell what proportion of the water came out of the river during the flood stage; I should think a majority of the water came out of the river; I don't know the capacity of the ditch at its upper end; we haven't figured that; the ditch does not divert water from the river at any other point than that; I do not know what the amount is that is diverted there; the wier that I speak of down here that controls the flood of the river is constructed to keep the water from going into the ditch at normal stage; if the ditch were not there, the waters would go down the river just the same. The second element that I said I took into consideration, that is, the diversion of the flood of the water would lower the tail race of the Northern States Power Company at flood times to the extent of the water that was diverted; I couldnt' tell you how much that would be; I couldn't tell you how many kilowatt hours of output the plant would gain by reason of that diversion; that is a matter in hydro-electric engineering that I have not attempted to qualify; the value of that increased head would be measured by the value of the increased output from the hydro-electric plant; this answer is based upon the assumption that it is cheaper

to produce electric current from a hydro-electric plant than from a steam plant.

434 By Mr. Grantham:

I didn't know I determined the capacity of the stream; we have several cross sections taken at various points of the ditch and the river as well; I couldn't tell you whether I have a cross-section of the ditch at about the point where the ditch that runs to the spillway is fed by the river; we have taken cross sections of every half mile; the ditch is not uniform all the way; I have no idea at all of the size of the stream; in testifying here that the ditch carries one-third of the water, I was basing my conclusion upon the investigations made; I determined on my survey the high water mark; the [heighth] above the banks of the stream of the high water varies at various points; the dotted line here on the map shows the high water line; at an elevation of 1438, the [heighth] of the high water line is about ten feet above the banks of the river; the water at that point would be about 8000 feet wide on the surface; it is impossible for anyone to tell you off-hand just what the average depth of water would be there without showing cross-sections at every point. I have no idea.

Q. How did you determine the capacity or amount of water carried if you didn't know the amount of water in the stream? A. I was not engaged for that purpose.

Q. You don't know as a matter of fact the amount of water that is carried down the stream in flood time?

A. I do not.

435 Cross-Examination.

On behalf of Northern States Power Company (Tr. p. 288).

When I spoke of diverting three thousand feet of water, I had reference to the discharge capacity of the spillway. I should think a majority of that water came out of the river during flood stage. The wier that controls the flood water is constructed to keep the water from going into the ditch in normal stage. The diversion of the flood water through this drainage ditch would lower the tail race to the extent of the water that was diverted. The exact amount I cannot tell you. That is a matter of hydro electric engineering that I have not attempted to answer. The value of that increased head would be measured by the value of the increased out-put from the hydro electric plant, and it is based upon a proposition that it is cheaper to produce electric current from a hydro electric plant than from a steam plant.

AUGUSTA C. ANDERSON, being called as a witness on behalf of the defendants, testified in substance as follows:

My name is Augustus C. Anderson. I am a consulting engineer; have had experience in installing and drawing plans for hydro-electric plants. I am a graduate of Brooklyn Technical College Institute; have been in the engineering business practically all my life; the last eight years previous to that in power plant and general electric work; nine years previous to that in general commercial engineering; and four years in hydraulic mining engineering. Previous to that I was engaged by Laidlow-Dunn Gordon Pump & Engine Company for years. I have made a casual examination of the drain-
436 age ditch and spillway that carries the water down the hill into the river, and have examined the course of the river which carries the water down to the dam in this town to the Northern States Power Company plant; and made some examination of the plant. I know the elevation of that plant, and can give the elevation of the bottom of its tail race. I know the elevation of the floor upon which the water turbines rest, and the elevation of the floor upon which the dynamos rest. The diversion of the water by the drainage ditch is, in my opinion, a direct benefit to the Northern States Power Company plant. The arrangement of the turbine wheel discharge draft tube in connection with the tail race, is such that the Northern States Power Company get the maximum benefit from that method of draft tubes or draft pipes at a stage of water in the tail race such as exists there other times than when there is a flood on; that is, the discharged water from the turbines maintains a seal over the end of the draft tube that gives them the maximum benefit in that manner of installation. In case of flood in the narrow gorge, it would necessarily raise the water very much above what is known as the seal of the draft tube, and every foot above that seal is a detriment to it, reducing the beneficial effect on the power derived from water passing through the turbo wheels. The draft tube leaves the turbo base at 54 inches. The lower opening of the turbo is some three times as large in area, and the water in the tail race should be at least a foot above the opening. I should say it would be between five and six feet deep. Deflecting the water off of the tail race as regards this particular hydro-electric plant, is to give it a uniform, even,
437 maximum benefit from its [fraft] tubes, draft gauges, dratt pipes, with the arrangement that they have now, a small dam below holding the water at a level, which completes the seal at all times. The turning of water away from

there, the flood waters, gives it the maximum benefit. In my opinion, the flood water that raises that tail race reduces the maximum benefit to the extent. The water from the river going into the tail race has the same effect practically as reducing the head.

Cross-Examination.

The tail race with a small dam below, maintains a seal regardless of how much water is flowing beyond there. There is a little reservoir built so it maintains a seal over the outlet of the draft pipe. Any raise in the level of that water has its effect. It is so arranged now to get the maximum benefit of that kind of construction, with a minimum of water. Every foot of rise in the tail race has its effect on the draft tube. The rise of water in the tail race reduces the head. The capacity of the units as recorded in the specifications is three five-hundred-killowatt-units at a seventy-two foot head. The head is sixty-two feet and the additional twelve feet of draft tube making the seventy-two foot head is gained through the use of the draft pipe.

I think it is figured that way; I am not absolutely positive; I believe that is what it is. I do not know the relations of the present condition of the plant to its condition as originally constructed; I have not studied the history of that
438 plant, of its construction, and of the changes in it; I have only got very slight information on it; I came on the job very recently; I don't know what changes have been taking place in the construction in relation to the head since the plant was originally built; I know there have been changes; it has been improved and brought up to date as time passes; I simply know that it is not exactly constructed like it was originally.

Q. Now, Mr. Anderson, suppose that those units there are installed for a certain maximum capacity at the lower head. Would you get any more power by increasing the head or would you get the same power with simply less water?

A. Use less water, increase the head, you get the same power.

I visited that plant Wednesday of this week, I believe; I live in Omaha; I spent about an hour down there at the plant."

J. W. LINK, being recalled in rebuttal as a witness for the plaintiffs, testified in substance as follows:

(Direct Examination)

Q. Mr. Link, I would ask you to state whether or not the fact of this by-pass upon the tail race of the Northern States Power Co. plant at a time of maximum flood would have any appreciable effect upon the output of that plant from its hydro-electric apparatus? A. Absolutely none.

Q. It can be maintained constant? A. Yes sir.

439 Q. I will ask you to state whether or not the effect of the straightening of the river in what I will term the upper reaches of the ditch, would have any effect on the constancy of the flow of the river at the Northern States Power Co. plant in different normal stages of the river.

A. As to whether straightening would have any effect?

Q. Yes. A. I can't see how it would.

Q. I will ask you, Mr. Link, that if it is assumed you had a maximum flow of 10,000 second feet or more down this river, whether or not under those conditions the results in the river would be appreciably affected by the presence of this by-pass ditch? A. I do not think so.

(Cross-Examination)

Q. If your head was lowered 25 feet would it affect your power?

A. That is too indefinite to answer. Lowered below what?

Q. Lowered below its present level?

A. Would it affect the amount of power we could get out of the plant?

Q. Yes sir. A. Absolutely not.

(Redirect Examination.)

Q. I wish you would explain to the court, Mr. Link, the character of the design and construction of the plant of

440 the Northern States Power Company under consideration here with reference to the matter of obtaining a maximum efficiency of the turbines, or maximum output from the turbines, in relation to the amount of water required.

A. The plant as originally constructed had a head of approximately 60 feet; there was another dam just below the present plant which backed the water up from that reservoir to our tail race, and controlled to a large extent the head; the machines that were installed in there were installed for a certain capacity at that head; the generators cannot pull any more load regardless of what the wheels may or may not do; the generators have a fixed capacity which we cannot exceed without burning them up; with the original head we could pull

the full load out of the generators; since then the head has been increased by about 12 feet, by wrecking the dam below, excavating the tail race, by building draft tubes and extending draft tubes to the wheels; the result of that is not to increase the capacity of the plant because the generator capacity is fixed for the lower head, but it enables us in low water time to pull the full capacity out of the units with a smaller quantity of water than we were able to do before on account of the enlarging of the tail race and the wrecking of the dam below, flood waters will not rise as high at the plant as they did previously, and it is my opinion that even a maximum flood of the river, even without the drainage ditch would not raise the level above the original normal level, consequently even with a maximum flood we would probably get the original load of the plant.

441 The Court: Which is full capacity?

A. Full capacity; now any diversion of the water which would lower the flood level in the tail race under present condition would not increase the capacity of the plant nor the amount of power we could get out of it; at flood times there is any abundance of water that we can put through the wheels, any amount of water they will take; sufficient water to produce the full output of the generators; so there is absolutely no benefit can accrue in diverting flood waters from the plant.

Q. Was this plant designed and constructed in your judgment so as to take care of flood conditions in the river?

A. The plant was designed to take care of maximum flood conditions. It was designed and constructed before the drainage ditch was constructed and was built to take care of any conditions regardless of any drainage.

(Recross Examination.)

Q. When was this plant so designed? What year?

A. I think about 1908, in 1907. I think it was completed in 1908, put in operation.

Q. What was the water level, what was the elevation of the water, Mr. Link, when the Bennett dam was in?

A. You mean the elevation above sea level?

Q. Elevation in your tail race there? The depth of the water?

A. I don't know just what you mean by the elevation unless you mean above sea level.

Q. How deep was the water in your tail race when the Bennett dam was in there?

A. That I can't tell you off hand.

442 Q. Did not the water in your tail race when the Bennett dam was in come to within a foot or two of the base of your water turbines?

A. I don't know what distance it came. The draft tubes were comparatively short. Much shorter than they are now.

Q. And the draft tubes were installed at that time by reason of the Bennett dam? A. Certainly they were, yes.

Q. By putting in those extended draft tubes of some ten or twelve feet, Mr. Link, does it not have practically the same effect as though you had lowered your water turbines the same distance? A. No, I would not say it has the same effect.

Q. How much power, more power, Mr. Link, can be produced with the same amount of water coming into your intake pipe from this same pipe by lowering your turbines ten feet?

A. Lowering them ten feet from where?

Q. From where they are now.

A. That is too complicated a question to answer.

Q. If you lower your turbines ten feet it gives you ten feet more head, does it not? A. Yes sir.

Q. If you put a draft tube on the bottom of your turbines which extend down ten feet, and seal the bottom, you get ten feet more head, do you not? A. Yes sir.

Q. Now as the water raises in that draft tube, when it reaches the bottom of the turbines, your turbines then begin to pump water, do they not? A. No sir.

443 Q. I mean when the water raises a very slight amount above the bottom of your turbines, they [being] to pump water?

A. No sir. They [being] to pump water as soon as water starts flowing over the wheel.

Q. And that water coming out of the draft tube, if you were to extend the draft tube in the shape of a U, and extend it up, and if that U were to extend ten feet above the base of your water turbines, you would lose ten feet of head, would you not?

A. Lose more than ten feet. We would lose the head of the length of the draft tube as it extends and the ten feet you cut off above the wheel, whatever that might be.

Q. Then when the water falls into the tail race above the top of the draft tube, each foot that it fills up is a reduction of your head a like amount, is it not? A. Yes.

Q. And as your head gets smaller, you are able to produce less power are you not?

A. I would not say that in this case.

Q. Would that be true if you could utilize all the power you could produce?

A. It is not a question of the power you can use. I don't understand your question.

(Question read)

A. I don't see any relation.

Q. Is it true?

A. I can't answer that. I don't understand the question.

444 The Court: All you can produce at this plant. It would have to be confined to this plant as it is equipped.

The Witness: I don't see how to answer a question like that. I can't get the meaning of it. It is a question that does not mean anything to me.

Q. As this plant is equipped you can produce all the power that your installed dynamos can take care of, is that right?

A. That is the generators attached to the water wheels.

Q. Can you [stall] larger dynamos and still run them with the power that can be produced over your water wheels?

A. I think probably some more power could be gotten if large generators were put on. That is a question that is a little difficult to answer without going into tests of the wheels to find out what they will do.

Defendants rest.

Endorsed: Filed in the District Court on Jan. 10, 1923.

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445 (Approval of statement of evidence by District Judge.)

The above named appellants having presented and filed in this Court their statement of the evidence in the above entitled cause, and the above named respondents having filed their objections thereto and asking that part of said statement be stricken and said respondents' statement of said evidence be substituted in lieu thereof, and the appellants having filed their objections to said substituted statement of said respondents, and said differences having been submitted to the above named court, and said statement having been made up and completed in conformity with the directions or said

446 Court,

Now Therefore, It Is Ordered that said statement so made in conformity with the order of this Court and hereto

attached be and the same is hereby approved as a true and complete statement of the evidence in this cause.

By the Court:

JAS. D. ELLIOTT, Judge.

Attest:

(Seal of Court) Jerry Carleton, Clerk.

Endorsed: Filed in the District Court on Jan. 10, 1923, at 2. P. M.

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447 (Clerk's Certificate to Transcript.)

United States of America,
Southern Division,
District of South Dakota—ss.

I, Jerry Carleton, Clerk of the District Court of the United States of America, in and for the District of South Dakota, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Eighth Circuit, that the foregoing, consisting of 446 pages, numbered consecutively from 1 to 446, inclusive, is a true and complete transcript of all of the record, process, pleadings, orders and final decree as enumerated in the Praecipe of the parties appellant and the Praecipe of the party appellee to this cause filed herein, directing the Clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original Citation, together with the affidavit of service thereof, and in addition thereto a copy of said Praecipes and all written opinions of the Court filed in said cause.

Seal
U. S. Dist. Court,
Dist. of South Dakota.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, in the said District, this 15th day of March, A. D. 1923.

JERRY CARLETON, Clerk.

Filed Mar. 20, 1923. E. E. Koch, Clerk.

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302 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

United States Circuit Court of Appeals, Eighth Circuit.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6315. vs.
Northern States Power Company.

Appeal from the District Court of the United States for the District of South Dakota.

(Order of Submission.)

Memorandum of Clerk:

On the 17th day of December, 1923, this cause, together with causes Nos. 6312, 6313, 6314, 6316 and 6317, was submitted to the United S'ates Circuit Court of Appeals for the Eighth Circuit and a full copy of the order of submission having been included in the transcript taken for the Supreme Court of the United States on appeal and an application for writ of certiorari in cause No. 6312, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee, the same is omitted from the transcript in this cause, No. 6315.

(Opinion.)

Memorandum of Clerk:

On the 18th day of March, 1924, an opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in causes Nos. 6312 to 6317, inclusive, and a full
303 copy of the opinion having been included in the transcript taken for the Supreme Court of the United States on appeal and an application for writ of certiorari in cause No. 6312, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee, the same is omitted from the transcript in this cause, No. 6315.

(Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1923.
Tuesday, March 18, 1924.

A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., intervening defendants, Appellants,
No. 6315. vs.
Northern States Power Company.

Appeal from the District Court of the United States for the District of South Dakota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of South Dakota, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Northern States Power Company have and recover against A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South
304 Dakota, et al., intervening defendants, the sum of Twenty Dollars for its costs herein and have have execution therefor.

March 18, 1924.

(Petition for Appeal to Supreme Court, U. S., Assignment of Errors and Allowance of Appeal.)

(Petition for Appeal and Allowance thereof.)

To the Honorable Presiding Justice, or any of the Judges of the Circuit Court of Appeals of the United States, for the Eighth Circuit:

Now comes the above named appellants, by their solicitors, and complain that in the record and proceedings, and also in the rendition of the Decree of the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Louis, in the State of Missouri, in the above styled and numbered cause, on the 18th day of March, A. D., 1924, affirming the Decree

of the United States District Court, for the District of South Dakota, Southern Division, in said cause, manifest error has intervened, to the great damage of the petitioners. In substance, said errors are these:

1. Appellee was given said relief by collateral attack, by means of a Bill of Equity, when it had an adequate remedy at law which it could pursue, at its election, either in the Courts of the [States] of South Dakota, or in the Federal Court.

2. It was given the relief aforesaid, despite the fact that the record shows without dispute that the appellants, the Board of County Commissioners, in establishing the said new project, and in attempting to obtain said contribution from appellee, acted strictly in accordance with the statutes of the State of South Dakota governing the establishment of such new project.

3. Appellee got said relief, though, in addition to the fact that the said Board had in fact thus complied with
305 said statutes of the State of South Dakota, it was the settled law of said State at the time the Circuit Court of Appeals acted as aforesaid, that the doings of said Board with reference to the aforesaid project were in compliance with the statutes of South Dakota, as construed by the highest court of that State. It was further settled at said time by the highest court of the State of South Dakota, that the very project at bar was the formation of a new drainage district, or ditch. And the Circuit Court of Appeals erred in disregarding the interpretation of the applicable statutes of the state of South Dakota as formulated by the highest court of that State, and substituting its own interpretation for that of said highest court of that State.

4. The Circuit Court of Appeals erred in granting the relief which it did grant and affirm, because neither the pleadings nor the evidence warranted such relief, or any relief, and because its finding that appellee was entitled to the relief which it obtained, is contrary to the pleadings and to the evidence, and contrary to and unwarranted by the law.

5. Said Circuit Court of Appeals erred also for the reasons set out in the assignments of error filed herewith.

The appellee invoked the jurisdiction of said United States District Court, as set out in its bill of complaint, on the ground that it, the appellee, was a citizen of the State of Minnesota; that the appellants were citizens of the State

of South Dakota, and that more than $3,000.00, besides costs, was actually in controversy. It did not invoke the jurisdiction solely on the aforesaid grounds, but, in addition, asserted in its bill of complaint that appellants were not proceeding in accordance with the requirements of the applicable statutes of the State of South Dakota; that if it were assumed they were acting in compliance with said statutes, such statutes themselves were unconstitutional and void, and violative of the Constitution of the United States, and amendments thereto, and that the action of appellants was depriv-
306 ing appellee of its property without due process of law, in violation of said Constitution and amendments thereto.

Therefore, your appellants and petitioners say that this cause and matter is not one in which the decision of the said Circuit Court of Appeals of the United States is made final, and say further that the controversy between appellants and appellee involves an actual controversy over more [that] One Thousand Dollars, besides costs.

Wherefore, petitioners pray for an allowance of the appeal, to the end that the cause may be carried to the Supreme Court of the United States, and petitioners pray for a supersedeas of said judgment, and such other process as is required to perfect the appeal prayed for, to the end that the errors therein may be corrected.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Solicitors for Appellants.

Appeal and supersedeas allowed, and bond fixed at the sum of One Thousand and no/100 Dollars ($1000.00), conditioned as the law provides, this 31st day of May, A. D. 1924.

WM. S KENYON,
Judge of the Circuit Court of Appeals of the United States, for the Eighth Circuit.

Assignments of Error.

Now on this 31 day of May, 1924, comes A. G. Risty et al. as County Commissioners, etc. et al., Appellants, by their solicitors, Benj. I. Salinger, Elbert O. Jones and Norman B.

Bartlett, and in connection with their petition for ap-
307 peal to the Supreme Court of the United States say that in the findings, judgment and decree entered in the above cause on the 18th day of March, 1924, manifest error has intervened, to the injury, wrong and prejudice of this appellant, and that the same is erroneous and unjust to appellant;

1. Because the Circuit Court of Appeals failed to follow the construction of the South Dakota Constitution and statutes as pronounced by the highest court of the state and did its own construing of said state law and based its affirmance of the decree of the District Court on a construction on its own part, which is in conflict with the construction of the highest court of the state.

2. Because it was based on the reasoning that appellant Board had no authority to make an assessment except in aid of a drainage project to drain agricultural lands and that said Board had no authority in law to establish a drain except for the drainage of agricultural lands.

This is erroneous and the interpretation of the Constitution and statutes by the Circuit Court of Appeals is erroneous because it is and for a long time has been the settled law of South Dakota as declared by the highest court of the state in construing its said Constitution and statutes that a Board such as appellant Board is, is by such Constitution and statutes authorized to establish and construct a drain for a public purpose and that such public purpose included but was not limited to the drainage of agricultural lands, and that such authority existed as to such drainage as the very one at bar is, and it is undisputed in the evidence that one object of this project was to drain agricultural lands.

3. Because it is not only a fact that the highest court of the state has ruled in construing the Constitution and statutes of the state of South Dakota that the drainage ditch at bar was lawfully established and that the acts of appellant Board were lawful, but the record shows both facts without dispute; and the Circuit Court of Appeals' affirmance is despite such ruling and despite said state of the evidence.

4. Because there is no evidence in the record to show
308 any fraud or subterfuge on behalf of the appellant Board or anyone at all in the establishment of this new drainage ditch; and there is absolutely no evidence in the record that appellee was prevented from making a full and fair defense to such establishment in the proceedings had upon

notice given by the appellant Board by which this new drainage ditch was established. Unless appellee was by some subterfuge prevented from making a full defense to the establishment of this project at the time of its establishment, the mere statement now that it was established by subterfuge is of no avail to it in this collateral attack.

5. Because the affirmance was based on an interpretation of the statutes of South Dakota by the Circuit Court of Appeals that such statutes did not permit or authorize appellant Board of County Commissioners to establish and construct a new drainage ditch over the line of two older ditches, which new project contained a materially larger area [that] the combined areas of such old ditches and called for cleaning out, widening, deepening and diking of the older ditches to double their former capacity—the construction of river cut-offs to accelerate the flow of water therein, and the installation of a new and larger spillway, all at a cost of more than double the cost of the original ditches; which interpretation was contrary to the interpretation given to such statutes by the highest court of the state of South Dakota in this very drainage project.

6. Because the statutes of South Dakota, as interpreted by the highest court of the state, permit and authorize the appellant Board to establish over the line of one or more old drainage ditches a new drainage project containing a materially larger drainage area than the combined area of such old ditches—with additional river cut-offs—new and larger spillway, and a cleaning out and deepening, widening and diking of the old ditches to double their former capacity, at an expense of more than double the cost of the original ditches; and the undisputed evidence in this case shows the proceedings of the appellant Board sufficient under
309 such statutes to establish and construct such new drainage project and make an apportionment of benefits for the payment of the cost thereof, and did not warrant the finding and conclusion of said Circuit Court of Appeals that said proceedings were in fact for repair and maintenance only.

7. Because it is based on the holding and reasoning that appellant Board had acted without authority from and had not complied with the provisions of the statutes of South Dakota regulating the maintenance and repair of ditches already established. The appellees, City of Sioux Falls, C. Milwaukee & St. P. Ry. Co., and the C. St. P. M. and Omaha Ry. Co., conceded that the project at bar was the creation of

a new ditch and a new project. That fact is established by the undisputed evidence as against all of the appellees. It is undisputed in the evidence that there was a full compliance with every statute dealing with the establishment of a new ditch. Therefore, the affirmance was given because there had been a failure to comply with statutes that had nothing whatever to do with the establishment of a new ditch or assessing for the cost of its construction. The court disregarded that the relevant statutes had been complied with and based its action wholly on the fact that statutes that had no application had not been complied with.

8. Because the appellant Board to whom had been [deligated] by the statutes of South Dakota the authority to determine the purpose and character of this drainage project had, after notice and hearing, determined that this drainage project, among other things, was for the benefit of the public health, welfare and convenience and was necessary and practicable for draining agricultural lands, from which determination no appeal was ever taken; and the highest court of the state of South Dakota has held in interpreting such statutes that such determination is final, no appeal from the same ever having been taken.

9. Because the notice dated September 15, 1916 and the hearing held pursuant thereto on October 2, 1916 was a notice to and an apportunity to be heard by appellee on the
310 formation of this new drainage project with an enlarged area subject to benefits and that appellee's property was included therein, and gave to it its day in court and its opportunity to contest the establishment of said drainage project, the legality thereof, the necessity therefor, the character and purpose thereof, and it having waived the same and defaulted therein and not having appealed from said determination, is bound thereby.

10. Because what was in effect done was to restrain legislative action on the part of the appellant Board acting in a legislative capacity under delegation from the leguislature of the state. The legislature itself could have by enactment of a statute done everything the Board did or was proposing to do. and it should be conceded that the legislature could not have been enjoined from enacting such a statute. The only difference is, that the Board was bound to give certain notices and hearings before any assessment could become a lien, and the Board did what it was bound to do.

11. Because the proceedings at bar were proceedings in rem, for the purposes of taxation, and dealing in this matter

or any review of the same involves property rules, over which the courts of the state are the final authority, and both resident and non-resident property owners must, at least in the first instance, resort to and exhaust the remedies provided by the statute in the state tribunals for reviewing such controversies before they may enter either the state or the federal courts at all.

12. Because although where a resident of a state may enter the courts of a state, one who has diversity and a controversy involving more than $3,000.00 need not submit himself to those state courts but may at his election enter the federal courts, yet in a proceeding in rem like a drainage project the resident of the state must first submit to administrative review and may not enter the courts of his state without first exhausting such administrative review, and the non-resident cannot disregard such administrative review and have his proceedings in rem reviewed in the first instance in
311 the federal courts. The non-resident can enter the federal court only when the resident of the state can enter the state court.

13. Because the injuction was granted on the reasoning that one should not be compelled to appear at the hearing to equalize apportionments for the reason that it would be had before said Board and said Board had no authority whatever to act—that one should not be compelled to submit to a hearing before a mere trespasser. This disregards, first, that the mere assertion that the Board was without authority did not justify the failure to appear at said hearing, and, second, it disregards the decisions of the highest court of the state that the Board was acting on full authority, and, third, it appears by the undisputed evidence that they had full authority.

14. Because the hearing enjoined was one to be had for the purpose of equalizing a tentative estimate only which had been made by the appellant Board. This estimate was not final and additional acts by the Board were necessary after such hearing was held before any tax, assessment or servitute could become operative. Manifestly the holding of such hearing could not give rise to a multiplicity of suits as against this appellee, no matter how many suits might arise as to other parties. Manifestly the proposal to hold such hearing cast no cloud on title, because other acts by the Board were necessary before any amount that was finally fixed could become a tax, assessment or servitute upon its property, and there was no evidence at all that there would result irreparable injury to appellee. This is especially applicable to the

appellee City of Sioux Falls and to the four railway company appellees, because even if an assessment had been made and a tax levied, it would have created no lien upon their property.

15. Because appellee made no case under any acknowledged head of equity jurisdiction and in the essence, based its claim for relief upon the assertion that it was threatened with exaction of an illegal tax. At any rate there could be no right to have equitable relief until such time, if ever, as the threatened tax was about to be collected by taking from ap-
312 pellee the title to the lands affected by the assessment. Up to that time nothing could happen more than to exact a sum of money for taxes which were illegal taxes, and for that wrong or threatened wrong the law provides an adequate remedy either in the state or federal courts.

16. Because if, as is contended by the Circuit Court of Appeals, the appellants acted utterly without authority of law and were therefore naked trespassers, that fact gave appellee an adequate remedy at law in either the federal or state courts at their election, to-wit, to sue in trespass—hence appellee's bill in chancery should not have been entertained. If, on the other hand, the acts of the appellants were in all respects lawful, the appellee was not entitled to any remedy either at law or in equity.

17. Because, assuming that appellee could enter the federal court at all, it had at all times a plain, adequate and complete remedy at law in the premises in said courts by appealing from the establishment of the ditch to the circuit court of the state and thence removing the entire controversy involved, including the making of assessments, to the law side of the federal courts, where a trial de novo could be had. Instead appellee lodged a bill of complaint seeking an injunction.

And while it may be true appellee has waived its right to this appeal from the establishment of the ditch, that does not alter the fact that it had not right to enter a court of equity on the ground that though it had at one time the right to thus appeal to and have review in the federal court and a trial de novo there on the law side, by its default and waiver it had voluntarily lost the right.

The right to enter chancery cannot be created by waiving or failing to exercise an adequate remedy at law.

Passing that, the appellee had the right to appeal from
313 the action of the appellant Board as to apportionment of benefits directly to the circuit court of the state and thereupon to remove this very controversy for review on the law side of the federal District Court and there have a trial de novo.

18. Because, assuming for the sake of argument that the District Court and the Circuit Court of Appeals had authority to pass upon the merits, both of them erred in finding for the appellee in that there is absolutely no evidence to support the contention of the appellee on the merits; that is to say, there is no evidence whatever that the appellant Board ever did anything whatsoever in the premises other than what it was authorized to do by the Constitution and statutes of the state of South Dakota. And in addition to this being the state of the evidence, the highest court of the state, construing said Constitution and statutes of the state, has ruled in a way that is binding upon said federal courts that in truth and in fact appellants acted on full authority and in every way in compliance with the requirements of said Constitution and statutes of the state of South Dakota.

19. Because appellee was not entitled to any relief for the reason that it was given legal notice by the notice dated September 15, 1916 of the proposed formation of this new drainage project containing an enlarged benefited area with its property included therein, and that the same was about to be established and that appellee could at a hearing to be held on October 2, 1916, resist such new project, and appellee waived such hearing with full knowledge that it was bound by all subsequent action of the appellant Board which necessarily followed in the premises; and in addition thereto appellee stood by and without any objection on its part to said proceedings, saw the expenditure of over a quarter million dollars, for the payment of which appellee is charged with knowledge that the same must be made out of the property benefited, included in which class is appellee's, and in addition thereto, appellee actively aided and abetted said work as the same progressed and made no protest, and it is now estopped from questioning the legality of said proceedings.

314 Wherefore Appellants pray that the said findings, judgment and decree of the said Circuit Court of Appeals be reversed and that such further orders and proceedings be had as law and justice may require and that this case

may be remanded and such relief given to appellants as may be their due.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 31, 1924.

(Bond on Appeal to Supreme Court, U. S.)

Know All Men By These Presents:

That we, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, as principals, and the Southern Surety Company, of Des Moines, Iowa, as surety, asknowledge ourselves to be jointly indebted to the Northern States Power Company, (a corporation) Appellee, in the above cause, in the sum of One Thousand Dollars ($1,000.00);

Conditioned that, whereas, on the 18th day of March, A. D., 1924, in the Circuit Court of Appeals of the United States, for the Eighth Judicial Circuit, in a suit pending in that Court upon appeal, wherein the Northern States Power Company, a corporation, was plaintiff and appellee, and A. G. Risty, et al., as County Commissioners, etc., et al., were defendants and appellants, numbered on the Docket as No. 6315, a Decree was rendered against the said A. G. Risty, et al., as County Commissioners, etc., et al., appellants, and the said A. G. Risty, et al., as County Commissioners, etc., et al., having obtained an appeal to the Supreme Court of the United States, and filed a copy thereof in the office of the Clerk of this Court, to reverse the said Decree, and a citation directed to the said appellee, citing and admonishing it to be and appear at
315 a session of the United States Supreme Court, to be held in the City of Washington, D. C.;

Now, if the said A. G. Risty, et al., as County Commissioners, etc., et al., shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the

above obligation to be void, else to remain in full force and virtue.

A. G. RISTY,
Signing for all the Appellants, Principals.

(Seal) SOUTHERN SURETY COMPANY OF DES MOINES, IA.,
By H. B. Charnock, Attorney-in-Fact,
Surety.

The foregoing bond is hereby approved.

May 31, 1924.

WM. S. KENYON,
Judge of the United States Circuit Court of Appeals, for the Eighth Circuit.

* * * * * * * * *

(Certified copy of Power of Attorney issued to Mr. H. B. Charnock by the Southern Surety Company of Des Moines, Iowa, etc., attached to original Bond.)

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 31, 1924.

316

Citation.

United States Circuit Court of Appeals Eighth Circuit.

A. G. Risty, et al. as County Commissioners, et al., Appellants,
No. 6315. vs.
Northern States Power Company, Appellee.

United States of America to Northern States Power Company—Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Northern States Power Company is complainant and A. G. Risty et al. as County Commissioners et al. are defendants, and in which case the said defendants perfected an appeal to the Circuit Court of Appeals, Eighth Circuit, an appeal has been allowed to the said A. G. Risty et al. to the United States Supreme Court. You are hereby cited and admonished to be and appear in said court at Washington, D. C. sixty days after the date of this citation to show cause, if any there be, why the

order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable William S. Kenyon, Judge of the United States Circuit Court of Appeals, Eighth Circuit, this 31st day of May, A. D. 1924.

WM. S. KENYON,
Judge of the United States Circuit Court of Appeals, Eighth Circuit.

Service of the within Citation this 2nd day of June, A. D., 1924, at Sioux Falls, South Dakota, is hereby acknowledged.

HAROLD E. JUDGE,
Counsel for Appellee.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No. 6315. A. G. Risty, et al., as County Commissioners, et al., Appellants, vs. Northern States Power Company. Citation on Appeal to Supreme Court, U. S., and acknowledgment of service. Filed Jun. 5, 1924. E. E. Koch, Clerk.

---

317 (Praecipe for Transcript on Appeal to Supreme Court, U. S.)

The clerk of the above named Court is hereby directed to prepare and certify a transcript of record in the above entitled case for the use of the Supreme Court of the United States by including therein the following:

1. The printed transcript of record filed in your court.

2. Appropriate reference to the hearing held at St. Louis in the Circuit Court of Appeals.

3. The opinion of the Circuit Court of Appeals in this cause except the title thereof.

4. The decree of the Circuit Court of Appeals, except the title thereof.

5. Petition for appeal and order allowing the same, except the title thereof.

6. Assignments of error.

7. The bond on appeal and approval, except the title, and the powers of attorney, verification and authentication which may be shown by sufficient memoranda.

8. Citation in appeal and admission of service thereof.

9. Memoranda as to the praecipe filed.

10. Clerk's certificate.

Dated at Sioux Falls, South Dakota, this 3 day of
318 June, 1924.

BENJ. L. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals Jun. 5, 1924.

---

319 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of South Dakota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, except the order of submission and opinion, had and filed in the United States Circuit Court of Appeals, omitting, however, the full captions, titles and endorsements in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for the appellants, in a certain cause in said Circuit Court of Appeals, wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Northern States Power Company was Appellee, No. 6315, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this ninth day of June, A. D. 1924.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 30,419. U. S. Circuit Court Appeals, 8th Circuit. Term No. 454. A. G. Risty et al., as county commissioners, et al., appellants, vs. Northern States Power Company. Filed June 16th, 1924. File No. 30,419.

(4404)

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible].

No. [illegible]

A. G. KEETY ET AL., AS COUNTY COMMISSIONERS, ET AL., APPELLANTS,

vs.

CITY OF SIOUX FALLS

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Filed June 2, 19[illegible].

(19,[illegible])

(30,420)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 455

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS, ET AL., APPELLANTS,

vs.

CITY OF SIOUX FALLS

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1923, of said Court, before the Honorable William S. Kenyon, Circuit Judge, and the Honorable Jacob Trieber and the Honorable David P. Dyer, District Judges.

Attest:

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twentieth day of March, A. D. 1923, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of South Dakota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the City of Sioux Falls was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (Affidavit of Service of Citation.)

In the District Court of the United States for the District of South Dakota, Southern Division.

City of Sioux Falls (A Municipal Corporation), Plaintiff,
vs.
A. G. Risty, et al., Defendants,
and
Minnehaha National Bank et al, Intervening Defendants.

District Court of the United States
District of South Dakota—ss.

W. C. Welsh, being first duly sworn on oath, deposes and says: That he is a citizen and elector of the State of South Dakota. That he served the hereto attached citation in the above entitled cause upon the above named plaintiff on the 8th day of December, 1922, in the city of Sioux Falls, South Dakota, by then and there handing to and leaving with Ralph Parliman, Sr., its solicitor, a true copy of said citation.

W. C. WELSH.

Subscribed and sworn to before me this 8 day of December, 1922.

(Notarial Seal)

DOUGLAS S. ELLIOTT,
Notary Public, South Dakota.

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2 Citation.

In the District Court of the United States, for the District of South Dakota, Southern Division.

City of Sioux Falls (A Municipal Corporation), Plaintiff,
No. 102 vs. In Equity.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J.

O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial & Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter, Intervening Defendants.

United States of America to the above named Plaintiff, City of Sioux Falls,—Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the City of Sioux Falls, a municipal corporation, is complainant and A. G. Risty, et al., as County Commissioners of Minne-
3 haha County, South Dakota, are defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., are intervening defendants an appeal has been allowed the above named defendants and intervening defendants therein to the Circuit Court of Appeals, Eighth Judicial Circuit. You are hereby cited and admonished to be and appear at said Court at the City of St. Paul in the State of Minnesota sixty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable James D. Elliott, Judge of the United States District Court for the Southern Division, District of South Dakota, this 25 day of November, 1922.

JAS. D. ELLIOTT, Judge.

Service of the foregoing Citation, by receipt of copy, at Sioux Falls, South Dakota, is hereby admitted this ..... day of ....., A. D., 1922.

. . . . . .

Solicitor for City of Sioux Falls, Plaintiff.

Endorsed: Filed in the District Court on Dec. 12, 1922 at 2 P. M.

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5 In the District Court of the United States of America, in and for the District of South Dakota, Southern Division.

City of Sioux Falls, Plaintiff,
No. 102 S. D. vs. In Equity.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants.

Be It Remembered, that on the 25th day of July, A. D. 1921, there was filed in the above entitled court, on behalf of the plaintiff, a Bill in Equity; that said Bill in Equity, excluding the verification and Exhibit A, is in words and figures the following, to-wit:

6 (Bill of Complaint.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

City of Sioux Falls (A Municipal Corporation), Plaintiff,
vs.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, W. G. Tyler, and C. T. Charnock as County Commissioners of Minnehaha County, South Dakota; Fred E. Ward as Auditor of Minnehaha County, South Dakota; and J. O. Anderson as Treasurer of Minnehaha County, South Dakota, Defendants.

The Plaintiff a Municipal Corporation of the State of South Dakota, and a resident and citizen of said State of South Dakota, brings this its Bill of Complaint against A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha

County, and J. O. Anderson, as Treasurer, of Minnehaha County, South Dakota, Residents and Citizens of the State of South Dakota and of the Southern Division of the District of South Dakota, and respectfully shows unto the Court:—

First.

That the plaintiff is and was during all of the times hereinafter mentioned a Municipal Corporation organized and existing under and by virtue of the Laws of the State of South Dakota, having its principal place of business in the City of Sioux Falls, in said State, and a Resident and Citizen of the said State of South Dakota.

Second.

That the defendants, A. G. Risty, J. A. Jensen, C. W.
7 Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, Fred E. Ward, and J. O. Anderson, are each of them residents and citizens of the state of South Dakota and of the southern division of the district of South Dakota.

Third.

That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, and C. T. Charnock are the duly elected, qualified and acting county commissioners of the county of Minnehaha, in the State of South Dakota and constitute the board of county commissioners of said county of Minnehaha; that the defendant, G. W. Tyler, is a duly elected and qualified commissioner of said county of Minnehaha, and claims to be the legal commissioner of said county in place of said Chris Olson; that the defendant, Fred E. Ward, is the duly elected, qualified and acting auditor of the said County of Minnehaha, and that the defendant, J. O. Anderson, is the duly elected, qualified and acting treasurer of the said county of Minnehaha.

Fourth.

That the Legislature of the State of South Dakota at the ninth session thereof enacted a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Convenience or Welfare", which purported act was approved by the Governor of the State of South Dakota on March 7, 1905. and which purported act is commonly known as Chapter 98 of the Session Laws of South Dakota of 1905; that
8 subsequently and at its tenth session the Legislature of the State of South Dakota re-enacted said Chapter 98 of the Session Laws of 1905 by enacting a purported law

entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Convenience or Welfare or Whenever it Shall be Necessary or Practicable for Drainage of Agricultural Lands", which purported law was approved by the Governor of the State of South Dakota February 21st, 1907, and which purported law is commonly known as Chapter 134 of the Session Laws of South Dakota of 1907; that by said Chapter 134 of the Session Laws of 1907 the Legislature of the State of South Dakota attempted to re-enact said purported law known as Chapter 98 of the Session Laws of 1905, together with amendments thereto; that subsequently the Legislature of the State of South Dakota at the Sixteenth Session thereof re-enacted said Chapter 134 of the Session Laws of 1907 with amendments thereto and that such re-enactment is contained in the South Dakota Revised Code of 1919, as Sections 8458 to 8491 inclusive thereof; that at the Second Special Session of the Legislature of the State of South Dakota, held in the year 1920, the Legislature of said State enacted a purported law entitled "An Act to Amend Sections 8464, 8471, 8472 and 8473 of the South Dakota Revised Code of 1919, Relating to Drainage and Declaring an Emergency," said purported law being Chapter 46 of the Laws of the Second Special Session of the Legislature of the State of South Dakota; that a copy of the purported law of the State of South Dakota, known as Chapter 98 of the Session Laws of 1905 as amended and re-enacted as Chapter 134 of the Session Laws of 1907, and as amended and re-enacted as Sections 8458 to 8491 of the South Dakota Revised Code, 1919, and amended at the Second Special Session of 1920 is hereto attached, marked
9 "Exhibit A", and made a part hereof.

Fifth.

That prior to the year 1916 the Board of County Commissioners of the said County of Minnehaha established within said County a drainage ditch known as "Drainage Ditches No. 1 and No. 2", which drainage ditches were designed for the purpose of draining upwards of twenty thousand acres of agricultural land situated in Townships 101, 102, 103 and 104 North, of Range 49, West of the Fifth Principal Meridian, in the said County of Minnehaha; that said drainage ditches were established pursuant to and under the provisions of said purported Law known as Chapter 134 of the Session Laws of South Dakota of 1907, and extended for a distance of several miles through said townships, and were fully

completed prior to the year 1916; that an assessment for the cost of the construction of said drainage ditches No. 1 and No. 2 was made prior to the year 1916; that prior to said assessment the said Board of County Commissioners equalized the benefits to the lands so assessed and by such equalization of benefits established the area of the drainage district and determined the various properties benefited by said drainage ditches No. 1 and No. 2; and that all matters connected with the construction of said ditches and with the assessment of the costs thereof were fully completed prior to the year 1916.

Sixth.

That the land drained by said drainage ditches No. 1 and No. 2 is situated in the valley of the Big Sioux River north of the city limits of the city of Sioux Falls, which city is a municipality of upwards of twenty-five thousand inhabitants; that the Big Sioux River flows in a southerly direction through said townships 101, 102 and 103 north of said Range 49, West of the Fifth Principal Meridian, and that the City of Sioux Falls is situated in said Township 101; that after entering said township 101 at the northern boundary line thereof the said Big Sioux River flows in a southerly direction to the vicinity of the southern boundary line of said township and then flows in an easterly direction for a distance of some miles and then in a northerly direction through the said City of Sioux Falls and towards the north line of said township and then continues in an easterly direction until it passes out of said township over the eastern line thereof; that in its course in a northerly direction through the City of Sioux Falls the said Big Sioux River passes over a series of falls aggregating approximately ninety feet; that the city water supply of the said City of Sioux Falls is situated in a gravel bed extending over a considerable area in said townships 101 and 102 north of the City of Sioux Falls; that the South Dakota State penitentiary is situated north of the said City of Sioux Falls, and that said penitentiary and the lands belonging thereto are situated in said townships 101 and 102.

Seventh.

That the Big Sioux River has its source in Lake Pelican adjoining the City of Watertown in the County of Codington and State of South Dakota, which City of Watertown is situated approximately one hundred miles north of the City of Sioux Falls; that from the said City of Watertown the said Big Sioux River flows in a generally southerly direction but

with many crooks and bends through the counties of Codington, Hamlin, Brookings and Moody to the City of Sioux Falls, in the County of Minnehaha, and that the said Big Sioux River during its southward course drains a large area of territory both eastward and westward of its channel.

Eighth.

That none of the property of Plaintiff described in said purported drainage Notice, of which Exhibit "C" is a copy is agricultural land; that said property is and prior to the construction of said drainage ditches No. 1 and No. 2 was platted property located within the limits of he City of Sioux Falls, in said County of Minnehaha, and was then and ever since has been entirely used for other than agricultural purposes; that upon a portion of said property there is constructed, owned and operated by Plaintiff its City Pumping Station, and its wells, from which wells and Pumping Station, water is furnished to the Citizens of Sioux Falls, and
11 which wells and Pumping Station was acquired by the City, and in operation prior to the construction as aforesaid of said Drainage Ditches No. 1 and 2, and that Plaintiff's said property and rights are not benefitted by said Drainage Ditches No. 1 and No. 2, but on the contrary are damaged thereby, in this that the former ditches and spill-way was efficient and relieved the Valley Northwest of the Spill-way from the over-flow of water; while the present ditch is wholly inefficient and incapable of carrying off the surplus waters, for which purpose it was intended.

Ninth.

That as originally constructed said drainage ditches No. 1 and No. 2 emptied into the Big Sioux River through a ditch constructed across the land immediately north of the City of Sioux Falls, which ditch was between the City of Sioux Falls and the gravel bed from which said city obtains its water supply, and emptied into the Big Sioux River in the Northeast portion of the City of Sioux Falls and north of the series of falls situated upon said river along its course through the said City of Sioux Falls; that subsequent to the construction of said drainage ditches No. 1 and No. 2 and about the years 1915 and 1916 and volume of water passing through said drainage ditches caused the outlet of said drainage ditches into the Big Sioux River to wash out a channel upon the land though which said outlet was constructed to such an extent that there arose im-

minent danger that the course of the Big Sioux River
12 would be changed so that all of the water in the channel of said river would be diverted through said drainage ditches and the outlet thereof, and a new river channel formed by said ditches which would cause the water in said river to cease flowing through its proper and natural channel and over the series of falls in the City of Sioux Falls, and to flow instead through said drainage ditches and the outlet thereof into the Big Sioux River at a point north of the City of Sioux Falls; that such diversion of the channel of the said Big Sioux River threatened to cause enormous damage to property in the said City of Sioux Falls situated along the channel of said river, and to destroy plaintiff's said water power obtained from said river at the falls thereof, and also to destroy the municipal water supply of the City of Sioux Falls by draining the water from the gravel bed from which said municipal water supply is obtained.

Tenth.

That the Board of County Commissioners of the said County of Minnehaha, for the purpose of repairing and maintaining said drainage ditches No. 1 and No. 2 in such manner as to avoid the threatened change in the Channel of the Big Sioux River and to prevent the drainage of the gravel bed and from which the City of Sioux Falls obtains its Municipal Water supply, and to prevent the injury to the property owners of the City of Sioux Falls and the destruction of the water power at the falls of the Big Sioux River, in the City of Sioux Falls, which would be caused by the threatened change in the channel of the Big Sioux River, caused to be constructed in the Summer of the year 1916, various dams and gateways at various places along said drainage ditches No. 1 and No. 2, made changes in the Channel of the Big Sioux River along the course of said drainage ditches and caused to be re-constructed the spillway at the outlet of said drainage ditches into the Big Sioux River; that said construction work was not done for the purpose of draining lands in addition to the lands theretofore found to be benefitted by and assessed for
the cost of the installation and construction of said
13 drainage ditches No. 1 and No. 2, but for the sole and only purpose of maintaining said drainage ditches No. 1 and No. 2 in such manner as to permit them to attempt to perform the function for which they were originally constructed without danger of damage to the property and rights theretofore threatened as hereinbefore pleaded.

Eleventh.

That there has been expended by the board of county commissioners of said Minnehaha county upon the construction of ditches, dams, gateways and other work as aforesaid, and upon the reconstruction of said spillway upon the outlet of said drainage ditches No. 1 and No. 2 a sum in excess of Two Hundred Fifty-five Thousand Dollars ($255,000.00) for which said sum the said board of county commissioners has issued drainage warrants, and that there is due for principal and interest upon said warrants a sum, as plaintiff is informed and believes, in excess of Three Hundred Thousand Dollars ($300,000.00).

Twelfth.

That before the construction of said spillway, dams, retaining gates, and other work, and straightening of the channel of the Big Sioux River, no petition therefor signed by one or more owners of land likely to be affected was ever made or presented to the Board of County Commissioners of the said County of Minnehaha, excepting that on or about the 3rd, day of August 1916, there was filed in the office of the County Auditor of the said County of Minnehaha a purported petition signed by F. L. Blackman and other persons, which said Petition purported to be a petition "to reconstruct and improve Drainage Ditches No. 1 and No. 2, in Minnehaha
14 County, South Dakota, and to construct a new spillway and outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor, by assessment upon the property, persons and corporations benefitted thereby", that drainage ditches No. 1 and 2 referred to in said purported drainage notice, of which "Exhibit C" is a copy, is a combination of and is the same as drainage Ditches No. 1 and No. 2 hereinbefore referred to; that the owners of some of the property included within the drainage area of drainage ditches No. 1 and No. 2 as theretofore established as aforesaid objected to the repair of said ditches and to the assessment of their property for the cost of said repairs and of the maintenance of said ditches, and that on account of such objection and as a mere subterfuge and for the sole and only purpose of attempting to lay a foundation authorizing the Board of County Commissioners of said Minnehaha County to change the boundaries, of the Drainage area or the district of said drainage ditches No. 1 and No. 2, and to assess property not included within the area of said drainage ditches and not benefitted by said Ditches No. 1 and No. 2, for the cost of the necessary repairs and maintenance of said ditches theretofore established, con-

structed and accepted, the then Board of County Commissioners of said County of Minnehaha, caused the said purported petition hereinbefore in this paragraph referred to, to be filed, and that said Board of County Commissioners acquired by the filing of said Petition no power or jurisdiction under and by virtue of the drainage laws of the State of South Dakota, hereinbefore referred to, to proceed in any manner to include any of the property or rights of Plaintiff within the drainage area or district of said ditches No. 1 and No. 2 or of said ditch No. 1 and 2, and that said Board and the said Defendants now constituting said Board never acquired and have no power or jurisdiction to determine that any of the property or
15 rights of Plaintiff are benefitted by said drainage ditches No. 1 and 2, now attempted to be designated drainage ditch No. 1 and 2, or to assess said property or rights, or any portion thereof, for the cost of the necessary repairs and maintenance of said drainage ditches No. 1 and No. 2; that upon the filing of said purported petition the County Commissioners of said County of Minnehaha did not transmit a copy of the same to the State Engineer of the State of South Dakota; that the said Board of County Commissioners of the said County of Minnehaha did not inspect the proposed route of said drainage ditches and did not cause a survey of said drainage ditches to be made by a Surveyor; that no survey of the same was ever made under the general supervision of the State Engineer of the State of South Dakota, or otherwise prior to the construction thereof; that no Surveyor's report in writing was made to the said Board of County Commissioners; that no Surveyor's report, or copy of any map or plan made or filed by said surveyor was furnished to the said State Engineer prior to the beginning of said work; that the said Board of County Commissioners of said Minnehaha County did not file with the said purported petition its determination of its costs, length and width of the drainage improvement furnished in said petition; that the said Board of County Commissioners did not fix a time and place for a hearing of said Petition and did not give notice thereof in the manner provided by law; that none of the proceedings of the said Board of County Commissioners in the matter of the said Drainage Petition have been recorded and indexed in any book kept for that purpose in the office of the Auditor of said County of Minnehaha; that no drainage district for the purpose of the construction of said spillway, dams, retaining gates, ditches, and other work has
16 ever been established other than the drainage district established as alleged in paragraph Fifth hereof.

Thirteenth.

That prior to the re-construction of said spillway, dams retaining gates, ditches and other work, the said Board of County Commissioners of Minnehaha County did not prepare plans and specifications therefor, and did not file plans or specifications therefor in the office of the County Auditor of the said County of Minnehaha, and did not let contracts upon competitive bids for the construction of said spillway, dams, retaining gates, ditches and other work; that prior to the re-construction of said spillway the said Board of County Commissioners did advertise for competitive bids for the construction of the spillway in accordance with certain plans therefor; that bids were received by the said Board of County Commissioners for the construction of a spillway in accordance with such plans, and that the same were rejected by the said Board of County Commissioners, and subsequently the said Board of County Commissioners adopted a new and amended plan for the construction of an entirely different form of spillway, and without advertising for bids for such construction made a contract for the construction of said spillway in accordance with said new and amended plans with the Sioux Falls Construction Company, under which said contract the said Sioux Falls Construction Company constructed such spillway upon the cost plus plan; that under said contract the said Sioux Falls Construction Company was paid the entire cost of the construction of said spillway, together with nine per cent (9%) of the total cost added; that the cost of the construction of said spillway under said cost plus plan was, as plaintiff is informed and believes, upwards of one hundred fifty thousand dollars ($150,000.00) for which said sum drainage ditch warrants upon said drainage ditches No. 1 and No. 2 were issued by the said Board of County Commissioners of Minnehaha County to the said Sioux Falls Construction Company, and to other persons.

Fourteenth.

That on or about the 20th day of November, 1920, the Board of County Commissioners of said Minnehaha County entered into a certain contract with Albert J. Chenoweth and Herman Rettenhouse, co-partners as Chenoweth & Rettenhouse, whereby the said Board of County Commissioners employed the said Chenoweth & Rettenhouse to make a topographical survey showing the lands benefitted and subject to assessment for the payment of the cost of said spillway, dams, retaining gates, ditches and other work, and that by said contract the said

Board of County Commissioners agreed to pay the said Chenoweth & Rettenhouse for said survey the sum of Seven thousand five hundred dollars ($7,500.00) to be paid in drainage ditch warrants drawn on drainage ditches No. 1 and No. 2; that the said Chenoweth & Rettenhouse thereupon proceeded to make the purported survey of the lands purported to be subject to assessment for the construction of said spillway, dams, retaining gates, ditches and other work; that the said Chenoweth & Rettenhouse made and filed a report with the said Board of County Commissioners, in which report they made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereunto annexed, marked "Exhibit B" and made a part hereof.

Fifteenth.

That on or about the 10th day of June, 1921, the said Board of County Commissioners of the said County of Minnehaha, adopted a purported Notice of the time and place for equalizing the proportioning of benefits for the construction of said spillway, dams, retaining-gates, ditches and other
18 work, and caused the same to be published on July 13th, 1921, and on July 20th, 1921, in the Sioux Falls Daily Argus-Leader, the Official Newspaper of the said County of Minnehaha; that a copy of said Drainage Notice is hereto annexed marked Exhibit "C"; that the proportion of benefits assessed against the Plaintiff is 3145.95 units out of a proposed total of 32,549.62 units, and that upon the basis of such apportionment the assessment against Plaintiff and its property will be in excess of the sum of Twenty-nine Thousand Nine Hundred Five Dollars and Fifty-two Cents ($29,905.52); that the said Board of County Commissioners of said Minnehaha are threatening to and will, as Plaintiff is informed and believes, unless enjoined by this Court, make an apportionment of benefits upon Plaintiff of 3147.95 units and will make an assessment thereon against Plaintiff and its property in the sum in excess of Twenty-nine Thousand Nine hundred Five Dollars and Fifty-two Cents ($29,905.52), and that the Defendant Fred E. Ward as County Auditor of the said County of Minnehaha will spread such assessment upon the books of his Office, and that the Defendant, J. O. Anderson as Treasurer of the said County of Minnehaha, will proceed to collect the same pursuant to the provisions of said purported Statute Exhibit "A".

Sixteenth.

That this action is a suit of a civil nature to resist and prevent an assessment upon the property of plaintiff under the

pretended authority of a purported act of the Legislature of the state of South Dakota claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000.00) and is the amount of said threatened assessment, to-wit: a sum in excess of Twenty-nine Thousand nine hundred Five Dollars and Fifty-Two Cents ($29,905.52).

Seventeenth.

That the costs of the board of county commissioners of said Minnehaha County in constructing said spillway, dams, retaining gates, and ditches, were unauthorized under the constitution and laws of the state of South Dakota, and that the same have never been approved by the State Engineer
19 of the state of South Dakota; that no benefits have accrued to plaintiff or its property by the construction of said spillway, dams, retaining gates, and ditches, and by the other work done as aforesaid upon the property in the drainage area of said drainage ditches No. 1 and No. 2, but that the same have been and are a positive damage to the property of plaintiff.

Eighteenth.

That said purported statute of the state of South Dakota, "Exhibit A" hereto, is unconstitutional and void, in that the same is in violation of Section 2 of Article VI. of the Constitution of the State of South Dakota, and in that the same is in violation of the Fourteenth Amendment of the Constitution of the United States; that said Statute, "Exhibit A", is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area, and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies and other corporations, and upon the property of municipal and quasi-municipal corporations, and upon platted property in cities and villages. Said purported law, "Exhibit A", is further unconstitutional and void in that the same provides for an assessment against property without the right of the property owner to be heard thereon and without notice of any character to the property owner; that if said apportionment of benefits be made as threatened by the said board of county commissioners of said Minnehaha County, and as is provided in said notice, "Exhibit C", the same will consti-

tute the taking of the property of plaintiff and of the
20 other property owners affected by said notice without due process of law and will deny and deprive Plaintiff of the equal protection of the laws; that a cloud will be placed upon the title of the Plaintiff to its real property situated within said drainage area affected and attempted to be established by said notice, "Exhibit C", that there will result a multiplicity of suits; that Plaintiff and other property owners affected will suffer immediate and irreparable injury; and that Plaintiff has no plain, speedy and adequate remedy at law.

Wherefore, plaintiff prays judgment that the defendants and each of them, their agents, servants, employees, attorneys and successors in office and each and every one of them be forever restrained and enjoined from proceeding further in the making of an apportionment of benefits upon the property of plaintiff for the construction of said spillway, dams, retaining gates, ditches and for the other work done as aforesaid by the Board of County Commissioners in the area of said Drainage Ditches No. 1 and No. 2 and restrained and enjoined from making any assessment upon the property of plaintiff for the cost of the construction of said spillway, dams, retaining gates, ditches, and other work or any part thereof, and from proceeding in any manner under said purported statute Exhibit "A" in the construction of any work in the area of said Drainage Ditches No. 1 and No. 2 and from doing any act looking toward the apportionment of benefits for any work heretofore done in the area of said Drainage Ditches No. 1 and No. 2 and from doing any act tending towards the making of an assessment for the cost of any such work heretofore done and from in any manner proceeding under said purported law Exhibit

"A" in the doing of any work in the area of
21 said Drainage Ditches No. 1 and No. 2; that the defendant, Fred E. Ward, as Auditor of the said county of Minnehaha, be forever restrained and enjoined from making any apportionment of benefits for work done, as aforesaid, in the area of said Drainage Ditches No. 1 and No. 2 and from making any assessment therefor, and from certifying any assessment therefor to the County Treasurer of the said county of Minnehaha; that the defendants A. G. Risty, J. A. Johnson, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of the said county of Minnehaha, and their successors in office be forever restrained and enjoined from fixing a proportion of benefits for the construction of said spillway, dams, retaining gates

and ditches upon the property of plaintiff and upon the property of the other property owners named in said notice Exhibit C and forever restrained and enjoined from making any assessment against plaintiff, or its property, or against the property of any other property owner in the area of said Drainage Ditches No. 1 and No. 2 for the cost of said work; that the defendant J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, and his successors in office be forever enjoined and restrained from filing any assessment and from collecting any assessment against the property of plaintiff or of the other property owners named in said notice Exhibit C, upon any assessment for the construction of said spillway, dams, retaining gates and ditches; that the said purported statute of the state of South Dakota, Exhibit A, hereto be adjudged and decreed to be unconstitutional and void; that all acts of the Board of County Commissioners of the said county of Minnehaha and of the State Engineer of the state of South Dakota heretofore done in connection with the construction of said spillway, dams, retaining gates and ditches be adjudged and decreed to be illegal and void; that it be adjudged and decreed that no benefits have resulted to plaintiff from the construction
22 of said spillway, dams, retaining gates and ditches, and that no apportionment of benefits or assessments of damages ever be made against plaintiff or its property therefor.

That pending the issuance of a perpetual injunction herein, this Honorable Court grant an interlocutory injunction herein restraining the defendants herein, their agents, servants and employes and each and every of them from doing any of the above mentioned acts until the final hearing herein or until the further order of this court; that before the hearing and determination of plaintiff's application for an interlocutory injunction this Honorable Court grant a temporary restraining order restraining the said defendants, their agents and servants and each and every of them, from doing any of the above mentioned acts until the hearing and determination of plaintiff's application for an interlocutory injunction herein.

The plaintiff further prays that a subpoena of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, individually and as County Commissioners of the County of Minnehaha in the State of South Dakota, and to

Fred E. Ward, individually and as auditor of the said county of Minnehaha, and to J. O. Anderson, individually and as Treasurer of the said County of Minnehaha, thereby commanding them and each of them on a day certain therein to be named to be and appear before this Honorable Court, and then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular, the premises and to perform and abide by such order, direction or decree as may be made in the premises, and that on final hearing hereof said order of injunction may be made perpetual. Plaintiff further prays for such other and further relief as shall to the Court seem just, proper and equitable, and for its costs and disbursements herein.

23 R. W. PARLIMAN, Sr.
Solicitor for Plaintiff.

R. W. Parliman, Jr.
James C. Parliman
of Counsel.

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24 Exhibit B.

Proposed Distribution of Proportional Benefits.

	District or Division	Acres	Units	Percent of total.	
1.	Farm lands north of City Limits and North of South Line of Sec. 12-101-50	13,271.09	10862.30	33.4%	$103,191.85
2.	City Lots and Town of Renner lying north of above line,	81.20	42.52	0.1%	403.94
3.	Farm land and tracts south of above line,	2,065.23	2958.45	9.1%	28,105.28
4.	City lots south of above line,	361.60	1372.52	4.2%	13,038.94
5.	City of Sioux Falls,		3147.95	9.7%	29,905.52
6.	Minnehaha County,		2518.36	7.7%	23,924.42
7.	Township roads,		1573.98	4.8%	14,952.81
8.	Railroads,		4721.91	14.5%	44,858.15
9.	Northern States Power Company,		5351.63	16.5%	50,840.49
	Totals,	15,722.12	32549.62	100.0%	$309,221.40

In the above calculation the Value of One Unit is taken at $9.50.

CHART

TOO

LARGE

FOR

FILMING

26 Endorsed: Filed in the District Court on Jul. 25, 1921, at 5 P. M.

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27 (Order granting leave to Minnehaha National Bank of Sioux Falls et al., to intervene and be made parties defendant.)

The matter of hearing the show cause order heretofore issued out of this Court at the instance of the Minnehaha National Bank of Sioux Falls, South Dakota, et al, to the above named plaintiff and defendants in the above entitled cause, coming on regularly for hearing before this Court, at the court room thereof, in the Federal Building, in the City of Sioux Falls, South Dakota, the said plaintiff appearing by its attorneys of record, and the said defendants appearing by their attorney of record, and the said petitioning interveners appearing by their attorneys, Porter & Bartlett, and after hearing of said matter, it is hereby

Ordered and Adjudged that the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, said petitioning interveners, petition be granted, and the said Minnehaha Nation Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Hartford, South Da-
28 kota, The Colton State Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, the Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, H. E. Donahoe, and W. G. Porter, be and they are hereby made parties defendant to this cause of action, and they are hereby given until the 25th day of August, 1921, at Ten o'clock A. M. thereof, within which time to file their answer to plaintiff's bill of complaint herein, and to make a return to plaintiff's show cause order herein.

And good cause appearing therefor, it is further likewise Ordered that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, have and they are hereby granted until August 25th, 1921 at Ten o'clock A. M. to file their answers to plaintiff's bill herein, and to make a return to plaintiff's show cause order herein.

And it is further Ordered that the hearing of said show cause order be and the same is hereby adjourned to August 25th, 1921, at Ten O'clock A. M.

Dated this 11th day of August, A. D. 1921.

By The Court:

JAS. D. ELLIOTT,
Judge of the District Court.

(Seal of Court)

Attest:

Jerry Carleton,
Clerk of the District Court.

29 Endorsed: Filed in the District Court on Aug. 19, 1921, at 2 P. M.

And afterwards, to-wit, on the 1st day of September, A. D. 1921, there was filed in the office of the clerk of said court, Answer of Defendants; that the Title of the case; Paragraphs A, B, C, D, E and G of defendants' Special Answer, Paragraphs "First" to "Eighteenth", inclusive, of defendants' General Answer, Paragraphs I, VII, VIII, IX, XII, XIII, XIV and XV of defendants Affirmative Defense, the Prayer, Petition of F. L. Blackman and others to reconstruct and improve Drainage Ditches No. 1 and 2, the Order for filing said Petition, the Resolution for survey under said Petition, the Resolution fixing the exact line and width of the ditch and fixing the time and place for hearing said Petition, and the Resolution establishing Drainage Ditch No. 1 and 2, all as contained in said Answer of Defendants, is in words and figures the following, to-wit:

30 (Answer.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

City of Sioux Falls (a Municipal Corporation), Plaintiff.

vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha, County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South South Dakota, H. E. Donahoe, and W. G. Porter, Intervening Defendants.

Comes now the above named defendants, A. G. Risty, et al., and for their answer to plaintiff's bill of complaint in the above entitled action, admit, deny and allege as follows:

A.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint, allege that said bill does not state any matter of equity entitling plaintiff
31 to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against the said defendants in that said plaintiff has a plain, adequate and complete remedy at law.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

B.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint and the allegations contained in paragraph eighteen thereof, to-wit: "That there will result a multiplicity of suits and that the owners affected will suffer irreparable injury", are not truly stated or alleged in good faith and are stated with the false and fraudulent purpose of imposing upon the jurisdiction of this court and they are therefore fictitious and fraudulent. And said defendants say there are no other actions at law or in equity pending or threatened against said plaintiff and that said plaintiff has a plain, adequate and complete remedy at law, all of which these defendants allege to be true and plead the same in bar to said bill.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

C.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint, allege that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this Court in that this suit is wholly based upon the alleged existence of a federal question, and that the amount sued for and the value of the subject matter as alleged in said bill is not truly stated or alleged in good faith. That the
32 allegations of plaintiff's bill show it as being "a suit of a civil nature to resist and prevent an assessment upon the property of this plaintiff under the pretended authority of a purported act of the legislature of the State of South Dakota, claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00) and is the amount of the threatened assessment, to-wit: a sum in excess of Twenty-Nine Thousand Nine Hundred Five & 52/100 Dollars ($29,905.52)", are false and stated with a false and fraudulent purpose of imposing upon the jurisdiction of this Court and are therefore fictitious and fraudulent. And said defendants say that the amount involved, or value of the subject matter in this suit, does not exceed the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs; that said bill of complaint upon its face shows that under the

drainage law referred to in paragraph four thereof the amount of the assessment, or the amount in controversy herein, has not been, and cannot be, determined until after the equalization thereof provided for in such statute and until such equalization, the amount to be hereinafter assessed, if any, by said Board of County Commissioners or by the Courts of the State of South Dakota, to which an appeal is taken, as provided for by said law is purely speculative, is uncertain and undeterminable at this time by said plaintiff, this court, or anyone at all, and is dependent entirely upon the showing made by this plaintiff at such hearings and determinations provided for by said law, as to the amount of benefits received by this plaintiff; and that no sum has been or can be assessed and determined against the plaintiff's property until such equalization of the proportion of benefits has
33 been had, and at which hearings this plaintiff is permitted to make his showing therein and the amount of benefits, if any, which plaintiff does receive are thereafter equalized and fixed by said Board or Court and the amount so fixed is then extended and assessed against the property of said plaintiff, and not otherwise, all of which these defendants aver to be true and set up the same in bar of plaintiff's bill of complaint herein.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

D.

The defendants above named, A. G. Risty et al, for answer to that part of plaintiff's bill herein, upon which it bases the jurisdiction of this Court, showing "That this action is a suit of a civil nature to resist and prevent an assessment upon the property of plaintiff under the pretended authority of a purported act of the Legislature of the State of South Dakota, claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, etc", and says that the same is not made truly and in good faith, but is stated with the false and fraudulent purpose of imposing upon the jurisdiction of this Court and is therefore fictitious and fraudulent. And these defendants say that said plaintiff invoked the law, which it now attempts to declare to be in controvention and in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States. That, by its Mayor, George W. Burnside, attested, [but] its auditor, W. C. Leyse, under the seal of said municipality, it being a land owner likely to be affected and benefited thereby, was the first

signer and petitioner upon the petition presented to the defendant Board of County Commissioners on August 3, 1916, upon which said petition said drainage ditch No. 1 & 2 was established after legal notice given, upon October 3, 1916, no one resisting the same. And said plaintiff, its officers,
34 agents and servants, without objection, and with the full knowledge, acquiescence and consent that the work was being done and material furnished and incorporated into said ditch and money expended thereon, allowed the work to be continued and said ditch to be established and constructed and said plaintiff acquiesced and consented thereto with full knowledge that the same was to be paid for by a special assessment against the property affected and benefited thereby, and that said plaintiff has for more than three years last past, and is now, receiving enormous benefits by reason of the establishment, construction and operation of said drainage ditch No. 1 & 2, all of which these defendants allege to be true and by reason of which facts said plaintiff is now estopped and barred from questioning the constitutionality of said drainage law and these defendants plead the same in bar to the plaintiff's bill.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

E.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint herein, allege that on or about December 4, 1920, an equity suit was instituted in the Circuit Court within and for Minnehaha County, in the State of South Dakota, the same being a Court of general jurisdiction and having jurisdiction over the subject matter there presented by one Oluf O. Gilseth, whose lands are affected by the construction of drainage ditch No. 1 & 2 and against which lands the proportion of benefits for the construction of said ditch has been proportioned upon the same basis and in like manner as the proportion of benefits upon the lands of this plaintiff as hereinafter set forth, which action was brought by the said Oluf O. Gilseth, for himself and as representing an informal organization of farmers and others who are similarly situated, against the defendants herein, the Board of County Commissioners of Minnehaha County, South Dakota, and other persons, which action was instituted with full knowledge, approval, acquiescence and consent of the plaintiff herein, its officers, agents and attorneys, and in which said cause the same facts are alleged and relied on in plaintiff's bill of complaint as herein set forth, and which

said bill of complaint prayed that said defendants be
35 forever enjoined and restrained from making or attempting to make any proportion of benefits upon the property of the plaintiffs herein, or the property of other property owners within the drainage area of the drainage ditches No. 1 and No. 2 for the costs and construction of said spillway, dams, retaining gates or other work, and be forever restrained and enjoined from levying any assessment upon the property of the plaintiff or upon the property of other property owners in said drainage area for the payment of the costs of the construction of said spillway, dams, retaining gates or other work, for the reason and upon the grounds that the law under which said drainage ditch was established and constructed was in contravention of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States, to which said bill of complaint said defendant Board of County Commissioners and these intervening defendants set up and relied upon the same facts and defenses as are hereinafter set forth; that said action came on for trial before said Circuit Court of Minnehaha County, South Dakota, with the full knowledge, acquiescence, consent and approval of plaintiff and at which trial plaintiff was entitled to be heard and was represented by its attorneys on the 31st day of January 1921, evidence was introduced upon said hearings on behalf of said plaintiff and these defendants and after the taking of evidence therein was closed and thereafter upon the facts there presented, and in the trial of which the plaintiff could have and did participate, said Court made findings and conclusions and judgment thereon dismissing said action upon its merits. That a duly exemplified copy of said bill of complaint, answer, findings,
conclusions and judgment are hereto attached, mark-
36 ed "Exhibit B", and made a part hereof, all of which these defendants allege to be true and plead the same in bar.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

* * * * * * * * * * *

37 G.

Comes now the above named defendants, A. G. Risty, et al, and for answer to plaintiff's bill allege that this suit does not really and substantially involve a controversy within the jurisdiction of this court, in that this suit involves the determination of facts and matters controlled and governed by

the drainage statute of South Dakota, mentioned in plaintiff's bill of complaint and which by its provisions creates and provides its own special tribunal with exclusive original jurisdiction to try and determine the questions necessarily involved therein, and which are attempted to be presented for litigation in this action, and that, until such determination by said special tribunal so provided for, this court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, and that said special tribunal has not fully determined the matters and things herein presented for determination. All of which these defendants allege to be true and plead the same to the jurisdiction of this Court.

Wherefore, defendants pray that plaintiff's bill of complaint be dismissed with costs.

H.

Comes now the above named defendants, A. G. Risty, et al, and for their further answer to the allegations contained in plaintiff's bill of complaint, admit, deny and allege as follows:

First.

That these defendants admit Paragraph I of said bill.

Second.

That these defendants admit Paragraph II of said bill.

Third.

That these defendants admit Paragraph III of said bill.

38 Fourth.

These defendants, answering said bill of complaint, admit that the Legislature of the State of South Dakota, at its Tenth Session enacted a law entitled: "An Act for the Establishment, Construction and Maintenance of Drainage and Levies in Counties, Whenever such Drainage shall be Conducive to the Public Health, Convenience or Welfare, or Whenever it shall be Necessary or Practicable for the Drainage of Agricultural Lands", which law was approved by the Governor of the State of South Dakota on February 21st, 1907, said law being Chapter 134 of the Session Laws of South Dakota of 1907, and that subsequently thereto, the Legislature of the State of South Dakota, in the years 1909, 1911, 1915 and 1917, enacted laws amendatory thereto, and in 1919 re-enacted said law and amendments thereto, as Sections 8458, to 8491, inclusive, of the South Dakota Revised Code for 1919, and thereaf-

ter and in the years 1920 and 1921, enacted amendments thereto, which law and amendments now constitute the drainage laws of the State of South Dakota, and specifically deny each and every other allegation of said paragraph.

Fifth.

These defendants answering the Fifth paragraph of complainant's bill, deny that the Board of County Commissioners of Minnehaha County, South Dakota, established a drainage ditch known as "Drainage Ditch No. 1 and No. 2", as therein alleged, but allege the fact to be that in the year 1907 the Board of County Commissioners of Minnehaha County, upon the petition of William H. Lyon, accompanied by a proper bond, approved by the County Auditor, and after due notice and other procedure pursuant to and under Chapter 134 of the Laws of 1907 of the State of South Dakota, established Drainage Ditch No. 1 commencing at a point named in the Southeast Quarter (SE¼) of Section Twenty-nine (29), Township One Hundred two (102), Range Forty-nine (49), running thence about two (2) miles directly South, thence in a Southeasterly course about a mile, cutting through the rim of the natural ridge or bluff just North and East of the State Penitentiary in the City of Sioux Falls, and descending about one hundred (100) feet following the slope of the hill, and terminating in the Big Sioux River on the Northeast Quarter (NE¼) of Section Nine (9), Township One Hundred One (101), Range Forty-nine (49), which said drainage ditch was constructed so as to have a bottom width of forty (40) feet, except where the same cut through the bluff and descended into the Big Sioux River, where a thinly lined concrete gutter or spillway, with sufficient capacity only to carry the water that was planned to come through the said ditch, was constructed, but the terminal thereof was never safely or securely anchored and established, and that thereafter and before the construction of said Drainage Ditch No. 1 had been completed, one Iver R. Peterson and numerous other persons, filed their petition in regular form, accompanied by a proper bond duly approved by the County Auditor, with said Board of County Commissioners, asking and praying that the said Drainage Ditch No. 1 be extended Northward several miles through the Valley of the Big Sioux River, to drain other agricultural lands therein situated; that said petition was found sufficient in form, and was ordered filed and referred to the State Engineer, and a resolution for survey regularly adopted thereon, and thereafter, and

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upon the Engineer's written report of said survey, by
40 resolution, the exact line and width of said ditch extension was fixed, and after due notice and hearing, said petition was allowed, and resolution adopted by the Board of County Commissioners establishing said drainage ditch, and designating it as "Drainage Ditch No. 2", extending from the North end of Drainage Ditch No. 1, hereinbefore described, Northward about twelve (12) miles to a point near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, and said drainage ditch was thereafter constructed, which ditch so constructed, tapped the Big Sioux River in two places, and the assessment for the costs and expense of the construction thereof was duly spread upon the lands benefited within the territory embraced within the initial point in Dell Rapids Township, and the terminal point in Section Nine (9) of Sioux Falls Township; and further answering said Paragraph V, these defendants admit that prior to the year 1916 assessments were duly spread upon the lands determined to be benefited by the construction thereof, and such assessments collected, but deny each and every other allegation in said paragraph contained.

Sixth.

These defendants answering the sixth paragraph of complainant's bill, admit the allegation contained in said paragraph, but allege the fact to be that in addition to the lands drained lying North of the City of Sioux Falls, the said Drainage Ditches No. 1 and No. 2 also drained, affected and benefited lands lying West and South of said City and also the lands adjacent to said River through and in said City of Sioux Falls were drained, affected and benefited thereby.

41

Seventh.

These defendants answering the Seventh Paragraph of the complainant's bill, allege that they are without knowledge as to the facts therein set out, and therefore deny the same.

Eighth.

These defendants answering the Eighth paragraph of complainant's bill, admit that upon a portion of said property there is constructed, owned and operated by the plaintiff, its city pumping station and its wells, from which wells and pumping station water is furnished to the citizens of Sioux Falls, but specifically deny each and every other allegation, matter and thing in said paragraph contained.

Ninth.

These defendants answering the Ninth paragraph of complainant's bill, admit the statements therein made, but in explanation thereof, allege the further facts to be that after the construction of said spillway, as above described, the capacity of said ditches were increased by the rapidly flowing waters therein, eroding the banks and widening said Ditch No. 1 to nearly twice its original width of forty feet; the natural barrier which originally prevented the waters of the Big Sioux River from flowing into said Ditch No. 1 near its initial point, except in flood times, eroded and wore away and permitted a large part of the water from the Big Sioux River to flow uncontrolled directly into said ditch and through the same to said spillway, which said spillway did not have the capacity to safely carry all of the flood waters that came to it through said ditch; that by reason of the foregoing facts said ditches became out of repair, and filled with sand bars and mud, and other obstructions, and that, owing to the tortuous course of the Big Sioux River through the district drained by said Ditches No. 1 and No. 2, the said river and said ditches were inadequate to carry away the flood waters and properly drain the lands within the area of said drainage ditches during flood seasons; that on or about the 15th day of March, 1916, during a spring flood, said spillway and outlet for said drainage ditches, as above described, was washed out and destroyed, so that the waters passing through said ditches and outlet, were wholly uncontrolled; that at the place where said spillway had been constructed, the waters descend-
42 ed to the basin of the Big Sioux River over a steep bluff by a drop of approximately of the height of one hundred feet, and that after the washing out and destruction of said spillway and outlet, the waters from said ditches washed out a deep gorge in the bluff, and tore away and destroyed the adjacent land to the extent of several acres; that said outlet and spillway were located in the immediate vicinity of State lands belonging to the State of South Dakota, and in the immediate vicinity of the State Penitentiary, and also of the City Water Works of the City of Sioux Falls, by means of which water works the said City was supplied with water from gravel beds immediately adjacent to said drainage ditches, and that by reason of the washing out of said spillway and of the uncontrolled waters of said ditches, the said lands of the State of South Dakota, the State Penitentiary and the water works and water supply of the said City of Sioux Falls, as well as the properties of private citizens in the vicinity of

said outlet and spillway, were greatly imperiled and endangered; that there was imminent danger of the waters of the Big Sioux River being entirely diverted from their natural course into Drainage Ditch No. 1 and through the said spillway and outlet, and the water power of the Big Sioux River immediately above the mouth of said drainage ditches thereby destroyed, to the great and irreparable damage of many private property owners.

Tenth.

These defendants answering the Tenth paragraph of the complainant's bill, hereby specifically deny the same, and each and every allegation thereof, and in explanation of the facts attempted to be therein set out, allege that upon the oc-
43 currence of the destruction of the original spillway as hereinbefore set out in the Ninth paragraph hereof, that thereupon the Board of County Commissioners of said Minnehaha County took immediate steps to control the said waters coming through said drainage ditches, by means of dams across said drainage ditches above said spillway, and by driving piling therein, and were so employed when, on or about the 21st day of March, 1916, one Charles Kaufmann, and other persons owning property within the area of said Drainage Ditch No. 2, brought an action in the Circuit Court of Minnehaha County, South Dakota, to restrain said Board from so proceeding to control the waters of said drainage ditches, and obtained an order against said Board, requiring them to show cause why an injunction should not be granted, which said order came on for hearing before the said Court on the 25th day of March, 1916, and the said Court thereupon denied said application for said temporary injunction, whereupon said action was dismissed, the same being Circuit Court File of Minnehaha County No. 15708, which is hereby referred to and made a part hereof.

That on or about April 1, 1916, and because of the conditions above described, the plaintiff in the last mentioned suit and a large number of his neighbors, similarly situated and affected by said drainage ditches perfected an informal local organization and appointed a committee of eight members to look after their interest with reference to repairing said drainage ditches, and to urge before the
44 Board of County Commissioners, such improvements as seemed advisable.

That thereafter and on or about the 8th day of April, 1916, several persons representing said local organization or com-

mittee, including some of the said plaintiffs in said last mentioned suit, filed a petition and bond with the said Board of County Commissioners praying that the outlet and spillway to said drainage ditches as originally established and constructed, be closed up and abandoned, and that a new outlet for said ditches be provided by diverting the waters thereof at a point above said spillway, as originally constructed, in a westerly direction through Covell's Lake, and thence back into the Big Sioux River above the said City of Sioux Falls, upon which said petition the said Board caused a survey to be made, with the approval of the State Engineer, and a surveyor's report to be filed, and a hearing had upon said petition, after notice, as required by law upon which hearing numerous property owners within the territory affected thereby, appeared before said Board and filed objections to the said proposed proceedings, and filed numerous large claims for damages by reason of said proposed change of outlet, and that upon said hearing, on July 8th, 1916, said Board made an order allowing the prayer of said petition, and established said Covell's Lake outlet, and abandoned said outlet and spillway as originally established and constructed; that thereupon numerous conferences were had between the petitioners in said proceeding last above referred to, and the said objectors and property owners owning lands within the area of said Drainage Ditches No. 1 and No. 2, and that it was agreed at said conference that the proceedings upon said petition last above referred to should be abandoned, and the same were abandoned accordingly, and that a new petition should be filed and new proceedings instituted for the re-establishment of said Drainage Ditches No. 1 and No. 2 and the reconstruction and improvement thereof, and the re-establishment and the reconstruction of the outlet to said ditches, and for the establishment and construction of a new spillway to properly control and take care of the waters flowing through said drainage ditches, and for the enlargement of said drainage district so as to embrace all of the property benefited thereby, extending from the Northern end of said territory included in said Drainage Ditches No. 1 and No. 2, following the course of the Big Sioux River around the City of Sioux Falls, and extending as far down said river as the mouth of said spillway and outlet to said drainage ditches, where the waters thereof were discharged into the Big Sioux River, below the said City of Sioux Falls, and that thereafter, and in accordance with said agreement, and with the consent and acquiescence of this plaintiff, a new drainage petition and bond, ap-

proved by the County Auditor, were filed with the Board of County Commissioners, by the plaintiff, the City of Sioux Falls, F. L. Blackman, and other persons who owned lands within the area of and that was assessed for the cost of construction of said Drainage Ditches No. 1 and No. 2, praying for the establishment and construction of a new drainage ditch in the exact location of said original ditches, and the re-establishment and construction of a substantial spillway and outlet therefor, together with several cut-offs or ditches, straightening and canalizing the channel of the Big Sioux River
46 adjacent thereto, so as to improve and increase its carrying capacity, and praying that the assessment area be increased to cover said new territory benefited, pursuant to said agreement, which said petition being found sufficient in form by said Board of County Commissioners, was, on August 3, 1916, ordered filed and referred to the State Engineer, who, with the said Board of County Commissioners, on August 4, 1916, inspected the route of said drainage, and had several conferences with the said persons interested as aforesaid, including this plaintiff, and authorized and ordered a survey to be made by Engineer L. E. Stevens, under the supervision of the State Engineer, which said survey was accordingly made by said L. E. Stevens, who, on September 13, 1916, filed his written report with said petition, and thereupon the said Board of County Commissioners fixed the exact route and width of said drainage, and the time and place of hearing thereon, and caused notice of hearing to be given according to law and upon the return date fixed in said notice, after due hearing, and upon the approval and advice of the State Engineer, and without objection upon the part of the plaintiff herein, or any other person, upon October 3, 1916 found said proposed drainage, as petitioned for, to be conducive to the public health, convenience and welfare, and necessary and practicable for draining agricultural lands, and thereupon, by resolution duly adopted, re-established said drainage ditch in the exact location of the original ditches, and fixed the damages caused by the construction thereof, and designated it as "Drainage Ditch No. 1 & 2", and no appeal was taken from such order establishing said "Drainage Ditch No. 1 & 2", and said order so establishing said Drainage Ditch No. 1 & 2 is now in full force and effect.

Eleventh.

These defendants answering the Eleventh paragraph of the complainant's bill, admit that the Board of County Com-

missioners of Minnehaha County have expended ap-
47 proximately Two Hundred and Fifty-five Thousand Dollars ($255,000.00) in payment for work done and material furnished in the construction of ditches, dams, gateways and the spillway upon said Drainage Ditch No. 1 and 2, for which drainage ditch warrants upon Drainage Ditch No. 1 and 2 Fund have been issued, payable only out of the assessments to be hereafter levied upon the lands and properties benefited by the construction of said ditch, and there is now due thereon, for principal and interest, about Two Hundred and Ninety Thousand Dollars ($290,000.00) and hereby specifically deny each and every other allegation in said paragraph contained, but further allege that the drainage warrants above referred to were issued only upon duly verified claims, duly presented, audited and allowed by the County Commissioners, and report of the allowance of the same duly published in said Commissioners' proceedings, as provided by law.

Twelfth.

These defendants answering the Twelfth paragraph of complainant's bill, hereby admit that on or about the 3rd day of August, 1916, a petition was filed in the office of the County Auditor of the County of Minnehaha, duly signed by the City of Sioux Falls, the plaintiff herein, by George W. Burnside, its Mayor, and duly attested by Walter C. Leyse, City Auditor, F. L. Blackman, and others which petition was for the purpose of re-constructing and improving Drainage Ditches No. 1 and No. 2, in Minnehaha County, South Dakota, and to construct a new spillway and outlet to Drainage Ditches No. 1 and No. 2, and to pay therefor by assessments upon the property, persons and corporations benefited thereby, but these defendants specifically deny each and every other allegation, matter and thing contained in said Twelfth paragraph, but allege the facts to be as stated and set forth in the Tenth paragraph of this Answer, and further allege that all acts negatived in said paragraph Twelve, were duly taken, done and performed, upon due notice, as required by the laws of the State of South Dakota.

48 Thirteenth.

These defendants answering the Thirteenth paragraph of complainant's bill, hereby specifically deny each and every allegation in said paragraph contained, as therein alleged, and allege the facts in relation thereto to be as follows: That immediately after the establishment of "Drainage Ditch No.

1 & 2", as hereinbefore described, the said Board of County Commissioners, acting under said newly established Drainage Ditch No. 1 & 2, proceeded to dike, clean out, enlarge and re-construct original Drainage Ditches No. 1 and No. 2, and the additional river cut-offs were constructed, and the outlet and spillway of said drainage ditches re-built in a more substantial and permanent manner, upon plans approved by the State Engineer; that in the course of the construction of said spillway, plans were prepared under the supervision of the State Engineer, and approved by him on May 7, 1917, and bids for the construction thereof asked for by legal notice, and upon the opening of said bids and a consideration thereof, it was, by resolution of the Board, determined that the "spillway for which bids have been received for 'Drainage Ditch No. 1 & 2' can be constructed for less money than the amount of any bid submitted therefor", and it was "therefore ordered that the Board of County Commissioners cause such spillway to be constructed, hire the necessary labor, machinery, tools and appliances, and a superintendent to oversee the construction thereof, and purchase all necessary material for such construction, without letting a contract for the entire construction thereof", and the Board thereupon proceeded to construct said spillway in accordance with said determination, ordered the necessary material for the construction thereof, and employed the Sioux Falls
49 Construction Company to furnish the necessary labor, superintendent and supervision of the construction thereof, and to furnish the necessary machinery, tools, etc, to be used in said construction.

From the determination of the Board that it would build said spillway without letting a contract therefor, and by buying the necessary material therefor, and employing the Sioux Falls Construction Company to furnish the necessary labor, machinery, tools, superintendent and supervision thereof, one William H. Lyon, being the original petitioner in the construction of original Drainage Ditch No. 1, appealed to the Circuit Court of Minnehaha County, South Dakota, which appeal came on for hearing before the Court on the 14th day of July, A. D. 1917, and the court, after full hearing and consideration of the evidence introduced on behalf of the appellant and the Board, dismissed said appeal, holding that it appeared that the "decision appealed from is one that rests in the sound judgment of the Board of County Commissioners, and is not a proper subject for review by the Court"; that the

proceedings upon said appeal are contained in File No. 16405 of the Circuit Court of Minnehaha County, South Dakota, which file and proceedings are hereby referred to and made a part hereof.

That thereupon the said spillway and outlet to said Drainage Ditch No. 1 & 2 was immediately re-constructed in a more substantial manner in accordance with the determination of said Board of County Commissioners, under the supervision of the State Engineer of the Stat of South Dakota, at a cost of more than One Hundred Thousand Dollars ($100,000.00); that the soil at the place where said outlet and spillway are constructed is of peculiar formation; that beneath the surface at said point are found deep quicksands, the extent of which was at said time unknown to said Board of County Commissioners; that by reason of the necessity for immediate action in the construction of said spillway, and on account of the difficulties to be encountered in the construction thereof, it was impossible to prepare fully completed working plans at the time said work was commenced, but that the working plans had to be modified and adapted to the difficulties encountered as the work progressed, and that thereupon and by reason thereof, and with the approval and under the supervision of the State Engineer, the said Board of County Commissioners employed one F. C. Shenehon, a competent civil and [hydralic] engineer, to prepare working plans and to superintend the construction of said spillway as the work progressed, and that said working plans were so prepared by said Shenehon, and said spillway re-constructed under his immediate supervision and the supervision and approval of the State Engineer, in a substantial and adequate manner, and that the same, as so constructed, has ever since said time been in operation, and for the past three years has safely controlled and cared for the waters flowing through said drainage ditches, and protected the properties adjacent thereto, as aforesaid, from injury and damage by reason of the said waters, and the same is now in successful operation.

These defendants further allege that the records and proceedings in the establishment and construction of Drainage Ditch No. 1 & 2, on the petition of F. L. Blackman, the plaintiff herein, the City of Sioux Falls, and other persons, referred to in Paragraph Fifth hereof, except the lengthy notices, are hereunto annexed, marked Exhibit "A", and made a part hereof, and that all of said proceedings were taken and had after due and legal notice, as required by law, which notice

specifically named the plaintiff herein, and cited it to show cause why said drainage ditch should not be constructed as petitioned for.

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Fourteenth.

These defendants answering the Fourteenth paragraph of complainant's bill, hereby specifically admit the facts therein set out, except the allegations that said "Chenoweth & Rettinghouse were to be paid in Drainage ditch warrants drawn on Drainage Ditch No. 1 and No. 2", and except the further allegation that they "made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereto annexed, marked Exhibit "B", and made a part hereof", which allegations are hereby specifically denied, and the facts are alleged to be that the said Chenoweth & Rettinghouse were paid in drainage warrants drawn on Drainage Ditch No. 1 & 2 Fund, and that said Exhibit "B" referred to, is merely an analysis or resume or deduction drawn from the facts set out in the report, merely for the purpose of showing the results shown by the proportion of benefits recommended.

Fifteenth.

These defendants answering the Fifteenth paragraph of complainant's bill, deny that said Board of County Commissioners, on the 10th day of June, 1921, adopted a purported notice of time and place of equalizing the proportioning of benefits for the construction of said spillway, etc., as therein alleged, but allege the fact to be that for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness,

52 or drainage warrants, heretofore issued in the sum of about Two Hundred and Fifty-five Thousand Dollars ($255,000.00), in payment of the labor, material, etc., used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commissioners, did, on the 10th day of June, 1921, by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux

Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and indirect benefits that accrue by the construction of said drainage, taking a particular tract as a unit for comparison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law, to this plaintiff, at which time and place, the apportionment fixed as to the plaintiff's property and other property, will be equalized, and the assessment will be later extended and spread on said equalization, but the defendants have no knowledge of the total number of units or sum in dollars that will finally be equalized and assessed against said plaintiff's property. The defendants further allege that the notice, in addition to being published, as stated, was also posted according to law, and deny the balance of said paragraph.

Sixteenth.

These defendants answering the Sixteenth paragraph of complainant's bill, specifically deny the same.

Seventeenth.

These defendants answering the Seventeenth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

53 Eighteenth.

These defendants answering the Eighteenth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

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54 I.

That said proceedings of the said Board of County Commissioners so taken and had in the establishment and construction of said Drainage Ditches No. 1 and No. 2, and in the assessment and equalization of the proportion of benefits, and in the assessment of the cost thereof upon the lands benefitted thereby, were taken and had after due and legal notice

as required by law, and that said ditches were so established and constructed in accordance with said proceedings.

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VII.

These defendants further allege that in the assessment of Drainage Ditch No. 2, hereinbefore referred to, resolutions were adopted assessing and equalizing the proportion of benefits thereunder upon and including all of the land assessed for the construction of Drainage Ditch No. 1, and other lands, including the lands and property rights of the plaintiff herein, but making due allowance for the assessment already made upon the lands within the area of the original district of Drainage Ditch No. 1 thereby treating and consolidating said two ditches as Drainage Ditch No. 2; that all of the proceedings herein referred to required to be recorded and indexed in a book kept for that purpose in the County Auditor's office, were so recorded and indexed.

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VIII.

And the defendants, further answering complainant's bill, admit that they entered into a contract with Chenoweth & Rettinghouse, civil engineers, to make and perfect a topograhical survey of all the lands lying between the City of Dell Rapids and the outlet to said spillway and drainage ditch, lying within the valley of the Big Sioux River, and that said survey was necessary and was made in order that said defendant Board might advisedly make an apportionment of and fix the benefits to the lands and properties affected by reason of the benefits derived by said plaintiff and others like situated, by reason of the diking, cleaning out, reconstruction and improvement made upon said drainage ditch, the river cut-offs and new spillway and outlet to said ditches; and further allege that the original petition for said drainage ditch, river cut-offs and spillway, hereinbefore mentioned, was a compromise between the said petitioners therefor and others affected thereby, as hereinbefore set forth, and that the making and filing of said petition, accompanied by a bond, as provided by law, which was duly approved by the County Auditor of Minnehaha County, South Dakota, transmisssion of a copy thereof to the State Engineer, the inspection of the proposed route of said drainage project, the causing and ordering of a survey thereof to be made by a competent surveyor under the supervision of said State Engineer, the surveyor's report thereon, the filing of the same by the Board with said petition, said Board's determination of

the exact length and line and width of said drainage improvement, and the order and resolution of said Board fixing a time and place for hearing said petition, and the giv-
57 ing of notice thereof, the establishment of said drainage district and project by resolution and order of said Board upon said hearing, and the subsequent notice given to all parties interested, of the establishment of the cut-off ditches, including the plaintiff herein, and the final establishment thereof, and all work done and performed upon said ditches and river-cut off ditches, and the establishment and construction of said spillway and work done thereon, and the manner of doing the same, and all other work done and performed upon said drainage ditch, cut-offs and spillway, were done and performed by said defendant Board, with the notice, actual knowledge, acquiescence, approval and consent of the plaintiff herein, its officers, agents and servants, and all others like situated, and said plaintiff and all others like situated during all the time said ditch, river cut-offs and spillway were being established, layed out and constructed, had notice and actual knowledge that payment therefor was to be made by special assessments against the lands and properties of said plaintiff affected thereby, and the lands of others like situated, and that there was no other provision of law or method of making such payment, and said plaintiff and none other of said parties took any legal steps to stop or prevent the establishment of, or work performed upon said ditches, river cut-offs or spillway, or the issuance of certificates of indebtedness or drainage warrants therefor, which said parties had notice and actual knowledge of, were to be taken up and paid only by said special assessments as aforesaid; and that said plaintiff and others like situated are now, and since 1918 have been, receiving large and continuing benefits to their lands and properties affected, by reason of said reconstruction and construction of said drainage ditch, river cut-offs and spillway, under the said re-establishment as Drainage Ditch No. 1 & 2.

IX.

These defendants further allege, as special instances of the notice, knowledge, approval and co-operation of the plaintiff the City of Sioux Falls, South Dakota, with these defendants as the Board of County Commissioners in proceeding with the work of reconstructing and constructing said Drainage Ditch No. 1 & 2, its dams, dikes, spillway and controlling works, that said plaintiff was the first signer on the petition filed August 3, 1916, asking for the establishment and con-

struction of said Drainage Ditch No. 1 & 2; that said plaintiff was by name summoned in the published notice dated September 15, 1916, to appear and show cause why said Drainage Ditch No. 1 & 2 should not be established and constructed; that said plaintiff, its officers, agents and servants had notice and actual knowledge of all of the proceedings taken and the work done in the establishment and construction of said Drainage Ditch No. 1 & 2, as the work progressed; that the officers of said City had repeated conferences with the defendants as a Board of County Commissioners and individually, urging and advising the construction of the spillway and con-
trolling works, and other work on said Drainage Ditch,
58 as the work progressed; that said plaintiff through its
water department, by special arrangement with the defendant Board, in 1917 and 1918, furnished the water used in mixing the concrete in the construction of said spillway, and rendered bills for the water so used to the County of Minnehaha, which bills were audited and allowed by the Board, and settled by drainage ditch warrants drawn on Drainage Ditch No. 1 & 2 Fund being issued and received therefor.

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XII.

That by reason of each and all of the foregoing facts, acts and resolutions and orders done, passed and performed as hereinbefore set forth, the said plaintiff and all others like situated are now estopped and forever barred from in any manner claiming or asserting any right or relief herein, or at all.

XIII.

That in pursuance of said resolutions and orders hereinbefore referred to and set forth, and for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum of about Two Hundred and Fifty-five Thousand Dollars ($255,000.00), in payment of the labor, material etc., used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full

and careful consideration thereof, the said defendants, the Board of County Commissioners, did, on the 10th day of June, 1921, by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the plaintiff herein, the City of Sioux Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and indirect benefits that accrue by the construction of said drainage, taking a particular tract as a unit
60 for comparison, after determining the extent of the benefit to said unit and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law.

XIV.

The above named defendants, A. G. Risty, et al, further answering plaintiff's bill of complaint allege that heretofore and on and prior to October 3, 1916, due and legal notice was given to the plaintiff herein of the time and place appointed by the Board of County Commissioners of Minnehaha County, South Dakota, for claiming any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2 and that the plaintiff herein wholly failed and neglected to present to said Board of County Commissioners at said time and place, to-wit: October 3, 1916, any claim for damages therein, and that by reason thereof this plaintiff is now estopped and debarred from claiming or asserting herein any right, or claim to any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2.

XV.

The above named defendants, A. G. Risty, et al, for further answer to plaintiff's bill of complaint, allege that the plaintiff is not entitled to the aid of a court of equity herein, for
61 the reason that said plaintiff has failed, neglected and refused to tender or offer to tender herein the amount of the actual benefits received by it by reason of the establishment, construction and reconstruction of Drainage Ditch No. 1 and 2.

Wherefore, the defendants, above named, pray that the plaintiff's bill of complaint in said action be dismissed, with costs.

E. O. JONES,
L. E. WAGNER,
Solicitors for Defendants.

B. C. Matthews,
Of Counsel.

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62 Exhibit "A"

Petition.

To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefitted Thereby.

To The Honorable Board of County Commissioners of Minnehaha County, South Dakota:

1. The undersigned petitioners respectively represent and show that they are all residents of Minnehaha County, South Dakota, and that each of them is the owner of certain lands and real property situate and lying in said county in the valley of the Big Sioux River and within the territory to be drained, protected and benefitted by the reconstruction and improvement of drainage ditches One and Two in said Minnehaha County, South Dakota, and by the construction of a new spillway or outlet to said drainage ditches numbers One and Two.

2. Your petitioners further represent and show that said drainage ditches Numbers One and Two were established for the purpose of draining agricultural lands in 1907 and 1910 respectively as appears from records of said proceedings in the office of the County Auditor of Minnehaha County, South Dakota, which are hereby referred to and made a part hereof.

3. Your petitioners further represent and show that the said Drainage Ditches Numbers One and Two and the outlet thereto as constructed were and are insufficient to accomplish the purpose for which they were constructed and were
63 and are insufficient to properly drain the agricultural lands within the districts or territory supposed to be drained thereby and insufficient for the drainage of other ag-

ricultural lands lying within the valley of the Big Sioux River above the mouth of the outlet to said Drainage Ditches Numbers One and Two and between the mouth of said outlet and the lands heretofore included within the assessment districts upon which the cost of the construction of said drainage ditches One and Two was imposed and insufficient as constructed to improve, promote and conserve the public health and welfare within said territory hereinbefore described above the mouth of the outlet to said ditches Numbers One and Two lying partly within the City of Sioux Falls, South Dakota, all of which said lands and property would be benefitted, drained and protected by a proper reconstruction and improvement of said Ditches One and Two and by the construction of a new and proper spillway or outlet to the same by means whereof the public health and welfare within the area hereinbefore described and referred to above the mouth of the outlet to said ditches would be conserved and improved.

4. Your petitioners further represent that it is necessary for the drainage of agricultural lands within said drainage districts Numbers One and Two and also agricultural lands lying above the mouth of the spillway or outlet to said ditches and between the mouth thereof and the present boundaries of said drainage Ditches Numbers One and Two to reconstruct, deepen, widen and improve said drainage ditches One and Two and to construct a new outlet or spillway thereto and that the construction of such new outlet or spillway and the reconstruction and improvement of said Ditches One and Two would also be conducive to the public health, convenience and welfare of the
64 City of Sioux Falls, South Dakota, and also of the County of Minnehaha, South Dakota and people resident within the said area hereinbefore described lying between the present boundaries of said drainage districts One and Two and the mouth of the outlet to said ditches and within the valley of the Big Sioux River, partly within the corporate limits of the City of Sioux Falls, and that in the reconstruction of the said ditches One and Two, it will be necessary that the same be cleaned, deepened, widened and that certain levees, dikes, flood gates and barriers thereto be constructed to such extent as may be necessary to carry out the surplus or flood waters and to properly drain and protect the lands within said drainage districts and within the area hereinbefore described and within the city of Sioux Falls and to properly conserve and promote the public health and welfare within the said area as aforesaid.

5. Your petitioners further represent that there should be constructed and installed in the said Drainage Ditches Numbers One and Two and at the head of the said Spillway or outlet of said Drainage Ditches, controlling gates for the purpose of regulating and controlling the amount of water flowing through the said ditches and over the said Spillway, the number and location of said gates and the manner in which they should be installed should be determined by the County Commissioners upon the advice of their engineers.

6. Your petitioners further represent that the present spillway or outlet to said Drainage Ditches Numbers One and Two where the same empties into the Big Sioux River in Section Nine (9) Township One Hundred and one (101) of Range forty-nine (49) is wholly insufficient and has been practically destroyed by the action of the water therein, so that the same has become inefficient as a means of disposing of the waters flowing in said drainage Ditches Numbers One and Two and to such an extent that it has become dangerous to abutting property and to persons living within the vicinity thereof and that it is necessary to entirely abandon said present spillway or outlet and to construct an entirely new outlet or spillway in place thereof in accordance with a new and different plan therefor, the new spillway to be located at or near the present location of the present spillway.

7. Your petitioners further represent that the said drainage ditch or drainage system should consist of the following ditches: First a ditch having its initial point at the beginning of Section Two (2) of Drainage Ditch Number Two (2) of Minnehaha County as now established at the creek near the Northeast corner of Section thirty-one (31) Township One hundred four (104) of Range Forty-nine (49) and should then run Southwesterly to near the center of said Section thirty-one (31) and then south near the center line through said Section Thirty-one (31) and through Sections Six (6) and Seven (7) of Township one hundred three (103) of Range forty-nine (49) into Section eighteen (18) and then in a Southeasterly direction having its terminal point upon the Big Sioux River Sixteen hundred forty feet (1640) east of the said center of Section Eighteen (18), Township One hundred three (103) of Range forty-nine (49) following the present location of the said Section Two (2) of Drainage Ditch Number Two of Minnehaha County as now located.

Also a ditch having its initial point at the present beginning of Section One of Drainage Ditch Number Two of Minnehaha

County, at the high water channel of the Big Sioux
66 River in the Southeast quarter of Section Twenty (20)
Township One hundred three (103) of Range forty-nine (49) thence running in a general southerly direction through the Southeast quarter of Section Twenty (20) Township one hundred three (103) of Range forty-nine (49) and the Northeast quarter of Section twenty-nine (29), The Southwest quarter of Section twenty-eight (28), the west half of Section thirty-three (33) all in Township one hundred three (103) of Range forty-nine (49) and the west half of Section four (4) the northwest quarter of section nine (9) the Southeast quarter of Section eight (8) the east half of Section seventeen (17), the east half of section twenty (20) and the east half of Section twenty-nine (29) all in Township one hundred and two (102) of Range Forty-nine (49) with its terminal point at the southern end of said Section One of Drainage Ditch Number Two in the Southeast quarter of Section twenty-nine (29), Township One hundred two (102) of Range forty-nine (49) following the line of the said Section One of Drainage Ditch Number Two as now established in Minnehaha County.

Also a ditch having its initial point at the present beginning of Drainage Ditch Number One of Minnehaha County at or near the Northeast quarter of the Southeast quarter of the Southeast quarter of Section twenty-nine (29) Township one hundred and two (102) of Range forty-nine (49) thence running south across the East half of the East half of Section Thirty-two (32) in Township one hundred two (102) of range forty-nine (49) and the East half of the Northeast quarter of Section Five (5) Township one hundred one (101) of Range forty-nine (49) and the Northeast quarter of the Southeast quarter of Section five (5) Township one hundred one (101) of Range forty-nine (49) thence across the West half of the Southwest quarter of Section four (4) in Township one hundred one (101) Range forty-nine (49), thence across
67 the northwest quarter of Section Nine (9) Township
One hundred one (101) of Range forty-nine (49) and the Southwest quarter of the Northeast quarter of Section nine (9) township one hundred one (101) of Range forty-nine (49) where it empties into the Big Sioux River having its initial point and terminal point the same as and following the line of Drainage Ditch Number One as now established in Minnehaha County. With also a branch drain or second part beginning at the point near the center of the Northeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49) running thence in a southeasterly direction across the South-

east quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49) to where it connects with the main ditch of Drainage Ditch Number One as now established in Minnehaha County.

8. Your petitioners further represent that in order to make the foregoing drainage system complete and adequate for the purposes for which it is designed, that it will be necessary to straighten, clear out and deepen the channel of the Big Sioux River at a number of places within the said Drainage District and especially to straighten the channel of the said River upon Section thirty-two (32) Township one hundred three (103) of Range forty-nine (49) by a ditch cutting off the bend in said river on said Section. Also to straighten the said River upon section Eight (8) Seventeen (17), Twenty (20) and Twenty-nine (29) in Township one hundred two (102) of Range forty-nine (49) by cutting off bends of the said Sioux River situated upon those Sections, the exact location of the said ditches for straightening, clearing out and deepening the channel of the said Sioux River to be determined by the County Commissioners upon advice of their engineers.

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9. Your petitioners further represent and show that the lands and territory likely to be affected by the construction of such new spillway or outlet and by the reconstruction and improvement of said drainage ditches One and Two and which will be drained, benefitted and protected thereby and within which territory the public health and welfare will be promoted includes all of the lands lying in the valley of the Big Sioux River and included within the present boundaries of said Drainage Districts Numbers One and Two as well as all of the lands in said valley of the Big Sioux River between the mouth of said spillway or outlet to said ditches and the City of Dell Rapids, South Dakota, that are subject to overflow by the waters of the Big Sioux River and that will be subject to overflow and damage by the waters of said River if the said outlet to said Drainage Ditches Numbers One and Two be abandoned and said outlet thereto closed and that the said District should be so extended and enlarged as to include all lands and property benefitted thereby as far down the valley of the Big Sioux River as the mouth of said outlet or spillway and including therein the corporation of the City of Sioux Falls as well as the corporation of the County of Minnehaha, South Dakota, which said corporations your petitioners further represent are and will be largely benefitted by the reconstruction

and improvement of said ditches and construction of said new outlet or spillway thereto to their highways, bridges and other corporate properties owned by them respectively.

Dated this 15th day of July, A. D. 1916.

Attest: WALTER G. LEYSE,
City Auditor

(Seal of the City of Sioux Falls)

CITY OF SIOUX FALLS
By Geo. W. Burnside,
Mayor.

F. L. BLACKMAN,

W. BRALEY,

DEN DONAHOE

DAN A. DONAHOE,

W. M. DONAHOE

CATHERINE PECK

PORTER P. PECK

MARY C. BRACE

JOHN P. BLEEG

FRANCES G. CARPENTER

M. RUSSELL, By Louis Caille,
Agt.

McKINNEY & ALLEN

E. D. CLARK

69 C. C. BRATRUD

L. P. CALDWELL

Filed in the office of the Auditor of Minnehaha County, S. D. this 3 day of Aug. 1916.

HARRY H. HOWE,
County Auditor.

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70 Order for Filing Petition for Drainage.

State of South Dakota,
County of Minnehaha—ss.

In re Drainage Ditch Numbers 1 and 2 Minnehaha County, South Dakota.

Whereas F. L. Blackman and others of the County of Minnehaha, State of South Dakota, have this day presented to this Board a petition for the construction of a drainage ditch conducive to public health, convenience and welfare and for the purpose of draining agricultural lands in the Big Sioux River Valley which lands have heretofore been drained and protected from overflow by ditches Number 1 and 2 of Minnehaha County as heretofore established and constructed, in which petition it is represented that it is necessary to re-construct, improve and extend said drainage ditches Number 1 and 2 and to construct a new spillway or outlet where said drainage ditch number one empties into the Big Sioux River in Section Nine (9), Township One Hundred and One (101), Range Forty-nine (49) by reason of the fact that the spillway or outlet of said drainage ditch number 1 is inadequate for its purpose and has been destroyed by action of the water; also that the drainage ditches number 1 and 2 are not adequate for the purpose of which they are constructed and that they should be cleaned, deepened and widened and levees, dikes, and barriers remodeled, re-constructed and improved in such places and to such extent as may be necessary to carry off the surplus or flood water and properly drain the land to be drained thereby and protect other land subject to overflow; also that there should be constructed and installed in said drainage ditches 1 and 2 necessary flood gates for the purpose of regulating the amount of water flowing
71 through; also that it is necessary in order to make such drainage system complete and adequate for the purpose for which it is designated to straighten, clear out and deepen the channel of the Big Sioux River at different places within the drainage district of said drainage ditches number 1 and 2, and said petition having been by this board examined and found sufficient in form and being accompanied by bond with sureties approved by the County Auditor.

Now Therefore it is hereby ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that the said petition be forthwith filed with the County Auditor of this County and that a copy thereof be transmitted by the said County Auditor to the State Engineer.

A. G. RISTY,
Chairman of County Board.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of Aug. 1916.

HARRY H. HOWE
County Auditor.

72 Resolution for Survey.

Whereas on the 3rd day of August, A. D. 1916, the City of Sioux Falls, F. L. Blackman and others of Sioux Falls, Minnehaha County, South Dakota, presented to this board a petition for the drainage of lands in the Big Sioux River Valley for the establishment of a drain chiefly to carry off the overflow water of the Big Sioux River, such drain to begin at the beginning of Section two (2) of drainage ditch number 2 of Minnehaha County, as now established at the creek near the northeast corner of Section 31, Township 104, Range 49, and should end at a point on the said river near the center of Section 9, in Township 101, Range 49, where drainage ditch number 1 as now established in Minnehaha County, empties into the Big Sioux River, which petition was accompanied by a proper bond with sureties approved by the County Auditor of said County; and

Whereas said petition was by this board examined and found sufficient in form and was ordered filed with the County Auditor of said County, and was so filed on the 3rd day of August A. D. 1916; and

Whereas this board together with the State Engineer did on the 14th day of August, A. D. 1916, inspect the proposed route of said drainage; and

Whereas this board deems it necessary that a survey of the proposed drainage be made by a competent surveyor.

Now Therefore it is Ordered that a survey be made of the lands in the Big Sioux River Valley between the City of Dell Rapids and the terminus of said proposed drainage for the purpose of determining the exact line of said drainage and the most practicable method of draining the entire sec-
73 tion of the country of which the lands proposed to be drained are a part. Such surveyor shall include in his report to this board a description of the exact line of said drainage ditch or ditches as suggested in said petition, the size and width thereof, such survey to be made under the supervision of the State Engineer and report filed with the County Auditor with all convenient speed.

And the chairman of this board is hereby authorized to employ such surveyors and his assistants and purchase such material as may be necessary for such survey.

Approved this 14th day of Aug. 1916.

A. G. RISTY.

74 **Resolution Fixing the Exact Line and Width of Ditch and Fixing the Time and Place for Hearing Petition.**

(Commissioners Proceedings, September 13, 1916)

Whereas, on September 13, 1916, Mr. L. E. Stevens, Civil Engineer employed by this Board for the making of a survey for a proposed drainage ditch, in the valley of the Big Sioux River, in Minnehaha County, South Dakota, in the territory previously partially drained by Drainage Ditches Numbered One and Two, as heretofore established, pursuant to the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, did file his report of such survey, together with maps and profiles; and

Whereas, this Board has personally inspected the route of said proposed drainage, as described in said petition and as described in the engineer's said report;

Therefore, be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of said proposed drainage, be and the same is hereby fixed as described in said Engineer's report, and that the requisite right of way for said drainage ditch and dump space be as described in said engineer's report; and

Be it further resolved that Monday, the 2 day of October, 1916, at 2 o'clock, P. M. at the Office of the County Auditor of said County be and it is hereby fixed as the time and place for hearing the said petition and that notice thereof be given in accordance with the provisions of Section Four (4) of Chapter 134, of Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication once in each week
75 for two consecutive weeks in the Sioux Falls Daily Press, and by posting copies of said notice in at least three of the most public places near the route of said proposed drainage ditch, such posting to be made at least ten days prior to the time of said hearing.

Approved:

A. G. RISTY,
Chm. Co. Bd.

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76 Resolution Establishing Drainage Ditch No. 1 and 2.

The matter of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on August 3, 1916, coming on to be heard by the Board of County Commissioners of said county at a regularly adjourned meeting, on Monday, the 2 day of October, A. D. 1916, pursuant to notice heretofore given, the said Board having heard and considered said petition and all matters in support of the same, and in opposition thereto, and being fully advised by the state engineer with reference thereto, now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said principal drainage ditch as hereinafter described and set forth, is conducive to the public health, convenience and welfare and it is necessary and practicable for the drainage of agricultural land and it is so found;

Be It Further Resolved that the said drainage ditch as hereinafter described be, and it is hereby named and designated as "Drainage Ditch No. 1 and 2";

Be It Further Resolved that the said Drainage Ditch No. 1 and 2 be and the same is hereby established in accordance with the resolution adopted by this Board on September 13, 1916, in so far as the same is set out and described in Sections One, Two and Three of the engineer's report of preliminary survey, filed herein on September 13, 1916, and particularly described as follows:

77 Section One.

Commencing at a point Fifty-eight (58) feet west and Ten Hundred and Thirty-five (1035) feet north of the Southeast corner of Section Twenty-nine (29), Township One Hundred and Two (102), Range Forty-nine (49) west of the 5 P. M. running thence South parallel to the adjacent highway Two Thousand and Eighty-five (2085) feet to Station One Hundred and Fourteen (114); also commencing at a point Six Hundred and Seventy-four (674) feet north and about Thirty-five (35) degrees west of said Station number One Hundred and Fourteen (114) thence southeasterly Six Hundred and Seventy-four (674) feet to said Station number One Hundred and Fourteen (114), thence south and parallel to said highway Seventy-seven Hundred (7700) feet to station number Thirty-seven (37) thence south forty-five (45) degrees east Three Thousand Seven Hundred (3700) feet to station

number zero (0) the same being on high water line, thence South Fifty-nine (59) degrees and Thirty-six (36) minutes east, Four Hundred and Fifty (450) feet, thence south Thirty-one (31) degrees east to the Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point Ten Hundred and Thirty-five (1035) feet north and Fifty-eight (58) feet west of the Southeast corner of Section Twenty-nine (29) in Township One Hundred and Two (102) of Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north Five Hundred and Forty-seven (547) feet; thence north Twenty-three (23) degrees west Thirty-three Hundred and Eighteen (3318) feet to a point Fifty-eight (58) feet west of the quarter quarter line in the northeast quarter of Section Twenty-nine (29) in said Township; thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17) and a part of Section Eight (8), Twelve Thousand Nine Hundred and Thirty-five (12,935) feet; thence north Fifty (50) degrees east Twenty-seven Hundred and Thirty-two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way of the Chicago, Milwaukee & St. Paul Railway Company, in the Northwest quarter of Section Nine (9) in said Township; thence Northerly parallel with and Thirty-three (33) feet west, of said right of way line Nineteen Thousand Three Hundred and Sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the Southeast Quarter of Section Twenty (20) in Township One Hundred and Three (103) North of Range Forty-nine (49).

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Section Three.

Commencing at a point Sixteen Hundred and Forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103), Range Forty-nine (49); running thence north Thirty-three (33) degrees west Thirty-one Hundred and Fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty feet (60) west of the quarter line in Sections Seven (7) and Six (6) in said Township and in Section Thirty-one (31)

in Township One Hundred and Four (104) North of Range Forty-nine (49) to the center line running east and west through said Section Thirty-one (31); thence northeasterly to the creek near the Northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River is to be straightened in Sections Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred and Three (103), North of Range Forty-nine (49) in order to afford better means of communication between the lower end of Section Three (3) of said ditch and the upper end of Section Two (2) thereof; the same being intended to cover the exact location of drainage ditch Number Two (2) as now established and constructed.

Be It Further Resolved that the consideration and determination of the question of the straightening of the Big Sioux River at the several points recommended in said engineer's report, be deferred, without passing upon the merits thereof, to some later date, when said straightening of the Big Sioux River may be given more complete consideration, covering the points recommended and other points requested and suggested at the hearing.

Be It Further Resolved that in the construction of the said Drainage Ditch, the rights of flowage of the owner of the mill at or near Baltic, South Dakota, will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch where the same joins with the creek near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, that it will not diminish or interfere with said rights of flowage and that the headgate or other protection now established, be maintained to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

80 Be It Further Resolved that headgates or controlling gates be established in said drainage ditch, on Section Twenty (20) of Sverdrup Township and on Section Twenty-nine (29) or Thirty-two (32) in Mapleton Township at such place and of such size and material as the state engineer may direct;

Be It Further Resolved that a good substantial adequate spillway be constructed, under the supervision of the state engineer, in said ditch on Section Nine (9) of Sioux Falls Town-

ship and that an efficient, substantial controlling gate be constructed at the upper end of said spillway in such manner that the same can be closed and all water be prevented from entering said spillway;

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same may be made a special order for Friday, October 6, A. D. 1916, at ten o'clock A. M.

A. G. RISTY,
Chairman of Board of County Commissioners of Minnehaha County, South Dakota.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of October 1916.

HARRY H. HOWE
County Auditor.

81 Endorsed: Filed in the District Court on Sept. 1, 1921, at 9:30 A. M.

And afterwards, to-wit, on the 28th day of November, A. D. 1921, there was filed in the office of the clerk of said court, Stipulation as to certain Drainage Ditch Notice and that same be considered as a part of the answers and returns of the defendants and intervening defendants; that attached to said Stipulation is a "Drainage Ditch Notice"; which said Drainage Ditch Notice is in words and figures the following, to-wit:

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Drainage Ditch Notice.

Notice is hereby given that Monday, October 2, 1916, at 2 o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others filed August 3rd, 1916, for the establishment and construction of a drainage ditch, pursuant to the provisions of chapter 134 of the laws of 1907 of the State of South Dakota, as amended by chapter 102 of the laws of 1909, the exact line and width of said drainage ditch was determined by action of said board on September 13, 1916, to be as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of section twenty-nine (29) township one hundred and two (102) range forty-nine (49) west of the 5th P. M. running thence south parallel to the adjacent highway two thousand eighty-five (2085) feet to station one hundred fourteen (114); also commencing at a point six hundred and seventy-four (674) feet north and about thirty-five (35) degrees west of said station number one hundred fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south 45 degrees east thirty-seven hundred feet (3700) to station number zero (0), the same being on high water line, thence south fifty-nine (59) degrees thirty-six (36) minutes east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to the Big Sioux River, the said line being the
83 center line of said drainage ditch and is intended to cover the exact location of said drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five feet (1035) north and fifty-eight (58) feet west of the southeast corner of section twenty-nine (29), in township one hundred and two (102) of range forty-nine (49), the same being the commencement point of section one (1), hereinbefore described running thence north five hundred and forty-seven (547) feet; thence north twenty-three (23) degrees west three thousand three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the northeast quarter of section twenty-nine (29) in said township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through sections twenty-nine (29), twenty (20), seventeen (17) and a part of section eight (8), twelve thousand nine hundred and thirty-five (12,935) feet; thence north fifty (50) degrees east twenty-seven hundred and thirty two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way of the Chicago, Milwaukee & St. Paul Railway Company in the northwest quarter of section (9), in said township; thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with a high water channel of the

Big Sioux River in the southeast quarter of section twenty (20) in township one hundred and three (103) north of range forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of section eighteen (18) in town-
84 ship one hundred and three (103), range forty-nine (49) running thence north thirty-three (33) degrees west thirty-one hundred and fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between sections seven (7) and eight (8) in said township; thence north parallel with and sixty (60) feet west of the quarter line in sections seven (7) and six (6) in said township and in section thirty-one (31) in township one hundred and four (104) north of range forty-nine (49) to the center line running east and west through said section thirty-one (31); thence northeasterly to the creek near the northeast corner of said section thirty-one (31). The said line being the center line of said proposed drainage ditch.

That in addition thereto the Big Sioux river is to be straightened in sections seventeen (17), eighteen (18) and twenty (20) in township one hundred and three (103) north of range forty-nine (49) in order to afford better means of communication between the lower end of section three (3) of said ditch and the upper end of section two (2) thereof; the same being intended to cover the exact location of drainage ditch number 2 as now established and constructed.

I further recommend that the Big Sioux river be straightened on section thirty-two (32), township one hundred and three (103) north of range forty-nine (49) west by the construction of a cut off beginning at the intersection of the center line of the highway bridge across the Big Sioux river, on the town line between sections thirty-two (32), township one hundred and three (103), range forty-nine (49) and section five (5), township one hundred and two (102), range forty-nine (49) and the center line of said river; thence northerly at right angles to said bridge two hundred (200) feet; thence
85 northwesterly at an angle of twenty (20) degrees to the west, nine hundred and fifty (950) feet; thence northerly at an angle of nineteen (19) degrees to the east twenty-eight hundred and fifty (2850) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8), township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at a point in the center line of the Big Sioux river, twen-

ty-one hundred and seventy (2170) feet easterly and seven hundred and eighty-five (785) feet southerly from the northwest corner of section eight (8) township one hundred and two (102), range forty-nine (49); thence easterly parallel with the north line of said section eight (8) three hundred (300) feet; thence northeasterly at an angle of twenty degrees (20) to the north, four hundred (400) feet, to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8) township one hundred and two (102) range forty-nine by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the east and west quarter line of section eight (8), township one hundred and two (102), range forty-nine (49); thence northerly at an angle of forty-one (41) degrees and thirty (30) minutes to the north eight hundred (800) feet; thence northwesterly at an angle of seventy-five (75) degrees to the west five hundred and fifty (550) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section seventeen (17), township one hundred and two (102), range forty-nine (49) by the construction of a cut off beginning at a point in the center of the Big Sioux river seven hundred and twenty (720) feet southerly and six hundred and twenty (620) feet easterly from the west quarter post of section seventeen (17) township one hundred and two (102), range forty-nine (49); thence northerly parallel with the westerly line of said section seventeen (17) six hundred (600) feet; thence northwesterly at an angle of twenty-nine (29) degrees to the west fourteen hundred and ten (1410) feet; thence northerly at an angle of twenty-nine (29) degrees to the east fifteen hundred and sixty (1560) feet; thence northeasterly at an angle of fifty-five degrees (55) to the east eight hundred and seventy (870) feet to the center of said river.

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I further recommend that the Big Sioux river be straightened on section twenty (20), township one hundred and two (102), range forty-nine (49), by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty (20), township one hundred and two (102), range forty-nine (49), thence southeasterly at an angle of one hundred and thirteen (113) degrees to the east six hundred and ten (610) feet; thence southwesterly at an angle of thirty-one (31) degrees to the

west ten hundred and eighty (1080) feet; thence southwesterly at an angle of twenty-one (21) degrees to the west thirteen hundred and eighty (1380) feet to the center of said river.

Also in said section twenty (20) beginning at the intersection of the center line of the Big Sioux river and the south line of section twenty (20), township one hundred and two (102) range forty-nine (49); thence northwesterly at an angle of sixty-two and one-half (62½) degrees to the north twenty-one hundred and ten (2110) feet; thence northerly at an angle of twenty-eight (28) degrees to the east five hundred (500)
87 feet to the center of said river.

I further recommend that the Big Sioux River be straightened on section twenty-nine (29) township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty-nine (29) township one hundred and two (102), range forty-nine (49); thence southerly at an angle of 81 degrees to the south twenty-nine hundred and ninety (2990) feet; thence southeasterly at an angle of thirty-five (35) degrees to the east ten hundred and ninety (1090) feet; thence southerly at an angle of thirty-seven and one-half (37½) degrees to the west eleven hundred (1100) feet, to the center of said river.

All of the above cut-offs to have a bottom width of sixty (60) feet and side slopes of one and one-half (1½) to one (1). A right of way one hundred (100) feet in width, one-half each side of the above described center lines will be required.

The tract of country likely to be affected by the establishment and construction of the said proposed drainage is in general terms described as follows: Sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty-two (22), twenty-seven (27), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), in township one hundred and one (101) of range forty-nine (49); sections thirteen (13), twenty-four (24) and twenty-five (25) in township one hundred and one (101), range fifty (50); sections three (3), four (4), five (5), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-eight (28), twenty-nine (29), thirty-one (31), thirty-two (32) and thirty-three (33) in township one hundred
88 and two (102), range forty-nine (49); section five (5), six (6), seven (7), eight (8), nine (9), sixteen (16),

seventeen (17), eighteen (18), twenty (20), twenty-one (21), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty-two (32), thirty-three (33) and thirty-four (34) in township one hundred and three (103), range forty-nine (49); sections twenty-nine (29), thirty-one (31) and thirty-two (32) in township one hundred and four (104), range forty-nine (49), including also the mill property at or near the town of Baltic and the tracts of country covered by the right of flowage belonging to said mill property. Also the following additions to the City of Sioux Falls, Minnehaha County, South Dakota; North Boulevard addition, Carpenter's addition, Central Park addition, Meredith's First Addition, Meredith's Second addition, Harrison's addition, Lincoln Park addition, Englewood addition, West Lawn addition, Sioux Falls Improvements Company's addition, North Park Addition, North Park Second addition, Brooks' addition, Bunker's addition, Lake View addition, Brookings addition, Berwick addition, Summit addition, McClellan's Second addition, West Park addition, Pettigrew & Tate's Eighth addition, Glendale addition, Scott's Second addition, Morningside addition, Van Eps' addition, Millspaugh's addition, Daniels' addition, Morse's addition, Gale's addition, Gale's Sioux Falls, Phillips' addition, Syndicate addition, Central addition and W. R. Green addition.

The separate tracts of land through which said proposed ditch will pass and parts of which will be required therefore and for dump space, and the names of the owners of said tracts as appears from the records in the office of the
89 register of deeds of said county on August 3rd, 1916, that being the date of filing said petition, are as follows:

Owner	Description		Township	Range
Lars Simonson	NW¼ of NW¼	Sec. 32	104	49
Lars Simonson	NE¼ of NE¼	" 31	104	49
Lars Simonson	SE¼ NE¼	" 31	104	49
Gustava Nelson	SW¼ of NE¼	" 31	104	49
P. G. Thompson	E½ of SW¼	" 31	104	49
Julia L. Moe	NW¼ of SE¼	" 31	104	49
Even O. Fossum	NE¼ of NW¼	" 6	103	49
Gunerius Thompson	All that part of SE¼ of NW¼ Sec. lying south of a certain slough running West of Northwest to end of drain ditch	6	103	49

F. P. Sorkilmo	All that Part of SE¼ of NW¼ Sec. 6 located & lying on the north side of a certain intermittent water-course or slough running through the center of said section in a northwesterly course to ditch on the west line of said "40" except the N½ of N½ of said SE¼,	103	49
Lina Hanson,	N½ N½ SE¼ NW¼ Sec. 6,	103	49
Gunerius Thompson	E½ of SW¼ Sec. 6	103	49
Ole J. Ustrud	E½ of NW¼ Sec. 7	103	49
Magnhild Floren, Olaf Berthum Floren, Mabel Floren & Ovidia Mathilda Floren	E½ of SW¼ Sec. 7	103	49
Andrew Swenson Aas	E½ of NW¼ Sec. 18	103	49
John O. Aasen	S½ of NE¼ Section 18	103	49
B. G. Flamoe	NE¼ of NW¼ Sec. 20	103	49
Bernt G. Flamoe	SE¼ of NW¼ Sec. 20	103	49
Peter Paulson,	E½ of SE¼ Sec. 20	103	49
Olymphious S. Thompson	Tract 3 of County Auditor's Subdivision of the NE¼ of Sec. 29	103	49
Olymphious S. Thompson	SE¼ of NW¼ and W½ of SW¼ of Sec. 28	103	49

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Owner	Description		Township	Range
Bertha Peterson, Alice, Christina Thompson, John Oscar Thompson, William Henry Thompson, Fred Raymond Thompson, Reuben Victor Thompson, Mabel Josephine Thompson, Carl Melvin Thompson	SW¼ of NW¼	Sec. 33	103	49
Andrew J. Aason	NW¼ of NW¼	" 33	103	49
Joseph C. Thompson	NW¼ of SW¼	" 33	103	49
Thomas Hendrickson	SW¼ of SW¼	" 33	103	49
Ole Thompson Aspass	W½ of NW¼	" 4	102	49
Martin H. Oyen and Cleopatra H. Oyen	W½ of SW¼	" 4	102	49
Martin Oien	W½ of NW¼	" 9	102	49
Martin H. Oien	SE¼ of NE¼	" 8	102	49

Ole Gunderson	W½ of SE¼	" 8	102	49
Leonard Renner	E½ of SE¼	" 8	102	49
Ingeberg Peterson Peter R. Peterson Iver R. Peterson Gertie R. Peterson, Christian J. Orstad	W½ of NE¼ W½ of SE¼	" 17 " 17	102 102	49 49
Albert N. Allis	W½ of NE¼	" 20	102	49
Robert J. Huston	W½ of SE¼	" 20	102	49
Charles E. Kaufmann,	NE¼ & NE¼ of SE¼ of Section 29		102	49
State of South Dakota	SE¼ of SE¼	Sec. 29	102	49
State of South Dakota	E½ of NE¼ & NE¼ of SE¼	" 32	102	49
Hans Ruvald	SE¼ of SE¼	" 32	102	49
Hans Ruvald	E½ of NE¼ & NE¼ of SE¼	" 5	101	49
City of Sioux Falls	Starting at Southwest corner of Section 4, running thence east along Sec. line to the center line of County Ditch #1 as shown on Map #3 of the recorded plat of said ditch, thence in a northwesterly direction along the center line of said ditch to the west line of Sec. 4 thence south along said section line to the place of beginning		101	49

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Owner	Description	Township	Range
State of South Dakota	SW¼ of Sec. 4, except above described tract	101	49
Southern Minnesota Railway Extension Company (Now Chicago Milwaukee & St. Paul Railway Company.	Right of way across the SW¼ of SW¼ Sec. 4	101	49
Watertown & Sioux Falls Railway Company	Right of Way across the SW¼ of SW¼ Sec. 4	101	49
Watertown & Sioux Falls Railway Company	Right of Way across the East ½ of SE¼ Sec. 5,	101	49
Chicago, Milwaukee & St. Paul Railway Company	Right of Way of Madison Branch, on Sections 8 and 9,	102	49
Mapleton Township	Interest in Highway adjacent to the line of the proposed ditch in Sections 4, 8, 9, 17, 20 and 29	102	49
Sverdrup Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 6, 7, 18, 20, 28, 29 and 33,	103	49

Dell Rapids Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 29, 30, 31 and 32,	104	49
Sioux Falls Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 4 and 5 and 9	101	49

92 Berwick Addition to Sioux Falls.

	Lot No.	Block No.
Elwin L. Potter	1, 2 and 3	5
Arthur D. Horton	5, 6, 7, 8, 9, 10 and 11	4
State of South Dakota	1, 2 and 3	13
Grant Lines	5, 6, 10 and 11 lying east of Drainage Ditch	14
State of South Dakota	7, 8, and 9	14
State of South Dakota	1, 2 and 3	19
Sophia Krull,	4	18
Sophia Krull, Emma Buchholz, Mary Toepfer, Charles Krull, William F. Krull and Otto R. Krull	5 and 6	18
Sophia Krull	7, 8, 10, 11	18
George W. Hanson (Fee) Security Savings Bank (Tax title)	9	18
Moses M. Robinson	1	31
Security Savings Bank	2 & 8	31
James Kennedy	3	31
Security Savings Bank	All of Block	32

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The Kittery Realty Company—Tract 2 of NE¼ Section 9, Twp. 101, Rge. 49.

The Kittery Realty Company—Tract 3 of NE¼ Sec. 9 Twp. 101 Rge. 49.

State of South Dakota. Tract 3 of NW¼ Sec. 9, Twp. 101 Rge. 49.

93 The separate tracts of land wherein the Big Sioux River is proposed to be constructed and which will likely be affected thereby and the names of the owners of said tracts as appear from the records of the office of the Register of

deeds of said County on August 3rd, 1916, that being the date of the filing of said petition, are as follows:

Name of Owner.	Description	Township	Range
Andrew J. Aasen,	W½ NE¼ Section 32	103	49
Andrew J. Aasen	NE¼ of NE¼ Sec. 32	103	49
Joseph O. Thompson,	S½ of SE¼ of NE¼ Section 32,	103	49
Gus S. Thompson,	N½ of SE¼ of NE¼ Section 32.	103	49
Jonas L. Finnegan,	N½ of SE¼ of Sec. 32,	103	49
Margaret Finnegan,	SE¼ of SE¼ Sec. 32,	103	49
John Finnegan,	SW¼ of SE¼ Sec. 32	103	49
Ole Gunderson,	NW¼ Sec. 8	102	49
Iver Nelson,	NW¼ of SW¼ Sec. 8,	102	49
Jonas Olson,	SW¼ of SW¼ Sec. 8,	102	49
Ole Gunderson,	E½ of SW¼ Sec. 8,	102	49
Iver R. and Palma Peterson,	NW¼ of NW¼ of Sec. 17	102	49
Bernt Mekvold,	SW¼ of NW¼ Sec. 17	102	49
C. C. Fleischer,	NW¼ of SW¼ Sec. 17.	102	49
Iver R. and Palma Peterson,	East 26 acres of NE¼ of NE¼ Sec. 18	102	49
Bernt Mekvold,	SE¼ of NE¼ Sec. 18	102	49
W. O. Quincy,	W½ of NW¼ Sec. 20	102	49
Albert N. Allis,	E½ of NW¼ Sec. 20,	102	49
Robert J. Huston	N½ of SW¼ Sec. 20,	102	49
Charles Kaufmann,	S½ SW¼ Sec. 20,	102	49
Charles Kaufmann,	W½ of NE¼ Sec. 29	102	49
Charles Kaufmann,	NE¼ of NW¼ Sec. 29	102	49
Ole P. and Maria Schjodt	W½ of SE¼ Sec. 29	102	49
Berit Johnson,	NE¼ of SW¼ Sec. 29	102	49

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In addition to the above, notice is also given to Minnehaha County, Townships of Sioux Falls, Mapleton, Sverdrup, and Dell Rapids in said County and the City of Sioux Falls in said County on account of benefits to highways, bridges, parks and city waterworks plant in the said drainage area and notice is also given to the Chicago, Milwaukee & St. Paul Railway Company, also to the Watertown & Sioux Falls Railway

Company on account of the benefits to their rights of way within said drainage area;

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have why the said drainage should not be established and constructed;

And all persons deeming themselves damaged by said proposed drainage or claiming compensation for the lands proposed to be taken for said drainage are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 15th day of September A. D. 1916.

THE BOARD OF COUNTY
COMMISSIONERS,
By: A. G. Risty, Chairman.

Attest:
(Seal) Harry H. Howe, County Auditor
By E. H. Shenkle Deputy.

Filed in the office of the Auditor of Minnehaha County, S. D., this 15 day of Sept., 1916.

HARRY H. HOWE, County Auditor,
By E. H. Shenkle, Deputy.

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96 (Order permitting amendment to bill of complaint.)

The Chicago, Rock Island and Pacific Railway Company, Great Northern Railway Company and the Northern States Power Company having heretofore procured an order from this Court asking for leave to amend the Bill of Complaint in their actions to conform to the proof by [additing] an additional paragraph to the original Bill, to be known as Paragraph 18½, and the said Order to Show Cause
97 coming on to be heard on the 31st day of January 1922, and at the said time and place this Plaintiff appeared by its attorney, and asked the Court that the same Order be made in this case as in the cases above referred to. Whereupon, in open Court, the Court ordered that the Plaintiff herein be permitted to amend its original Bill of Complaint the same as the Plaintiff's heretofore named; that the said Paragraph 18½, for which an amendment is prayed is as follows:

"Added to the Bill of Complaint by order of the Court dated the 31st day of January 1922.

That the equalization of benefits of 3147.95 units out of a total number of units of 32,549.62, estimated in dollars and cents at approximately Twenty-nine Thousand Nine Hundred Five and 63/100 Dollars ($29,905.63), fixed by the Board of County Commissioners of Minnehaha County, South Dakota, on the 10th day of June, 1921, against the property of the City of Sioux Falls, as above set forth, is wholly speculative, arbitrary, unjust, illegal and discriminatory and [eas] made by the Board of County Commissioners without any reasonable or rational basis therefor, and is not in proportion to any benefit which the property of the plaintiff has received or ever can receive by reason of the re-building of the spillway, the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and Drainage Ditch No. 2, as set forth herein; that the property of the Plaintiff has not and never can be [befitted] by the work performed by the Board of County Commissioners as herein set forth, to the extent of Twenty-nine Thousand Nine Hundred Five and 63/100 Dollars ($29,905.63), or to any extent whatever, and that the assessment sought to be collected from the Plaintiff, as above set forth, is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the City of Sioux Falls. That the said equalization of benefits
98 is so arbitrary and discriminatory against the property of the Plaintiff as to deprive the Plaintiff of its property, without due process of law and to deprive the Plaintiff of the equal protection of the laws."

The Plaintiff appearing by its solicitors, Parliman & Parliman, and the Defendants appearing by their solicitor, E. O. Jones, and the Intervening Defendants appearing by their attorneys, Porter & Bartlett, and the Court being fully advised in the premises, and it appearing to the Court that upon the trial of the said action evidence was offered and received by and from all parties to the said action, relevant to the issues proposed to be raised by said Amendment, and that in the furtherance of justice the said Amendment should be permitted;

Now Therefore, it is hereby Ordered that the motion to amend the Plaintiff's original Bill of Complaint, be and the same is hereby allowed, and it is Further Ordered that the Amendment be made and filed nunc pro tunc as of the date of the trial of the said action on the 15th day of December, 1921, and it is Further Ordered that the Amendment be made by

attaching to the original Bill of Complaint a copy of the Amendment and making it a part of the original Bill, and that the Bill, as amended, need not be written in full; and it is further Ordered that the Answers of the Defendants and Intervening Defendants now on file in this action shall stand as Answers to the Bill as amended.

And the defendants and intervening defendants having asked permission to submit further evidence upon the issue set out in said amendment, it is further ordered that they may do so at any time within 10 days from the date hereof upon two days notice to the attorneys for the plaintiff.

Done at Sioux Falls, South Dakota, this 2 day of February, 1922.

99 By the Court:

JAS. D. ELLIOTT,

(Seal of Court) Judge of the District Court.

Attest:

Jerry Carleton,
Clerk of the District Court.

Endorsed: Filed in the District Court on Feb. 2, 1922, at 3 P. M.

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100 (Exception of defendants to order allowing amendment to bill of complaint.)

February 2, 1922.

Come now the defendants, by their attorney, E. O. Jones, Esq., and the Intervening Defendants, by their attorney, N. B. Bartlett, Esq., and except to the Order permitting the amendment to the Bill to conform to the proof, which exception is allowed by the Court.

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101 (Amendment to Bill of Complaint.)

18½

102 Added to the Bill of Complaint by order of the Court, dated the 31st day of January, 1922.

That the equalization of benefits of 3147.95 units out of a total number of units of 32,549.62, estimated in dollars and cents at approximately Twenty-nine Thousand Nine Hun-

dred Five and 63/100 Dollars ($29,905.63) fixed by the Board of County Commissioners of Minnehaha County, South Dakota, on the 10th day of June, 1921, against the property of the City of Sioux Falls, as above set forth, is wholly speculative, arbitrary, unjust, illegal, and discriminatory and was made by the Board of County Commissioners without any reasonable or rational basis therefor, and is not in proportion to any benefit which the property of the Plaintiff has received or ever can receive by reason of the rebuilding of the spillway, the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and Drainage Ditch No. 2, as set forth herein; that the property of the Plaintiff has not and never can be benefited by the work performed by the Board of County Commissioners as herein set forth, to the extent of Twenty-nine Thousand Nine Hundred Five and 63/100 Dollars ($29,905.63), or to any extent whatever, and that the assessment sought to be collected from the Plaintiff, as above set forth, is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the City of Sioux Falls. That the said equalization of benefits is so arbitrary and discriminatory against the property of the Plaintiff as to deprive the Plaintiff of its property, without due process of law and to deprive the Plaintiff of the equal protection of the laws.

Endorsed: Filed in the District Court on Feb. 2, 1922, at 3 P. M., Nunc Pro Tunc as of December 15, 1921.

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104 (Opinion of the District Court.)

James D. Elliott, District Judge.

United States District Court, District of South Dakota.
Sioux Falls, S. Dak., Feb. 17th, 1922.

Chicago, Rock Island & Pacific Railway Company, a corporation, Plaintiff,
No. 98 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, Milwaukee & St. Paul Railway Company, a corporation, Plaintiff,
No. 99 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation, Plaintiff,
No. 100 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Northern States Power Company, a Corporation, Plaintiff.
No. 101 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

City of Sioux Falls, a Municipal Corporation, Plaintiff.
105 No. 102 S. D. vs. In Equity.
A. G. Risty, et al., Defendants

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Great Northern Railway Company, a Corporation, Plaintiff.
No. 103 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

C. O. Bailey, Esq., Sioux Falls, S. D. and others, Counsel for Plaintiffs.

Messrs. Porter & Bartlett, and C. O. Jones, Esq., Sioux Falls, S. D., Counsel for Defendants.

Gentlemen:—

I have finally disposed of the questions presented in the various drainage ditch cases, consolidated for the purpose of trial, and which were tried and submitted upon single record.

The question of the constitutionality of the South Dakota drainage statute is pleaded by each plaintiff, and upon this issue, the interests of the plaintiffs in all these suits are identical. It is urged by the plaintiffs in the various suits that the entire South Dakota drainage statute is unconstitutional for the reason that it is in conflict with the Fourteenth Amendment of the Constitution of the United States.

106 Plaintiffs call the Court's attention to the provision of the Fourteenth Amendment that prevents the taking of property "Without due process of law."

If the South Dakota statute does not give the person whose land is to be assessed for the drainage of agricultural lands his "day in court", then there is no "Due process of law." I find upon investigation of the various drainage ditch statutes that almost universally the provision is made for the organization at the inception of the proceeding of a drainage district, with boundaries defined, organized after notice to all property owners within the district, and endowed by statute with certain powers consistent with the purpose for which the district is organized. I also note that ordinarily, where no provision is made for the formation of a drainage district, as is the case in this state, provisions are usually made for the notification of the property owners whose interests are supposed to be included in the drainage district, and for the giving to them of an opportunity to be heard in respect to the question of the practicability or feasibility of the drainage proposition, and whether or not the benefits will exceed the cost, and whether or not the particular lands of the owner, shall be included within the drainage district and assessed its pro-rata share of the benefits.

It is urged by the plaintiffs, and must be conceded, that in this regard the South Dakota statute differs from the drainage statutes of most other states. Section 8459, Revised Statutes of South Dakota, provides that a petition for proposed drainage may be filed with the Board of County Commissioners. This is the first step in the proceeding.

107 This petition is only required to set forth the necessity for the drainage, a description of the route, its initial and terminal points, and its general course, or of its exact course in whole or in part, and a general statement of the territory likely to be affected thereby.

Under this statute petitioners are not required to describe the specific tracts of land to be included within the drainage area, or which will be affected thereby or assessed therefor.

Neither is it necessary to give the names of the owners of the property. The statute requires only a "general statement" as to the extent of the territory affected.

Section 8461 of said Revised Statutes, provides that the Board shall fix a time and place for the hearing of the petition and shall give notice by publication at least once each week for two consecutive weeks in a newspaper in the county, and by posting notices near the route of the proposed drainage. It also provides that such notice shall describe the route of the proposed drainage, and the tract of country likely to be affected thereby, in general terms, the separate tracts of land through which the proposed drainage will pass, and give the names of the owners thereof as appears from the records in the office of the Register of Deeds on the date of the filing of the petition. It is further provided that such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed.

Plaintiffs note that this statute, except as to property
108 owners through whose property the proposed drainage will pass, provides only this general notice, and especially complain that it gives no property owner any notice that his particular tract of land is included among the lands affected by the proposed drainage, and insist that the notice is broad enough to take in each and every tract of land included within the boundaries of the county in which the drainage project is situated.

It is true that, other than this general notice, there is no notice whatever given to the property owner that his particular land is affected by the drainage proposition, or that he has any interest in it, or will be mulcted in assessment for benefits by reason thereof. He receives no summons or other notice, either by personal service or by mail. He has, however, the general notice given in the published summons by the Commissioners to "All persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed."

By Section 8461 of the said Revised Statutes, the County Commissioners pass upon the petition at the time named in the summons and notice, and if they find it feasible to establish the drainage, no provision is made for any other notice to any property owner, unless it should be found necessary to change the initial or terminal points so that the

drainage will pass through other lands than those described in the original notice, or to increase the width of the lands to be taken for the proposed drainage, in which case the Board must give the owners of such lands notice. There is
109 no provision, however, for any notice to any property owner after the drainage ditch is established.

The Board may then proceed without further notice, to its construction. It may incur construction expense before taking any proceedings towards making an assessment for the payment of the costs, or it may before doing the work, estimate the costs and make an apportionment of benefits upon which the assessment may subsequently be spread by the County Auditor.

Section 8463 of said Revised Statutes authorizes the said County Commissioners, after establishing the drainage, to fix the proportion of benefits of the proposed drainage among the lands affected, and also appoint a time and place for equalizing the same. It is then provided that notice of such equalization of proportion of benefits shall be given publication for two weeks. It is provided that this notice must give a description of each tract of land affected by the proposed drainage, and the names of the owners as appears from the records of the office of the Register of Deeds. It is further provided that the lands to be charged with benefits include all pieces of property that, in the judgment of the Board of County Commissioners are benefitted by the drainage proposition. At this hearing the Board fixes the proportion of benefits for each tract of land, taking any particular tract as a unit, and also fixes the benefit which any railroad company may obtain for its property by such construction and equalizes it together with the proportion of the bene-
110 fits to tracts of land. This statute seems to provide for this hearing for fixing the proportion of the benefits before the ditch is constructed and before it is known what will be the actual amount of money expended. This hearing may be delayed until after the ditch has been built. It also provides that in event there is further expense incurred, or if for any reason, parties assessed do not pay the tax, a new proportion of benefits shall be fixed and new assessments made.

At this hearing the owners of the lands alleged to be benefitted have notice, have the right to appear and contest the amount of the benefits upon their lands, and may even urge that no benefits are derived. From this assessment there is a provision granting an appeal to the Circuit Court of the County in which the lands are situated, in which the pro-

portional benefit may be an issue, and the owner of the land, upon such appeal, may contest the fact that there are any benefits to the land in question. The law further provides for an appeal from the determination of such issue in the Circuit Court to the Supreme Court of the State.

After such proportional benefits are determined the County Auditor spreads the tax and it then becomes a lien upon the property benefitted.

This brief statement of the provisions of the statute, not at all complete, but in a general way outlines the general powers of the Board and the method of the establishment of the ditch, and the various steps up to the spreading of the tax against the lands benefitted.

These proceedings are peculiarly limited to the drainage of agricultural lands, because the Constitution of the State of South Dakota provides that:

"The drainage of agricultural lands is especially declared to be a public purpose and the Legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest corporate authorities thereof and the corporate authorities of counties, townships and municipalities, with powers to constitute levees, drains and ditches * * * * * by special assessments upon the property benefitted thereby according to the benefits received."

Pursuant to this provision of the Constitution, the Legislature of the State has provided for the drainage of agricultural lands, but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands "for any public use". Without repetition, and calling attention now to the reasons urged by the plaintiffs sustaining the unconstitutionality of this statute enacted for the purpose of draining agricultural lands, and considering the objections urged in various forms by the different plaintiffs, we find that all of the objections center about the criticism that no notice is provided the owners of lands affected by the drainage ditch, except the general notice, and in fact, no personal notice until the date fixed by the Board for the equalization of pro-
portional assessments for the various tracts of land
111 benefitted by the drainage. It will be noted that the
Legislature has provided that no tax can become effective, no assessment can be made, until the benefits have been ascertained and proportioned, and before this can be done a

definite day must be named by the Board and the various land owners are given notice.

The question resolves itself into one of whether or not this hearing after notice, with the right of appeal, constitutes "a day in Court" to the various land owners. I have reviewed the authorities submitted by plaintiffs and I am frank to confess that the statutes of this state do not provide for the description of the lands alleged to be benefitted by the ditch, or the owners of the lands, or that notice shall be given to such owners, or that the owners shall appear and show cause, if any they have, why the ditch is not practicable or should be established, or have the opportunity to show that the cost would be greater than the benefits, or would be confiscatory, and yet, I am satisfied that the courts of the various states and the Supreme Court of the United States have recognized the power of the Legislature to provide the method of the levying of this tax against the lands benefitted by a drainage ditch, and have held that a law that provides for notice and an appearance and the right to contest the amount of the tax, and to contest the right to tax at all, with the right of appeal therefrom, if given to the land owner prior to
112 the time that a tax is levied and becomes effective, is "due process of law."

I was impressed upon the oral argument with counsel's reference to the decision in the North Dakota case, Soliah vs. Heskin, etc., 222 U. S. 522. Counsel urged that the law of North Dakota, very similar to ours, was sustained because it provided for a notice at the time of the establishment of the ditch. Reference to this opinion demonstrates that the Court held as follows:

"Neither does that Amendment invalidate an act authorizing an appointed Board to determine whether a proposed drain will be a public benefit and create a drainage district consisting of land which it decides will be benefitted by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property.

(Underscoring is mine.)

Under the South Dakota statute, applying this rule as announced in the North Dakota case, clearly, the notice is provided and an opportunity to be heard is afforded the land

owner before the assessment becomes a lien upon his property, in the drainage of agricultural lands.

Louisiana has held that:

"Whenever by the rules of the state or by state authority, a tax assessment, servitude or other burden is imposed upon property for the public use, * * * * * * * * * and those
113 laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person of such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without 'due process of law.' " Davidson vs. New Orleans, 96 U. S. 97.

Massachusetts has held that:

"If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." Spencer vs. Merchant, 125 U. S. 578.

Construing the statutes of the State of Missouri, it was held that:

"It is granted that the land owners were not afforded an opportunity to be heard in respect to the value of their land. While no hearing is given when the lands are appraised a hearing is given when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice when owners aggrieved by the valuation may have a full hearing upon that question. This is due process of law." Embree vs. K. C. & L. Road Dist. 240 U. S. 242.

The drainage statute of Michigan was considered in re Roberts vs. Smith, 72 N. W. ....., and also in Gillette vs. McLaughlin, 37 N. W. 551, and in Smith vs. Carlo, 72 N. W.
22. In these cases the same objections were made to
114 the constitutionality of the law that are argued by the plaintiffs here, and especially that the persons who did not own lands traversed by the drain, but who are within the assessment district, have no opportunity to be heard upon the necessity for laying the drain. And, further, that persons within the assessment district are entitled, under the constitution, to a hearing upon the question of the public necessity for the drain. These contentions were denied in these cases,

the law held constitutional, and a full discussion of the questions is to be found in these cases and the cases therein cited.

The Michigan statute is construed again in re Voight vs. Detroit, 82 N. W. 253, and on appeal, 184 U. S. 115, in which it was urged that no provision is made for a notice to property owners of the time and place of hearing upon either the question of fixing the taxing district or the amount of the award to be spread thereon. This, it is claimed, leads to taking property without due process of law, and therefore the law is unconstitutional. It was claimed in this case, by counsel, that the complainant was entitled to notice of the hearing relating to the establishment of the assessment district, and of the amount of the total assessment, and because the statute did not provide for these notices it was unconstitutional. It was held in this case that this position could not be maintained.

"The provision of law by which, when the proceeding has reached the stage where it is proposed to levy the tax, a notice must be served on the property owner, was held sufficient to avoid the constitutional objection, notwithstanding no
115 notice is required in respect to the creation of the district or the determination of the aggregate amount of the tax to be collected.

In re Paulson vs. Portland, 149 U. S. 30 it is held:

"It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question, What proportion of tax shall be assessed upon his land, there is no taking of his property without due process of law."

I repeat that under the South Dakota statute there is ample provision for notice to every land owner, and an opportunity given to be present at the hearing, at which time and place he may assert all objections against the validity and justice of the proposed charge upon his property before the tax is levied, and carried by the County Auditor as such on the books of his office and made a lien upon the property. It follows that, in my judgment, the South Dakota statutes, enacted in the light of that provision of the Constitution of the State providing for the drainage of agricultural lands, is constitutional.

The case made by the bills filed by the plaintiffs in these various actions involve a real and substantial question under the Constitution of the United States. The amount involved

in each case is greatly in excess of Three Thousand Dollars, exclusive of interest and costs. On the question of the jurisdiction of this Court, I am of the opinion that each
116 plaintiff states a case in his bill plainly cognizable in this court. All of the plaintiffs except the City of Sioux Falls allege diversity of citizenship, in addition to the Constitutional question, and the proper amount involved. I repeat that there can be no question as to the bills involving a real and substantial question under the Constitution of the United States, and in such a case the jurisdiction of this Court extends to every question involved, whether of Federal or State law, and enables the Court to rest its judgment or decree on the decision of such of the questions as in its opinion effectually dispose of the cases. Davis et al. vs. Wallace et al. (Opinion Jan. 9, 1922,.... U. S. .... with cases there cited).

It conclusively appears on the face of these pleadings that there is no speedy or adequate remedy at law. The remedy at law must be a remedy on the law side of the Federal Court, not a remedy in the State Courts of South Dakota. In each of the cases where there is a diversity of citizenship, this Court of Equity will not deny the plaintiff relief because there may be a remedy in the courts of the state, for the reason that the non-resident is not required to subject himself to jurisdiction of the Courts of the State in order to obtain relief. U. S. Life Ins. Co. vs. Cable, 95 Fed. 761.

In neither of the cases at bar is there a remedy at law on the law side of the Federal Court. If plaintiffs, or either of them are compelled to pay this tax, no action would lie on the law side of the Court that would give them relief. No action on the law side of the Court would protect them, or either of them, from future assessments and future responsibilities.

There is the further issue presented on the face of the bills, that for the reasons therein stated, no Drainage Ditch No. 1 and 2, under which it is pretended this assessment is made, was ever established. That this is simply a pretense for the maintenance and repair of the ditches that had been theretofore established, and that the steps that have been taken by the County Commissioners are without authority of law. In substance, that the Board of County Commissioners are trespassers, acting with no right or color of right. That insofar as there is an attempt to assess benefits to the property of the plaintiffs, or other property in the City of Sioux Falls, the proceedings are entirely void. That as to each of the plain-

tiffs the assessment of benefits made is arbitrary, unjust, illegal and void. This is the basis of the claim that the assessment is such as to result in the property of the plaintiffs bearing more than its share of the burden of improvements while such property is in no wise benefitted thereby. That the alleged benefits from this improvement have not been estimated upon these properties with the farm lands according to any standard which will produce approximately correct general results. That the taxes upon the plaintiff's property are upon some fanciful view of future benefits, while the farm
117 property is assessed wholly according to its area and position. That the property of the respective plaintiffs is sought to be burdened for this improvement upon a basis so wholly different from that used for ascertaining the contribution demanded from individual owners of agricultural lands adjacent to the drain, as necessarily to produce manifest inequality. That the plaintiffs are therefore deprived of the protection of the law which must be extended to all.

The determination of these various issues necessarily requires a consideration of the facts as they appear in the record. Fortunately there is practically no dispute as to the facts. The only dispute is as to the legal effect of the acts of the Board of County Commissioners.

What, then, was the situation at and prior to the time that the said Board assumed authority to require the plaintiffs and others in the City of Sioux Falls, to pay for the building of this new spillway, and the repair of the ditches hereinafter referred to? The Sioux River flows from the north, in a southerly direction, west of the City of Sioux Falls, then flows in an easterly direction, south of the main portion of the city, then flows north through the city of Sioux Falls, flowing a distance of some ten miles from a point north of the city where the drainage ditch hereinafter referred to leaves the river, to a point where the drainage ditch empties its waters into the river. The river thus describes a large norse-shoe, the drainage ditch cutting across the open end, practically from the river on one side to the river on the
118 other. Dell Rapids is situated in the Sioux Valley more than twenty miles north of Sioux Falls.

At first there was established Drainage Ditch No. 1, and then Drainage Ditch No. 2. These two ditches extended from a point north of the City of Sioux Falls some distance to a point some fifteen miles north of Sioux Falls, at which point Drainage Ditch No. 2 was intended to take the flood water

from the Sioux River and conduct it down its length into and through Drainage Ditch No. 1, to the river north of Sioux Falls, cutting through the hills adjacent to the river, and necessitating the conduct of the water down a fall of more than one hundred feet into the river. Drainage Ditch No. 1 and Drainage Ditch No. 2 were duly constructed under the provisions of the Constitution and laws of the state for the drainage of agricultural lands and were operated for the purpose for which they were constructed. The first petition for said Drainage Ditch No. 1 was filed in 1907, and the petition for Drainage Ditch No. 2 was filed in 1910. Such proceedings were had that these two ditches were constructed down the valley in a southerly direction, near the Sioux River until a point was reached north of the City of Sioux Falls, when the ditch was turned in an easterly direction across to the Sioux River at a point north and east of the City of Sioux Falls. Benefits were assessed and paid by the owners of adjacent lands under the provisions of the statutes of the State of South Dakota to which I have referred. In
119 1915 the force of the waters conducted by these two drainage ditches was so great as to wash out what is called the spillway, through the bluff adjacent to the point where the waters from the ditches entered the river. The ditches in the meantime also became out of repair, and at one point several miles above the City where the ditch approached the river, the water was cutting from the river into the ditch, threatening to turn the entire course of the Sioux River at this point into the ditch, and through the ditch back into the river, leaving the Sioux River from that point and for about twelve miles around to where the ditch flowed into the river, without water. The spillway from the ditch through the bluff down into the river was so unskilfully, inefficiently and unscientifically constructed that it would not stand the force of the water with a fall of one hundred feet into the river. It was washed out, and the bluff being of soil and sand, washed out to the entire depth of the river and began washing back through the bluffs, threatening to cut clear back to a point where the water cut through from the river to the ditch, thus taking away from the City of Sioux Falls the benefits of the river, its sewer system and the advantages of the stream, and take the water from the plaintiff, The Northern States Power Company, that naturally flowed down the river except for the interference by this drainage ditch. And in the cutting into this bluff also threatened to cut into the gravel bed in which the water supply of the City is located, a few miles west of it, and thus drain and destroy and take away

from the City of Sioux Falls, its water supply. This was the situation in 1916.

This situation presented no question of the
120 drainage of agricultural lands. The people who had been responsible for the establishment of these two drainage ditches and the conduct of the water down through the hill to the river below, because of the inefficient manner in which the spillway had been constructed, had caused all of the trouble. The thing that confronted the Board of County Commissioners at that time, having charge of these two drainage districts, was the maintenance of the ditches and of the spillway which was a part of the ditch that had already been constructed. In the construction of these ditches no suggestion had ever been made that the City of Sioux Falls, all lying entirely south of the districts drained, was in any manner interested in the drainage, or that there could be any benefits assessed to such city or any property owner thereof. The situation that confronted them was not drainage of agricultural lands, it was the maintenance of the ditches that had been established by them, and the prevention of the dangers threatened by the water that they were conducting down through these ditches, through this hill, into the river. They might have taken their chances upon the damages that their acts were responsible for, and let the river cut down through the ditch that they had constructed and turned the course of the river there and taken the water away from the City of Sioux Falls entirely, and exhausted and destroyed the City's water supply, and destroyed the power of the plaintiff, the Northern States Power Company, by taking the water from the stream at the point where the power plant is located, without in any way endangering the agricultural lands along this ditch, except so much of it as would be
121 washed away in forming this new bed of the river. I apprehend that we may reasonably find from the evidence here that such a cut-off in the river would be to the advantage of the land owners and prevent floods, so that it was not the drainage of the lands that was bothering the Commissioners, it was not the purpose to drain agricultural lands that impelled the Commissioners to act; the thing that impelled them to give this situation any consideration was the dangers that were threatened by reason of their having constructed these two ditches, and an effort to stop the ravages of the water they were conducting down there, by the construction of a substantial, adequate spillway. It was also necessary for them, in order to stop this threatened danger, to stop the ravages of the water at the point where it was

cutting into their ditch. Certainly, this condition never could have existed if they had never built the ditch. They were responsible for it and it was their duty to maintain the ditch and to stop the ravages of the water cutting into it and through it.

This was one of the questions that they had before them, one of the problems that they had to solve, and they did proceed to construct this spillway in a substantial way and to dike, and with cement to hold the water in the stream at the place where it was cutting into the ditch. The statutes of the State of South Dakota specifically provide the duty and the method for the maintenance of these ditches. Section 8470 of the said Revised Statutes, provides as follows:

"Assessments for maintenance. For the cleaning and
122 maintenance of any drainage ditch established under the provisions of this article, assessments may be made upon the land owners affected, in the proportion determined for such drainage, at any time, upon the petition of any person setting forth the necessity therefor, and after due inspection by the Board of County Commissioners."

When this river cut through into the ditch, when the ditch became clogged in places and was not wide enough in others, when the spillway washed out by the force of the water they were conducting down the ditch, and the cutting of the bluff began and large areas of land were being washed away, and the other dangers were threatened, there was only one proposition presented to the Commissioners, and that was one of maintenance; was one of taking care of the water that they were conducting down these two ditches, No. 1 and No. 2.

Instead of proceeding frankly to maintain the ditches they had established in the manner provided by statute; instead of carrying out the obligations they had assumed when they brought the water down there through these ditches, and attempted to deliver it through this bluff into the river; instead of proceeding regularly under this statute to do that which it was their duty to do; instead of performing the obligation that they had assumed when they established the ditches, that of maintaining them, they proceeded to act upon the assumption that because they had conducted the water down into these ditches, and because of the inefficient manner in which
123 they had constructed the ditches and built the spillway, and all of these dangers were threatened, therefore, the plaintiffs, and others in Sioux Falls, were necessarily to be damaged. And, although a proper maintenance of these two ditches, No. 1 and No. 2, would stop the damage,

would prevent any danger, the Commissioners evidently reasoned that because the plaintiffs and others in Sioux Falls were in danger, they must pay for the repair of these ditches. That could not be done by simply saying the ditches shall be repaired and the City of Sioux Falls, the plaintiffs, and others, shall pay for it, or pay a part of it, and therefore, they proceeded to do indirectly what it was conceded they could not do directly. In other words, they then began to look around and see what they would do in the way of taking care of the water and stopping these dangers.

At first it was proposed to change the spillway and conduct the water down in a southerly direction, through a slough or lake, into the river west of the City, and save the great fall that is involved at the point where the water enters the river from the spillway northeast of the city.

This was abandoned and they finally then pretended to act under a statute authorizing the abandonment of ditches. As a matter of fact there was no abandonment in good faith. No attempt to abandon the ditches. In fact, the reading of the resolution shows it was simply that they abandoned the spillway. That they filed a petition which was headed, "To reconstruct and improve Drainage Ditches No. 1 and No. 2, Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by assessment upon the property, persons and corporations benefitted thereby."

This petition was filed in July, 1916, with the Board of County Commissioners. There had never been an abandonment of Ditch No. 1 and Ditch No. 2. There had been a pretended abandonment of the spillway. But the Commissioners proceeded then to construct a proper spillway on the identical location of the old one. In other words, no change whatever was made in the two ditches, No. 1 and No. 2, except to properly construct an efficient, adequate, substantial spillway, and prevent the river cutting from its bed into the ditch, cleaning out the ditch and repairing it, changing the gates at the head of the ditch where the flood waters were taken from the river.

Upon this petition, for this purpose, the Board of Commissioners assumed authority and power to re-christen this Ditch No. 1 and Ditch No. 2, and call it Ditch No. 1 and 2, and for the purpose of making these repairs and maintaining the old ditches under the new name, proceeded as if no ditch had been established, and as if the Ditches No. 1 and No. 2

were not in existence, and as if no obligation had been assumed by the drainage districts when they diverted the water down through the bluffs to the river, and proceeded to make the repairs and to reach out and say that the various plaintiffs were benefitted. Instead of charging the repairs and [maintainence] of the ditches to those who were responsible for their construction under the provisions of the statutes above referred to, the Commissioners proceeded to assume
124 the right and authority to constitute a new drainage ditch without any abandonment of the old ditches, with no thought of using new or different drainage in any way, except to maintain them and to perfect that which had been inefficiently constructed, with no thought or purpose except to repair the damage that had already been done, and prevent future damage.

Under these circumstances, I am of the opinion that the Commissioners were acting entirely without authority of law. There is no provision in the statutes of the State of South Dakota for the taking in of any other lands and assessing them, for the maintaining of a ditch after it has been constructed, and the benefits of its building have been assessed.

I am of the opinion that the forming of this new ditch was simply a pretense, and that the plaintiffs' pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed.

I am of the opinion that Section 8489 of said Revised Statutes, in regard to invalid and abandoned proceedings is not applicable to any situation such as existed here. That section has reference to the abandonment of a ditch that has been enjoined, vacated, set aside or declared void, and specifically provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expenses paid on the old ditch, and give credit for any payment
125 made upon the old ditch [—] benefitted. No such proceeding was attempted to be followed in this case. The proceedings establishing old ditches No. 1 and No. 2 have never been held void, never been set aside, never been abandoned. They are in force today and are responsible for the manner in which the ditches were constructed and for any damages that result from their negligence.

Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provisions of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and [maintainence] of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage Ditch No. 1 and 2 was ever established and has no existence.

I am of opinion that the proceedings of the Board of Commissioners in the repair and [maintainence] of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the City of Sioux Falls, are void. Entertaining this view it follows that plaintiffs' prayer for an injunction should be granted.

I may suggest in conclusion, however, that even if the Court had found that Drainage District No. 1 and 2, was legally constituted, and that the Board of County Commissioners had the right to extend the benefits to property within the City of Sioux Falls, the proofs overwhelmingly bring the plaintiffs within the rule recently expressed in re Thomas et al. v. Kansas City Southern Railway Co., et al. (December term A. D. 1921,....Fed.....) in that the taxation that is imposed upon each of the plaintiffs is a much higher rate, and upon a different basis, than the tax upon land lying within the district. As a matter of fact no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiffs' property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. Taking, for instance, the tax upon one of the plaintiffs, the City of Sioux Falls, for its miles of streets in the City of Sioux Falls, with no pretense that there is any method of taxation or measuring a benefit or a gain, that would produce even approximately correct general results, when considered with benefits to the lands in the district. Simply a vague, indefinite generality, indulged in by the engineer and adopted by the Board. Benefits purely fanciful, with no substantial basis. Take the railroads, different plaintiffs, there is no pretense that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners, and

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I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all.

Referring to the testimony showing the manner of making assessments and the amount, in a general way: I think it fairly appears from the record in the case that the contention of the plaintiffs that the attempt to assess the property of these plaintiffs was an afterthought. It, in my judgment, is established that they could not be benefitted, even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the Board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands. The plaintiff, Chicago, Rock Island & Pacific Railway Company, is simply arbitrarily assessed Eight Thousand Dollars, in raising a total of Three Hundred Thousand Dollars. The Northern States Power Company was assessed Fifty Thousand Dollars, one fifth of the entire expense although there is included in the pretended district agricultural lands something like twenty miles in length and several miles in width. The injustice of this is apparent when it is noted that the record disclosed that it was located upon the rapids of the Sioux River, in the City of Sioux Falls, had been located there for many years. It was, therefore, entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business.

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The injury that was to be remedied by this improvement was one that had been caused by Drainage Ditch No. 1 and Drainage Ditch No. 2, one that could not have existed but for the establishment of those ditches. The duty to maintain these ditches involved the duty to repair the break from the banks of the river, and the duty to prevent the taking of the water from the river, that would, or should, naturally flow therein to plaintiff's benefit.

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Even if there had been a valid establishment of a drainage ditch at the time and place in controversy, and even if the Board of County Commissioners had jurisdiction, there was an entire failure to present any evidence upon which any

benefit could possibly be predicated against this plaintiff. The engineer who pretended to work out the hypothetical benefit admitted that he was not a hydro-electric engineer, and therefore, not able to analyze and state the result of the different conditions of the water in the river. The suggestion applies with special force to the status of this plaintiff that the amount of benefits were fanciful, exorbitant and arbitrary, with no possible appreciation in the value of its property as a result of this improvement, and it is self-evident that upon no basis that can be used and applied to all of the property tributary to this ditch, could Thirty Thousand Dollars be ascertained as the reasonable contribution to be demanded of this particular plaintiff.

These suggestions are applicable in a general way to the attempted assessment of the property of all of the plaintiffs, and I am of the opinion that the plaintiffs have all properly invoked the aid of this Court from an arbitrary, unwarranted exercise of power by the Board of County Commissioners of Minnehaha County, who, without due process of law or compensation, threatened to deprive them, and each of them, of their property. What I have said, I think, should apply with equal force to all property in the City of Sioux Falls, attempted to be assessed by the Board of Commissioners for the maintenance of this ditch under the name of a new ditch. The responsibility for the maintenance of this ditch, for the repair of the break from the river into the ditch, and the change of the head gates, and the cleaning out of the ditch, and the repair and reconstruction of the spillway, was, and is, upon the two drainage districts responsible for their construction and maintenance, and the amount expended, some $250,000.00, which, with interest, now amounts to $300,000.00 or more, is a charge upon those districts to be assessed and made a lien upon the property within the districts, assessed in the proportion and collected in the manner, provided by the statutes of the State of South Dakota for the maintenance of drainage ditches.

There is another and further suggestion. I am of the opinion that this reconstruction of the old spillway without change of location, the repair of the break from the river into the ditch, the cleaning of the ditch, the change of the head gates where the flood waters are taken from the river, everything that was done under this pretended establishment of a new ditch, could not be viewed in the same light or as serving

the same purpose as the construction of the original
129 ditches, because the thing that caused the Board of Commissioners to take any action with reference to the condition that then existed was the danger that existed because of the conduct of the water down through these two drainage ditches to and through this spillway. The danger that was threatened was not that the agricultural lands would not be drained, but that immense damage was threatened, that the course of the river was to be diverted to this cut-off, that great areas of land were threatened to be cut away by this river one hundred feet deep, that the water supply of the City was threatened to be taken away because of this drainage ditch and this imperfect spillway. Because the water was to be taken from the river and all of the benefits of the river for several miles, through and around the City of Sioux Falls would be destroyed. The power of the Northern States Power Company would be destroyed by taking the water from the river. If it had not been for those conditions, for these threatened dangers, no action would have been taken, the ditches would have continued to function as they had functioned before. If the spillway had been properly constructed originally, and if it had not proven inadequate, there would have been no cause for any action by the Board in the year 1916. Every consideration that impelled action by the Board was some phase of the threatened danger by reason of the inadequate and imperfect construction and [maintain-
ence] of these two ditches. Neither of these considera-
130 tions that influenced the action of the Board had anything to do with draining agricultural lands.

It may be said that to remedy these wrongs constituted a public use, as referred to in the Constitution of the State of South Dakota. Admitting that that is true, we are confronted with the proposition that there has been no legislation conforming with the provisions of the Constitution, authorizing the Legislature to provide for the establishment of drainage ditch districts, and the naming of officers with the powers therein referred to. If, therefore, any claim were made that the Commissioners were acting under this authority, independent of the provision of law with reference to the drainage of agricultural lands, the answer is that the provision of the Constitution is not self-executing, and that no legislation has been provided carrying this provision of the Constitution into effect.

You may prepare proper orders in each case granting plaintiff an injunction as to all property located in the city of Sioux

Falls and all Property not within the old Drainage District No. 1 and Drainage District No. 2. [provided] an exception in behalf of the plaintiffs to the order of the Court denying the plea of the unconstitutionality of the drainage statute as applied to agricultural lands and the defendants a general exception to each order.

Yours truly,

JAS. D. ELLIOTT
U. S. District Judge.

131 Endorsed: Filed in the District Court on Feb. 23, 1922, at 4:15 P. M.

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133 (Decree, March 1, 1922.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

City of Sioux Falls, (A Municipal Corporation), Plaintiff,
No. 102 S. D. vs. In Equity.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

and

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, and W. G. Porter, Intervening Defendants.

This cause came on to be heard at this term and was argued by counsel: and thereupon, upon consideration thereof, it

was Ordered, Adjudged and Decreed as follows, viz: that the Defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of the County of Minnehaha, and State of South Dakota, their agents, servants, employes, attorneys and
134 successors in office, and each and every of them be and they are hereby forever restrained and enjoined from making an opportionment of benefits upon the following described property of the Plaintiff herein, the City of Sioux Falls, a municipal corporation, situated in the County of Minnehaha, State of South Dakota, to-wit: 14.2 miles of highways and dedicated streets, water plant situated on Block Eight (8) and Lots Three (3) to Nine (9) inclusive of Block Ten (10), and Lots Five (5), Six (6) and Twelve (12) of Block Eight (8), and Lots Three (3) to Ten 10) inclusive of Block Seven (7), all in Berwick's Addition to Sioux Falls; Sherman Park, situated on Tract Ten (10) of Southwest Quarter (SW¼) of Section Nineteen (19), Township One Hundred One (101), Range Forty-nine (49); Phillips Park, situated on the Northwest Quarter (NW¼) of Section Seventeen (17), Township One Hundred One (101), Range Forty-nine (49), for the construction of the spillway, dams, retaining gates, ditches, and for all other work done or that may hereafter be done under the supervision of the Board of County Commissioners of Minnehaha County, South Dakota, in the matter of the construction or reconstruction, repair and maintenance of drainage ditch No. 1 and drainage ditch No. 2 otherwise designated by said County Commissioners as drainage ditches No. 1 and No. 2, and as drainage ditch No. 1 and 2, of Minnehaha County, South Dakota, and they and each of them are hereby perpetually restrained and enjoined from making and levying any assessment upon said property, or any part, parcel or portion thereof, for the cost of the construction or reconstruction, repair and maintenance of the said spillway, dams, retaining gates, ditches and other work heretofore done, or which may be hereafter done, or any part thereof, upon the said drainage ditches referred to, or any of them, and from in any manner including any of said property of the Plaintiff, the City of Sioux Falls, a municipal corporation, within the territory benefitted by said
135 drainage ditches or any of them.

And the Defendant, Fred E. Ward, as auditor of the County of Minnehaha, and State of South Dakota, his agents, servants, employes, attorneys and successors in office, are hereby forever restrained and enjoined from making any such apportionment of benefits or making or levying any

such assessment upon any of said property, and from certifying any such assessment to the County Treasurer of the said County of Minnehaha, State of South Dakota,

And the Defendant, J. O. Anderson, as Treasurer of the County of Minnehaha, State of South Dakota, his agents, servants, employes, attorneys and successors in office, are hereby forever restrained and enjoined from filing any such assessment and from collecting any such assessment against the said property hereinbefore described.

It is further Ordered, Adjudged and Decreed that the Plaintiff herein, the City of Sioux Falls, a municipal corporation, have and recover from the Defendants and Intervening Defendants herein, and each of them, its costs and disbursements herein taxed and allowed in the sum of.....Dollars ($.....), the amount thereof to be inserted by the Clerk of the Court after the costs have been taxed by him.

Done in open Court at Sioux Falls, in said Southern Division of the District of South Dakota, on the 1st day of March 1922.

By the Court:

JAS. D. ELLIOTT,

(Seal of Court) Judge.

Attest:

Jerry Carleton,
Clerk.

To the making and entry of the foregoing decree the defendants and the intervening defendants duly and severally excepted, which exceptions are allowed by the court.

Dated Mch. 1st, 1922.

JAS. D. ELLIOTT, Judge.

136 Endorsed: Filed in the District Court on Mar. 1, 1922, at 2 P. M.

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137 (Assignment of Errors.)

And now, on this 25" day of August, A. D. 1922, come the defendants, by their Solicitors, Elbert O. Jones and L. E. Waggoner, and the intervening defendants, by their Solicitor, Norman B. Bartlett, and say that the decree entered in the above entitled cause on the 1st day of March, A. D. 1922, is erroneous and unjust to the defendants.

First:

Because plaintiff's bill of complaint herein does not set forth any matter of equity entitling the plaintiff to the relief prayed for and it affirmatively appears from said
138 bill of complaint that the plaintiff has a plain, adequate and complete remedy at law.

Second:

Because the bill of complaint does not set forth any matters of equity in addition to the pretended constitutional question, or any special circumstances to bring the case under some recognized head of equity jurisdiction, and it is necessary to allege and prove some special circumstances in addition to the constitutional question, and thereby bring the case under some recognized head of equity jurisdiction, in order that this Court shall have jurisdiction of said matters.

Third:

Because the bill of complaint fails to set forth facts sufficient from which this Court can infer or presume that there will result a multiplicity of suits, irreparable injury, or a cloud cast upon the title of its property, and it is necessary to specifically allege facts from which this Court can infer that either a multiplicity of suits, irreparable injury or a cloud will be cast upon the title of its property as a direct result of the action that plaintiff is attempting to enjoin, and such allegations must be specific allegations of fact, and not conclusions.

Fourth:

Because it affirmatively appears from the face of plaintiff's bill of complaint, and the record herein, that there is no jurisdictional amount in controversy in this case at this time, and can be none, and that, therefore, this action is prematurely brought, for the reason that no assessment, levy or tax has been, in fact, made, assessed, equalized, fixed or levied against the property of the plaintiff, or at all.

Fifth:

Because it affirmatively appears from plaintiff's bill
139 of complaint, and the record herein, that the State Tribunal having jurisdiction of said drainage ditch proceedings, was enjoined by this proceeding before such State Tribunal had had an opportunity to perform its statutory duty to determine, equalize, assess, fix or levy the amount of benefit, assessment or tax, if any, chargeable against the

property of the plaintiff, and for this Court to maintain jurisdiction before such State Tribunal had performed its full statutory duty, determined, equalized, assessed and fixed the amount of benefit, assessment or tax, was a usurpation of the authority invested in the State Tribunal, and an attempt to substitute this Court for such State Tribunal; and for the further reason that there is no provision of law giving this Court original jurisdiction over said matters.

Sixth:

Because the allegations of plaintiff's bill of complaint herein involve and present for litigation the determination of facts and matters controlled and governed by the drainage statutes of South Dakota, which, by their terms, create and provide a special tribunal with exclusive original jurisdiction to try and determine the questions presented in said bill of complaint, which determinations of said State Tribunal are final and conclusive upon this Court in this action, for the reason that this Court has no original jurisdiction by a bill in equity, to direct, reject, or control the proceedings and determinations of that tribunal, and thereby take away from that tribunal the power of discretion, and the exercise of its judgment in arriving at a proper determination of the matters before it.

Seventh:

Because until the tribunal created by the drainage statutes of South Dakota has exercised its judgment and discretion in the determination of questions of fact properly before
140 it, and the necessary steps of procedure have been taken, and it has finally determined, equalized and fixed the proposed tax or assessment, if any, against the plaintiff's property, this Court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, for the reason that until such proposed assessment, tax or servitude has been equalized and fixed and assessed, this action is premature.

Eighth:

Because the undisputed evidence shows that on or about December 4, 1920, an equity suit was instituted in the State Circuit Court, within and for Minnehaha County, South Dakota, the same being a court of general jurisdiction and having jurisdiction over the subject matter therein presented, by one Oluf O. Gilseth, being a person belonging to the same class of persons as the plaintiff herein, whose lands were affected by the construction of Drainage Ditch No. 1 and 2, and against whose lands the proportion of benefits for the con-

struction of said ditch had been proportioned at the same time, upon the same basis, and in like manner and under the same law as the proportion of benefits to the land of this plaintiff, which said action was brought by said Oluf O. Gilseth for himself, and as a representative of the class to which he and this plaintiff belong, and which action was brought against the defendants herein, and was instituted, tried and determined with notice to and knowledge by, approval, acquiescence and consent of this plaintiff, its officers, agents and attorneys, and in which said case the same facts were alleged and relied upon in the bill of complaint of the said Oluf O. Gilseth as are alleged and relied upon by the plaintiff herein in its bill of complaint, and which bill of complaint prayed for the same relief, and which said action came on for trial, in which trial this plaintiff was entitled to be
141 heard, on the 31st day of January, 1921, and thereafter said State Court entered its judgment and decree dismissing said action upon its merits, and denying the plaintiff the right to an injunction against these defendants, which said judgment and decree is now in full force and effect, and which determination is binding upon this plaintiff, and is, therefore, a bar to this action, for the reason that all matters presented by plaintiff's bill of complaint herein are res adjudicata.

Ninth:

Because the uncontradicted evidence in this case shows that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, and upon which the drainage ditch designated as Drainage Ditch No. 1 and 2, was ordered established and constructed, and the notice of hearing said petition given pursuant to law, and the resolution of the Board upon the hearing of said petition establishing said ditch, all contained a description of plaintiff's property, and alleged that the same was affected thereby, and said resolution determined that plaintiff's property so described was affected by said Drainage Ditch No. 1 and 2, which determination, unappealed from, is now final and conclusive upon this plaintiff, and this Court, and, therefore, this Court was unwarranted in determining and decreeing that plaintiff's property is not affected by Drainage Ditch No. 1 and 2, no extrinsic fraud being alleged in plaintiff's bill of complaint.

Tenth:

Because the undisputed evidence in this case shows that the plaintiff's property is receiving some benefit, and that it has not exhausted its statutory remedy for an equalization of such benefits, and its only complaint is that too many units of

benefit have been apportioned against its property; and, therefore, this Court has no jurisdiction under its gen-
142 eral equity power to correct an unequal or unjust assessment, since the statute prescribes a method for reviewing or correcting unequal or unjust assessments.

Eleventh:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was a new project, with plaintiff's property included therein, which finding and judgment of said Tribunal are binding upon this plaintiff and upon this Court, and can not be attacked in this collateral action, for the reason that said Tribunal is, by the drainage law of the State of South Dakota, given jurisdiction to determine the nature, kind and character of the proposed drainage, and the description of and the amount of property affected by said drainage project, and having made said findings and judgment, and this plaintiff not having appealed therefrom, said plaintiff is now bound thereby.

Twelfth:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was conducive to the public health, convenience and welfare of the territory described in the petition of the City of Sioux Falls, F. L. Blackman and others, and was necessary and practicable for draining agricultural lands, which findings and judgment of said Tribunal are now binding upon this plaintiff and
143 upon this Court, and cannot be attached in this collateral action, for the reason that, by the drainage law of the State of South Dakota, the Board of County Commissioners are given authority to determine whether or not a proposed drainage ditch will or will not be conducive to the public health, convenience and welfare of the territory described in the petition therefor, or necessary and practicable for draining agricultural lands; and having found in the affirmative in both instances, and the plaintiff herein not having appealed from such determination, the same is now binding upon this plaintiff and upon this Court.

Thirteenth:

Because no facts have been alleged in plaintiff's bill of complaint constituting extrinsic fraud on the part of the Board of County Commissioners of Minnehaha County, South Dakota, or any one else, in filing the petition of the City of Sioux Falls, F. L. Blackman and others, or in the allegations contained therein, or the resolution or other proceedings on, and prior to, or in the establishment of said drainage ditch designated as "Drainage Ditch No. 1 and 2", on October 3, 1916; and there is no evidence in the record of any extrinsic fraud on behalf of the Board of County Commissioners, or anyone else, in any of said proceedings, and, therefore, the determination of the facts found by said Board in said resolution of October 3, 1916, are now binding and conclusive upon this plaintiff and upon this Court, and this Court has no right, authority, or jurisdiction to enter upon, attempt to decide, to decide or re-litigate such questions of fact as were previously determined by such special Tribunal.

Fourteenth:

Because the undisputed evidence in this case shows that more than five years have elapsed after this plaintiff
144 had actual knowledge and legal notice of the establishment and construction of Drainage Ditch No. 1 and 2, and during all of said time this plaintiff took no steps to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars ($250,000.00) thereon and plaintiff's bill of complaint wholly fails to make any distinct averments, and none of the evidence tends to excuse this unwarranted delay, and for these reasons this Court should not come to its relief.

Fifteenth:

Because the drainage statutes of South Dakota provide a fixed and determinable basis, method and rule of apportionment of benefits, and, pursuant thereto, the Board of County Commissioners of Minnehaha County, South Dakota, applied such fixed and determinable basis, method and rule of apportionment of benefits, which will probably produce approximately correct general results as to the benefits to plaintiff's property, as well as all other property in the drainage district, and, therefore, such apportionment is not arbitrary, and this Court cannot usurp the power of the Board to equalize the proportion of benefits as provided by
145 said statutes.

Sixteenth:

Because the evidence wholly failed to show that there would result a multiplicity of suits, or irreparable injury, or a cloud cast upon the plaintiff's property, and also failed to show any circumstances to bring the case under some recognized head of equity jurisdiction, and the evidence does show that the plaintiff had a plain, adequate and complete remedy at law.

Seventeenth:

Because all the evidence now shows that there is no jurisdictional amount in controversy in this action, and that, therefore, this action was prematurely brought, in that the apportionment had not been equalized, and no tax had ever been assessed or levied against the plaintiff's property, or any other property, and that the amount of such tax, if any, and, therefore, the amount in controversy herein, has not been, and cannot be, determined until after such equalization and final assessment has been made, as provided by the law of South Dakota, and the uncontradicted evidence shows that said equalization of the apportionment of benefits was prevented by the temporary restraining order and the final decree in this case.

Eighteenth:

The Court erred in not adjudging and decreeing that on October 3, 1916, Drainage Ditch No. 1 and 2 was duly and legally established by the Board of County Commissioners of Minnehaha County, South Dakota, for a public purpose, including but not limited to the drainage of agricultural lands, for the reason, that the Constitution of the State of South Dakota and Section 8458 of the Revised Code of South Dakota, 1919, provide therefor.

Nineteenth:

The Court erred in not adjudging and decreeing that the proceedings taken by the Board of County Commissioners of Minnehaha County, South Dakota, upon the petition of the City of Sioux Falls, F. L. Blackman and others, filed with the County Auditor on August 3, 1916, and upon which Drainage Ditch No. 1 and 2 was established on October 3, 1916, constituted the establishment of an entirely new drainage proceeding, and gave the Board of County Commissioners jurisdiction to construct such drainage as a new project, for the reason that such petition prayed for the construction of a

drainage ditch over the exact line of drainage ditches
146 previously abandoned, and contemplated a more comprehensive and perfect drainage system for the purpose of draining and benefitting additional property, in compliance with and as authorized by Sections 8458, 8476 and 8489 of the Revised Code of South Dakota, 1919, and the undisputed evidence shows the work done consisted of about eight miles of canalizing the river, doubling the capacity of the ditch and outlet, building dikes, dams and controlling works, and an adequate spillway or outlet to said ditch, at a total cost of over Two Hundred Fifty-five Thousand Dollars ($255,000.00), which was more than double the amount of the total assessments for old Drainage Ditch No. 1 and Drainage Ditch No. 2, which was the sum of One Hundred Twenty-seven Thousand, Seven Hundred Six and 10/100 Dollars ($127,706.10).

Twentieth:

The Court erred in not adjudging and decreeing that plaintiff's land was subject to assessment for benefits which it received, if any, under the establishment and construction of Drainage Ditch No. 1 and 2, without regard to whether its lands had been assessed and included within the assessment district of Drainage Ditch No. 1 and Drainage Ditch No. 2, or not, for the reason that Drainage Ditch No. 1 and 2, as established on October 3, 1916, was established as a new project upon due and legal notice to the plaintiff, and in the manner provided by the drainage statutes of South Dakota.

Twenty-First:

The Court erred in entering its decree herein in favor of the plaintiff and against the defendants, upon this plaintiff's bill of complaint and the amendment allowed thereto, for the reason that said plaintiff's offer to amend said bill of complaint came too late, and long after plaintiff's attention was called to the fact that its bill contained no allegations
147 of arbitrary acts by objection to the introduction of testimony during the trial, and after the entire case had been tried, argued and submitted, and briefs had been filed twenty days, which amendment injected an entirely new cause of action into the bill of complaint, and to overcome which, the Court refused to receive evidence showing or tending to show that plaintiff's property was receiving a substantial benefit, and that the apportionment was not arbitrary and which amendment, when offered, did not conform to the facts established upon said trial, in that said proposed amendment assumed that the Board of County Commissioners were act-

ing under jurisdiction obtained in the establishment of old Drainage Ditch No. 1 and Drainage Ditch No. 2, and not under the new drainage proceedings designated as "Drainage Ditch No. 1 and 2", as shown by the undisputed evidence; assumed that the equalization of the proportion of benefits had been had and assessment duly made thereon, whereas, all the evidence shows that merely a tentative fixing of the proportion of benefits had been made; assumed that the property of plaintiff had not been, and never could be, benefited by old Drainage Ditch No. 1 and Drainage Ditch No. 2 while the uncontradicted evidence shows a substantial benefit from the construction of Drainage Ditch No. 1 and 2, and that its property had been assessed and the assessment paid for benefits received by the construction of Drainage Ditch No. 1 and Drainage Ditch No. 2; assumed that the assessment for benefits had been made, while the uncontradicted evidence shows that no equalization or assessment of benefits had ever been made, and cannot be made until after the proportion of benefits has been equalized and finally fixed; assumed that the acts of the Board in making the so-called assessment were arbitrary, while the evidence shows that no assessment or equalization of benefit has ever been made; and further, said amendment does not attack the drainage law as arbitrary, or the unit provided by law as arbitrary but alleges that the acts of the Board in fixing the amount
148 of the benefits to plaintiff's property were arbitrary, speculative and unjust, whereas, all the evidence shows that the Board, with its Engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received by plaintiff's property, using the fixed and determinable basis, method and rule of apportionment provided by the drainage law of South Dakota, and the undisputed evidence further shows on behalf of both parties that some benefit was received by the plaintiff; assumed the amount of the assessment and made an issue as to the amount of benefit, if any, plaintiff received, which matter this Court has no jurisdiction to determine; assumed and made an issue of the inequality of the so-called assessment upon plaintiff's property, and other agricultural land, which issue is within the exclusive jurisdiction of the State Tribunal, and this Court in this action has no jurisdiction to try or determine the same.

Twenty-second:

The Court erred in not adjudging and decreeing that the plaintiff herein is not in a position to question the regularity of the proceedings in the establishment and construction of

Drainage Ditch No. 1 and 2, as an independent drain-
149 age proceeding, as it, by its duly authorized City Commission and its officers, signed the petition of the City of Sioux Falls, F. L. Blackman, and others, requesting the establishment and construction of Drainage Ditch No. 1 and 2, and its bill of complaint herein and all the evidence, shows that the plaintiff received enormous benefit and protection by reason of the establishment and construction thereof; as it, by its officers and agents, had actual knowledge and legal notice of the proceedings taken to establish said drainage; as it, by its verified bill of complaint herein, alleges that the threatened change of the channel of the Big Sioux River threatened to cause enormous damage to the property of the City of Sioux Falls along the channel of said river, and to destroy the municipal water supply of said City, by draining the water from the gravel bed from which said municipal water supply is obtained, and that the work performed upon said ditches prevented the drainage of the gravel bed from which said City obtained its municipal water supply, which allegations are fully supported by the evidence in this case; as it, through its officers and agents, saw the work in the course of construction, assisted in the work of construction thereof by furnishing services and materials used therein, with knowledge that such service and materials were furnished therefor, and were being used in the construction of said drainage, and received compensation for said services and materials so furnished and used; as it, through its officers and agents, urged and encouraged the Board of County Commissioners to take the action and do the work which was done under such drainage proceedings for its benefit, and as it is now, and has been for more than three years last past, receiving protection and substantial benefits from said drainage construction, with the full knowledge that there was no manner of paying for such construction except by assessment upon the property
150 benefited, included in which was plaintiff's property, all without protest against the doing of any such work, or the extent or manner thereof, until such work and drainage project had been substantially completed, and until this action was brought to restrain the making of an assessment to pay for the cost of said construction, and, therefore, the plaintiff is now estopped from questioning said proceedings and maintaining this action.

Twenty-third:

The Court erred in not adjudging and decreeing that plaintiff's property, being included in the territory affected and assessed for benefits in the construction of Drainage Ditch No. 1 and Drainage Ditch No. 2, and which assessment was paid by this plaintiff, could and should be assessed for benefits accruing by reason of the repair and maintenance of said Drainage Ditch No. 1 and Drainage Ditch No. 2.

Twenty-fourth:

The judgment and decree herein is not supported by the evidence, and is contrary to law, in that it appears from the undisputed evidence that the outlet to old Drainage Ditch No. 1 was destroyed and abandoned and thereby said ditch abandoned and that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, fully complied with the requirements of the drainage statutes of South Dakota for the establishment of a new drainage, and that thereafter all the statutory requirements were duly and fully followed and pursued, and such proceedings were had that, pursuant to statute, on October 3, 1916, the Board of County Commissioners of Minnehaha County, upon due notice and hearing of said petition, ordered and adjudged the establishment of said drainage as a new project and drainage ditch, and designated it as "Drainage Ditch No. 1 and 2", and further adjudged and decreed that the construction thereof was for a public purpose, and was necessary and practicable for draining agricultural lands, and that the property of this plaintiff was included within the drainage area, and affected
151 thereby, which property was described in the petition, notice, and said resolution and judgment, which resolution and judgment was never appealed from by this plaintiff, or anyone, and is now in full force and effect, and has been for more than six years last past; that there is no evidence at all in the record that the plaintiff has been in any manner prevented from fully presenting its defense, if any, to the allegations and prayer contained in said petition of the City of Sioux Falls, F. L. Blackman, et al, or from fully trying all the issues therein presented, or that the jurisdiction of the Board of County Commissioners was imposed upon.

And it further appears from the undisputed evidence that an apportionment of benefits has been made for the payment of the costs of construction of said Drainage Ditch No. 1 and 2, and that the law provides, and the County Commissioners applied, after personal inspection, and exercising their best judgment, a fixed and determinable basis, method, and rule

of apportionment of benefits, which will probably produce approximately correct general results as to the plaintiff's property, as well as all other property in the drainage district; and that no equalization of benefits or assessment has been had thereon, and that no legal charge or servitude has yet been placed upon the property of plaintiff, or anyone else, and that this action is premature.

Twenty-fifth:

The said decree is not sustained by the evidence, but is contrary thereto, in that it appears from the undisputed evidence that Drainage Ditch No. 1 and 2 was established as a new ditch by the Board of County Commissioners of Minnehaha County, South Dakota, on October 3, 1916, included in which drainage district was plaintiff's property, and of which proceedings this plaintiff had knowledge and legal notice for more than six years last past, and has never taken any
152 steps prior to the institution of this action, to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars ($250,000.00) thereon, and has wholly failed to establish any lawful excuse for said unwarranted delay; and that all steps taken by the Board of County Commissioners leading up to and the establishment of said Drainage Ditch No. 1 and 2, were warranted in law, and said Board was lawfully acting under and in conformity with the Constitution and drainage statutes of the State of South Dakota; and that said drainage ditch was petitioned for, and lawfully established for a public use and purpose, and for the purpose of draining agricultural lands; that the apportionment of benefits, as made by the Board of County Commissioners, was made pursuant to and in conformity with the method and rule laid down by the drainage statutes of South Dakota, and after a personal inspection and deliberation by said Board, applied in conformity therewith in such a manner as will probably produce approximately correct general results as to the benefits enjoyed by plaintiff's property, as well as all other property in the drainage district and that plaintiff's property is enjoying substantially the amount of benefit apportioned to it; that plaintiff's property described in the decree herein lies in old
153 Drainage Ditch No. 1 and Drainage Ditch No. 2 districts, and that the same was duly assessed to pay the costs thereof, and that said assessment was thereafter paid by this plaintiff, and that the work performed upon said ditches prevented the drainage of the gravel beds North of the City of Sioux Falls, from which said City obtained its municipal water supply, and that said plaintiff is now and for

more than three years last past has been enjoying benefits by reason of such work and labor and material furnished upon said drainage ditch from and after October 3, 1916, for the payment of which the apportionment of benefits has been made by the Board of County Commissioners and is here in controversy.

Twenty-sixth:

For all the reasons and errors aforesaid, the Court erred in not entering and rendering a decree in favor of the defendants, and against the plaintiff, dismissing its bill of complaint, and denying the injunction herein, and in not entering its judgment and decree in accordance with the prayer of defendants' answers.

Wherefore, defendants pray that the judgment and decree of said Court be reversed, with directions to enter a decree in favor of the defendants and against the plaintiff, dismissing plaintiff's bill, as prayed for in defendants' answers.

ELBERT O. JONES and
L. E. WAGGONER
Solicitors for Defendants.

NORMAN B. BARTLETT
Solicitor for Intervening Defendants.

Endorsed: Filed in the District Court on Aug. 25, 1922, at [—] P. M.

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155 (Petition for appeal and allowance thereof.)

To The Honorable James D. Elliott, Judge of the United States District Court Within and for the Southern Division of the District of South Dakota:

The above named defendants and intervening defendants feeling themselves aggrieved by the decree made and entered in this case on the 1st day of March, A. D. 1922, do hereby appeal from said decree to the Circuit Court of Appeals, for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that their appeal be allowed, and that citation issue, as
156 provided by law, and that a transcript of the record, proceedings and papers, upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Paul, Minnesota, and your petitioners further pray that a

proper order touching the security to be required of them to perfect their appeal be made.

ELBERT O. JONES and
L. E. WAGGONER
NORMAN B. BARTLETT
Solicitors for Defendants and Intervening Defendants.

The foregoing petition granted, and the appeal allowed upon giving bond, conditioned as required by law, in the sum of One Thousand and No/100 Dollars ($1,000.00).

JAS. D. ELLIOTT
Judge of the United States District Court within and for the Southern Division of the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25,1922, at 5 P. M.

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158 Bond On Appeal.

Know All Men By These Presents: That we, A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, as Principals, and the Southern Surety Company of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the City of Sioux Falls (a Municipal Corporation), appellee in the above cause, in the sum of One Thousand Dollars ($1,000.00), conditioned that, whereas on the 1st day of March,

159 A. D. 1922, in the District Court of the United States, for the Southern Division of the District of South Dakota, in a suit pending in that court wherein the City of Sioux Falls, (a Municipal Corporation), was plaintiff, and A. G. Risty, et. al, were defendants, and the Minnehaha National Bank of Sioux Falls, South Dakota, et al, were intervening defendants, numbered on the Equity Docket as 102, a decree was rendered against the said A. G. Risty, et. al. defendants, and the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, and the said A. G. Risty et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al. intervening defendants, having obtained an appeal to the Circuit Court of Appeals for the Eighth Circuit, and filed a copy thereof in the

office of the Clerk of the Court, to reverse the said decree, and a citation directed to the said City of Sioux Falls, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals, for the Eighth Circuit, to be held at the City of St. Paul, in the State of Minnesota, on the 2nd day of May, A. D. 1923, next.

Now, if the said A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

A. G. RISTY
Signing for all Defendants.

THE MINNEHAHA NATIONAL BANK OF SIOUX FALLS,
H. V. Harlan, V. P.
Signing for all Intervening Defendants.

SOUTHERN SURETY COMPANY OF DES MOINES, IA.
By C. E. Charnock, Surety.

Southern Surety Corporate Seal

160 State of South Dakota,
County of Minnehaha—ss.

On this 15th day of August, 1922, before me H. B. Charnock, a notary public in and for said County, and State, personally appeared C. T. Charnock, well known to me to be the Attorney-in-fact of the Southern Surety Company, a corporation that is described in and that executed the above and foregoing instrument and duly acknowledged to me that said corporation executed the same.

And I further certify that at the same time the said C. T. Charnock exhibited to me the original certificate of authority issued to said Company by the Commissioner of the State of South Dakota, and that the following is a true, perfect and complete copy thereof:

STATE OF SOUTH DAKOTA
DEPARTMENT OF INSURANCE,

Renewable Annually.

Office of the Commissioner
Company's Certificate of Authority.
No. 11050

Whereas, The Southern Surety Company, a corporation organized under the Laws of Iowa, has filed in this Office a sworn statement exhibiting its condition of business for the year ending December 31st, 1921, conformable to the requirements of the Laws of this State regulating the business of Insurance, and

Whereas, The said Company has filed in this office a duly certified copy of its charter, with certificate of organization, and has complied with all the requirements of the Insurance Laws aforesaid;

Now Therefore, I, W. N. Van Camp, Commissioner of Insurance of the State of South Dakota, pursuant to the provisions of said laws do hereby certify that the above
161 named Company is fully empowered through its authorized agents to transact its appropriate business of Accident and Health, Liability, Workmen's Compensation, Fidelity, Surety, Burglary, Theft, Plate Glass and Automobile Insurance in this State according to the Laws thereof, until the last day of February, 1923.

In Testimony Whereof, I have hereunto set my hand and official seal at Pierre, this First Day of March, A. D. 1922.

(Notarial Seal)

W. N. VAN CAMP,
Commissioner of Insurance.
By W. J. Madden,
Deputy Commissioner.

H. B. CHARNOCK,
Notary Public, South Dakota.

The foregoing bond is hereby approved.

JAS. D. ELLIOTT,
Judge of the United States District Court
Within and for the Southern Division of
the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25, 1922, at 5 P. M.

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163 (Notice to plaintiff of lodgment of statement of evidence in District Clerk's office.)

To R. W. Parliman, Solicitor for the City of Sioux Falls, Plaintiff:

Please take notice that the Appellants have prepared a Statement of the evidence to be included in the record upon

the appeal of the above entitled matter to the Circuit Court of Appeals, for the Eighth Circuit, and has lodged the same in the office of the Clerk of this Court for your examination, (a copy of which Statement is herewith served upon you).

You will further take notice that the Appellants will ask the Court, at the Government Building, in the City of Sioux Falls, in said District of South Dakota, at ten o'clock in the forenoon of the 3rd day of October, A. D. 1922, or as soon thereafter as counsel can be heard, to approve said Statement.

Dated this 23 day of September, A. D., 1922.

E. O. JONES,
N. B. BARTLETT,
Solicitors for Appellants.

Service of the foregoing Notice this 23 day of September, A. D. 1922, is hereby acknowledged, also service of the Statement therein referred to.

R. W. PARLIMAN,
Solicitor for City of Sioux Falls,
Plaintiff.

164 Endorsed: Filed in the District Court on Sept. 23, 1922.

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166 (Praecipe for Transcript.)

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the Circuit Court of Appeals of the United States, for the Eighth Circuit, by including therein the following:

1. The Bill of Complaint, except the title and verification, and except the Exhibits thereto attached.

2. Order Allowing Intervention.

3. The following portions of Defendants' Answer, viz:

(a) Paragraphs "A", "B", "C", "D", "E" and "G" of Defendants' Special Answer.

(b) Introduction and Paragraphs "First" to "Eighteenth" inclusive, of Defendants' General Answer; and

(c) Paragraphs "VIII", "IX", "XII", "XIV" and "XV" of Defendants' Affirmative Defense, together with the prayer.

4. The Statement of the Evidence Submitted, and Approved by the Court.

5. Order Permitting Amendment of Bill, and Exception taken to said Order.

6. Amendment to Bill.

167 7. The Opinion and Decree of the District Court.

8. Assignments of Error.

9. Petition for Appeal.

10. Order Allowing Appeal.

11. Bond upon Appeal, and Approval of same.

12. Notice of Deposit of Statement of Evidence with Clerk and Proof of Service thereof.

13. Approval of Court of the Statement of the Evidence.

14. Citation in Appeal, and Service thereof.

15. Praecipe and Clerk's Certificate.

Dated at Sioux Falls, South Dakota, this 23 day of September, A. D., 1922.

E. O. JONES
N. B. BARTLETT,
Solicitors for Appellants.

Endorsed: Filed in the District Court on Sept. 23, 1922.

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169 (Additional praecipe for transcript.)

The Clerk of this Court is hereby directed to incorporate into the transcript upon the appeal in the above entitled cause for the use of the Circuit Court of Appeals of the United States, for the Eighth Circuit, the following additional portions of the record which are not indicated in the praecipe filed by Appellants, to-wit:

1. The title of the case as a part of and as it appears
170 in the bill of complaint, and Exhibit B and Exhibit C attached to and made a part of the bill of complaint.

2. The title of the case as a part of and as it appears in the Defendants' answer.

3. Paragraphs I, VII, and XIII of Defendants' affirmative defense as a part of Defendants' answer.

4. The following Exhibits made a part of the answer, to-wit: the petition of F. L. Blackman, and others, upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had; the order for filing said petition; the resolution for survey under said petition; the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman, and others; the published notice of hearing said petition (said notice not being attached to the answer but having been filed after the filing of the answer and on November 28th, 1921, together with a stipulation that it might be considered as a part of the answer); and the resolution establishing Drainage Ditch No. 1 and 2, all of said exhibits to be inserted as a part of said answer.

R. W. PARLIMAN,
R. W. PARLIMAN, JR. and
J. C. PARLIMAN,
Solicitors for Appellee.

Endorsed: Filed in the District Court on Oct. 24, 1922, at 2 P. M.

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172 (Statement of Evidence.)

(Filed in U. S. District Court on January 10, 1923.)

The above entitled suit came on for hearing before the Court on December 15th, 1921, before the Honorable J. D. Elliott, Presiding Judge, plaintiff appearing by Mr. R. W. Parliman, Sr., its solicitor, defendants appearing by Mr. E. O. Jones, their solicitor, and the intervening defendants appearing by Messrs. Porter & Bartlett, their Solicitors, the following proceedings were had:

173 Evidence of Plaintiff.

F. E. WARD, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Stipulation.

"It is stipulated and agreed between all parties that the testimony received in these consolidated cases shall be considered as received in each case, so far as such testimony is pertinent to such case, and that such testimony apply only to that case."

Q. You may state your name?

The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set aside, for the reasons that the said bills of complaint fail to state any matter of equity entitling the plaintiffs to the relief prayed for, nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this court has no jurisdiction over these matters, because plaintiff's bills of complaint herein do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this court can infer or presume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property, or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that the plaintiffs have a plain, adequate and complete remedy at law.

174 For the further reason that it affirmatively appears from the fact of the bills of complaint and record, that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits, assessment or tax chargeable against the property of the plaintiffs, if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multiplicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determinations of the state tribunal upon questions of fact before them, are conclusive upon this court in this action, this court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings. Motion denied, defendants and intervening defendants excepting.

175 The defendants and intervening defendants then objected to the introduction of any testimony for the reason and on the ground urged in the motions to dismiss. Ob-

jection overruled. The Defendants and intervening defendants excepting.

(Testimony of Witness F. E. Ward)

I am the auditor of Minnehaha County, South Dakota; drainage ditch records A and B and Commissioners records 5 and 6 are part of the records of Minnehaha County, and of the drainage proceedings of the Board of County Commissioners of Minnehaha County.

Plaintiff offered and there were received in evidence the following portions of Drainage Ditch Record A.

July 1, 1907.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioner respectfully represents: That he is a resident of the City of Sioux Falls in said County; that he is the owner of certain lands in the valley of the Big Sioux River north and west of the City of Sioux Falls in said County, viz: Blocks Three (3) and Thirty-one (31) of Meredith's First Addition to Sioux Falls, according to the recorded plat thereof; the Northwest Quarter of the South West Quarter of Section Eighteen (18), and the South West Quarter of the North West Quarter of said Section Eighteen (18), except the railroad right of way, all in Township One Hundred and One (101) North, of Range Forty Nine (49); also a certain
176 tract or parcel of land bounded and described as follows, to-wit:—Commencing at a point twenty-four (24) rods north of the southeast corner of the North-West quarter of Section Thirty Two (32), in Township One Hundred and Two (102) North, of Range Forty-Nine (49); running thence north ten (10) rods; thence west eighty (80) rods; thence south ten (10) rods; thence east eighty (80) rods to the place of beginning all of which lands will be affected by the drainage herein proposed;

Your petitioner further represents that it is necessary for the drainage of agricultural lands in said Big Sioux Valley between the dam of the Cascade Milling Company in the City of Sioux Falls and the City of Dell Rapids that the proposed drainage be established.

Your petitioner further represents that the establishment of such drainage will be conducive to the public health, convenience and welfare of the inhabitants of the City of Sioux

Falls and of the inhabitants of the Big Sioux Valley between Sioux Falls and Dell Rapids that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in said valley and will prevent great damage to the buildings and their contents; and will prevent great damage to the highways in said County, and also to the railroad tracks and rights of way of the Chicago, Milwaukee & St. Paul Railway Company and of the South Dakota Central Railway Company in said valley; and will prevent damage and destruction of many bridges and their approaches in said valley;

Your petitioner further represents that the general purpose of said proposed drainage is, among other things, to
177 prevent the annual or occasional flooding of lands in said valley caused by high water in said river, by providing a drain to carry off all the water of said river above its normal stage or above the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the center line of Section Five (5) in Township One Hundred and One (101) North of Range Forty Nine (49), and running thence southeasterly across said Section Five (5), Section Four (4) and the North Half of Section Nine (9), all in Township One Hundred and One (101) North of Range Forty Nine (49) and east of the buildings of the State Penitentiary to a terminal point on said river in the City of Sioux Falls near the center of Section Nine (9) in said Township, the length of which will be approximately one and three-fourths miles.

Your petitioner further represents that the territory likely to be affected thereby is that portion of the Townships of Dell Rapids, Sverdrup, Mapleton, Wayne and Sioux Falls and of the City of Sioux Falls in the immediate valley of the Big Sioux River subject to overflow from said river.

Dated July 1, 1907.

WILLIAM H. LYON

Petitioner.

178 State of South Dakota,
County of Minnehaha—ss.

Personally appeared William H. Lyon, who being first duly sworn, deposes and says; that he is the petitioner in the above entitled matter; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein

stated on information and belief, and as to those matters he believes it to be true.

WILLIAM H. LYON

Subscribed and sworn to before me, this 1st., day of July, 1907.

M. E. McDOUGAL,
(Notarial Seal) Notary Public.

Petition for Drainage, Filed this 1st day of July, 1907.

C. E. HILL, County Auditor.
By H. W. Ward, Deputy.

Plaintiff offered and there was received in evidence pages 562 and 563 and the first two lines of 564 of Commissioners' Record 5, it being a resolution of the Board of County Commissioners fixing the route and width of the proposed ditch and the time and place of hearing the petition of W. H. Lyon for the proposed drainage ditch thereafter established as Drainage Ditch No. 1.

This resolution is not printed at length herein because it contains matter not deemed of importance. It established the line of Drainage Ditch No. 1 as follows: Commencing 58 feet west and 135 feet north of the southeast corner of Sec-
179 tion 29, Township 102, Range 49, thence south parallel to the adjacent highway 2085 feet to station No. 114; also commencing 674 feet north and about 35 degrees west of Station No. 114; thence southeasterly 674 feet to said Station 114, thence south and parallel to said highway 7700 feet to Station No. 37, thence south 45 degrees, east 3700 feet to Station Zero (0), thence south 59 degrees, 36', east to the Big Sioux River.

It also contains the following provisions: "Be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the width of said drainage ditch be and it is hereby fixed at 40 feet at the bottom thereof, with a side slope of one foot to one."

Plaintiff offered and there was received in evidence the following part of Commissioners Record 5:

Sioux Falls, S. D., Dec. 31, 1907.

Pursuant to adjournment, at 10 o'clock A. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the County Court House.

Present:

Dist. No. 5: Thomas McKinnon, Chairman.

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson.

Dist. No. 3: Alfred Acheson.

Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. J. H. Gates, attorney for the Board in the matter of Drainage Ditch No. 1, filed and read a written opinion in regard to the legal propositions presented.

Further remarks were made by Messrs. Porter, Keith and Bates and by Mr. Blackman.

On motion, the Board adjourned at 2 o'clock P. M .Tuesday, December, 31, 1907.

180 Sioux Falls, S. D., Dec. 31, 1907.

Pursuant to adjournment, at 2 o'clock P. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the county court house.

Present:

Dist. No. 5: Thomas McKinnon, Chairman.

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson,

Dist. No. 3: Alfred Acheson.

Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. Howard offered the following resolution:

Resolution Establishing Drainage Ditch No. 1:

The matter of the petition of William H. Lyon for the establishment of a drainage ditch filed in the County Auditor's office of Minnehaha County, South Dakota, on July 1, 1907, the said drainage ditch having been heretofore described and named "Drainage Ditch No. 1", coming on to be heard by the Board of County Commissioners at a regularly adjourned meeting, on Monday, December 30, 1907, pursuant to notice heretofore given, and written objections thereto having been filed by Martin Oien, et al, and by Joseph C. Carpenter, and

by the Chicago, Milwaukee and St. Paul Railway Co. and the claims of said parties having been presented orally by their counsel, and William H. Lyon, F. S. Blackman, O. Benson and others having appeared in behalf of said petition, and said hearing having been adjourned to this 31st day of December, 1907, and this Board having fully heard and considered said petition and all matters in opposition to and in support of the same; Now Therefore

Be it Resolved by the Board of County Commissioners
181 of Minnehaha County, South Dakota, that said Drainage Ditch No. 1, is conducive to the public health, convenience and welfare, and is necessary and practicable for draining agricultural lands, and it is so found:

Be it further Resolved that said Drainage Ditch No. 1, be and is hereby established:

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land, or other property through which the same shall pass, and damages as compensation for the land taken for the route of such drainage.

Mr. Howard moved the adoption of said resolution, and that the vote be taken by districts. Mr. Harvey seconded the motion. Upon roll call,

Charles Harvey, Dist. No. 1 voted, Yes;

J. E. Johnson, Dist. No. 2 voted, No;

Alfred Acheson, Dist. No. 3 voted, No;

J. D. Howard, Dist. No. 4. voted, Yes;

Thomas McKinnon, Dist. No. 5 voted, Yes;

The Chairman declared the resolution adopted.

Plaintiff offered and there was received in evidence the following portions of Ditch Record A;

April 11, 1908.

Resolution Assessing Benefits.

Whereas, The Board of County Commissioners of Minnehaha County, South Dakota, has established Drainage Ditch No. 1, and has fixed the damages arising therefrom, and has been investigating and considering the proportion of bene-
182 fits that will accrue to the lands, tracts and lots within the drainage area of said Drainage Ditch; and

Whereas, in arriving at this determination of the proportion of benefits it has considered, not only the benefits which will accrue directly by virtue of the construction of said Drainage Ditch, but also the indirect benefits by virtue of such drainage being an outlet for connecting drains that may hereafter be constructed, and particularly is this so in reference to the lands within the drainage area lying north of a line running east and west through the center of Section Twenty Nine (29) Mapleton Township; and

Whereas, the number of acres set opposite each tract hereinafter described represents the actual number of acres of land within said tract that are benefitted, and excluding therefrom lands taken by said Drainage Ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said Drainage Ditch, the land taken by the drainage is excluded; and

Whereas, in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat of the County Auditor's Subdivision of the particular quarter section in which the land is located on file in the Register of Deeds office; and

Whereas, in the consideration of benefits said Board has assumed that the North-East Quarter of the North-East Quarter of the South-West Quarter of Section Thirty-Three (33) in Township One Hundred and Two (102) of Range Forty-Nine (49) West of the Fifth P. M., owned by
183 the state of South Dakota, and containing ten acres is benefitted "one", and taking the same as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sverdrup, Mapleton, Sioux Falls and Wayne; the benefits to the County of Minnehaha; and the benefits to the several Railroad Companies hereinafter described, arising and accruing by the construction of Drainage Ditch No. 1, be, and they are hereby fixed and determined in the following proportions, viz:—

(Here follows descriptions of lands in Sections 31, 32, 33, 29, 28, 21, 20, 19, 17, 16, 9, 8, 5, 4, and 3, Township 102, Range 49, Sections 34, 33, 32, 29, 28, and 27, in Township 103, Range 49; and Sections 4, 5, 6, 7, 8, 9, 17, 18, 19, 30, and 31, in Township 101, Range 49; and Sections 13, 24, and 25 in Township 101, Range 50; and of lots and blocks in the following

additions to Sioux Falls, to-wit: Berwick; Brookings, Brooks; Bunkers; Minnehaha Trust Company Subdivision of Block 3 of Carpenter's Addition; Carpenters; Central Park; Englewood; Harrison; Lake View; Lincoln Park; McClellan Second; Meredith's First; Meredith's Second; Millard Park; North Boulevard; North Park; North Park Second; Sioux Falls Improvement Company; Summit; West Lawn; West Park, and of certain lots in the Town of Renner, with the names of the owners and the proportion of benefits assessed to each; the one and one eighths miles of highway and dedicated streets within drainage area described herein and the property hereinafter described in the resolution levying the assessment herein is all of the real estate of the plaintiff of any kind described or referred to in said petition.

184 A large amount of property situated in a southerly direction from the ditch and its outlet, commonly called "the spillway", and now attempted to be assessed under the proceedings [iniatated] by the filing of the petition of F. L. Blackman, and others, attached to and made a part of the answer herein, and which property is described in the "Drainage Ditch Notice" attached to and made a part of the bill of complaint herein is likewise not described in this exhibit. Following the description of lands, lots, and blocks above referred to and omitted here for the purpose of diminishing the record, are the descriptions of railroad and certain other properties, and the conclusion of the exhibit, which are as follows:

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Name of Owner.	Description	Acres.	Proportion of Benefits
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 28, 29, and 33, township 103, range 49, west 5th p. m.....	25.02	3.75
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4, 9, 16, 21, 28 and 33, township 102, range 49, west 5th p. m. Sioux Falls and Egan line....	72.50	15.41
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 5, 8, and 9, township 102, range 49 west 5th p. m. (Sioux Falls and Madison line)	17.30	2.60
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4 and 9, township 101, range 49, west 5th p. m.	17.05	5.12

South Dakota Central Railway Co.	Right of way as now laid out and located across sections 29 and 32, township 102, range 49 west 5th p. m.	11.06	3.32
South Dakota Central Railway Co.	Right of way as now laid out and located across sections 4, 5, and 9, township 101, range 49, west 5th p. m.....	17.72	5.32
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 18, Township 101, range 49, west of 5th p. m.	12.18	3.65
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 13, Township 101, range 50, West 5th p. m.	16.88	5.06
Sverdrup Township.	Seven miles and 84 rods of laid out and established highways within the drainage area.		2.9
Mapleton Township.	Twelve miles and 52 rods laid out and established highways within the drainage area.		7.73

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Sioux Falls Township.	Two and onehalf miles of laid out and established highways within the drainage area.....		3.2
Name of Owner	Description	Acres	Proportion of Benefits
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.		.6
City of Sioux Falls	1⅛ miles of highways and dedicated streets within the drainage area		.9
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area		25.

Be It Further Resolved that Tuesday, the 5th day of May, 1908, at two o'clock P. M. at the office of the County Auditor of said County be and it is hereby fixed as the time and place for the equalization of such proportion of benefits, and that notice thereof be given, in accordance with the provisions of Sec. 6. of Chap. 134 of the Laws of 1907 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Weekly Argus-Leader, once in each week for two consecutive weekly issues, and one further publication in the Sioux Falls Daily Argus Leader, and by posting copies of such notice in at least three public places near the route of

said Drainage Ditch, the said posting and the last of such publications to be made at least 10 days prior to the time of said hearing.

Adopted April 11, 1908 THOS. McKINNON,
Chairman.

Attested:
C. E. Hill,
County Auditor.

(Seal)

187 Filed in the office of the Auditor of Minnehaha County, S. D. this 8th day of April, 1908.

C. E. HILL
County Auditor.

Plaintiff offered in evidence pages 53 to 61 inclusive of Ditch Record A, being the record of notice of hearing upon the equalization of benefits with reference to Ditch No. 1. In this notice of hearing the same persons are named and the same property is described as in the "resolution assessing benefits".

Plaintiff offered in evidence pages 260 to 268, inclusive, of Ditch Record A, the same being a record of the levying of the assessment for Drainage Ditch No. 1. In this assessment the same persons and the same property was assessed as is described in the "resolution assessing benefits." a material portion of which appearing on page 260 thereof, is as follows:

"The work of the construction of Drainage Ditch No. 1 of Minnehaha County, South Dakota, having been completed, and the contractors constructing the same having taken warrants upon Drainage Ditch No. 1 Fund for their services, and the entire costs of establishment and construction, including all expenses of every kind and nature that contributed to the establishment and construction of said drainage ditch, being ascertained by the Board of County Commissioners of said County to be the sum of [$46,6000.10".]

On said page 261 the following material portion appears:

"The following is a description of the property assessed, the name of the owners as appears from the records of the office of the Register of Deeds of said County at the date of filing of the petition, the proportion of the benefits
188 equalized, and the amount of each assessment levied".

* * * *

And on said page 262 the following material portion appears:

"Name of Owner.	Description.	Units of Equalized Assessment.	Amount of Assessment.
Abbie P. Sherman Annie C. Phillips, and Flora C. Phillips,	Tract 3 of NW¼ of Sec. 17. Twp. 101. Range 49.	.30	$ 16.46
Southwestern Investment Company,	N. 50 rods, of Tract 10 of SW¼ of Sec. 19. Twp. 101. Range 49,	2.45	134.46"

And on said page 264 the following material portion appears:

"E. S. W. Parker,	Lots 1 & 2, Block 7, Berwick's Add. to Sioux Falls,	.026	1.43
G. W. Shattuck,	Lots 3 & 4, Block 7, Berwick's Add. to Sioux Falls,	.026	1.43
Martha G. Shattuck,	Lots 5 & 6, Block 7, Berwick's Add. to Sioux Falls,	.026	1.43
F. W. Williams,	Lots 7 & 8, Block 7, Berwick's Add. to Sioux Falls,	.026	1.43

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Name of Owner	Description.	Units of Equalized Assessment.	Amount of Assessment.
Martha G. Shattuck,	Lots 9 & 10, Block 7, Berwick's Add. to Sioux Falls.	.026	$ 1.43
G. W. Shattuck,	Lots 5 & 6, Block 8, Berwick's Add. to Sioux Falls.	.026	1.43
Martha G. Shattuck,	Lot 12, Block 8, Berwick's Add. to Sioux Falls.	.013	.71
Abiel Abbott,	Lots 1, 2, 3, 4, 5, & 6, Block 9, Berwick's Add. to Sioux Falls,	.078	4.28
C. B. Rosengren,	Lot 3, Block 10, Berwick's Add. to Sioux Falls,	.013	.71
G. W. Shattuck,	Lots 4, 5, 6, 7, 8 & 9, Block 10, Berwick's Add. to Sioux Falls.	.078	4.28"

Also the following material portion on said page 265:

"City of Sioux Falls,	Block A, Berwick's Add. to Sioux Falls,	.750	41.16"

Also the following material portion on said page 269:

"City of Sioux Falls, 1⅛ miles of highways and dedicated streets within the drainage area, .90 49.39"

Plaintiff offered in evidence pages 94 to 95 and a por-
190 tion of page 96 of Ditch Record A, as follows:

April 10, 1908.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioners respectfully represent that they are all residents of the Township of Mapleton in said County, and that each of them is the owner of certain lands in said Township in the valley of the Big Sioux River as follows: The said Iver R. Peterson is the owner of the South Half of the South West Quarter of the North East Quarter of Section Seventeen (17) and the South Half of the East Thirteen (13) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said Bernt Mekvold is the owner of the South-West Quarter of the North West Quarter of Section Seventeen (17) and the West Twen-
191 ty-six and Two-Thirds (26 2/3) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said William O. Quincy is the owner of the West Half of the North West Quarter of Section Twenty (20); and that the said Iver I. Nelson is the owner of the East Half of the South West Quarter of Section Seventeen (17) and the North West Quarter of the South West Quarter of Section Seventeen (17), all in Mapleton Township, Minnehaha County, South Dakota, all of which lands will be affected by the drainage herein proposed;

Your petitioners further represent that it is necessary for the drainage of agricultural lands in said Big Sioux Valley from a point about four miles north of the south line of Sverdrup Township to a point about one and one-half miles north of the south line of Mapleton Township, that the proposed drainage be established;

Your petitioners further represent that the establishment of such drain will be conducive to the general health, convenience and welfare of the inhabitants of said territory, and that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow

in said valley, and will prevent great damage to the buildings and their contents, and will prevent great damage to the highways in said territory, and also to the railroad tracks and the rights of way of the Chicago, Milwaukee and St. Paul Railway Company in said territory, and will prevent damage and destruction of many bridges and their approaches in said territory;

192 Your petitioners further represent that the general purpose of said proposed drainage is, among other things, to prevent the annual or occasional flooding of land in said territory caused by high water in said river by providing a drain to carry off all of the water of said river above its normal stage from about the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the south line of Section Five (5) of Mapleton Township, and running thence southeasterly adjacent to the right of way of the Madison line of the Chicago, Milwaukee and St. Paul Railway Company to the west line of the East Half of the North East Quarter of Section Eight (8) in Mapleton Township, running thence south about three miles to a point about forty (40) rods south of the north line of Section Twenty Nine (29) in Mapleton Township where the said line intersects Silver Creek, running thence southeasterly to the upper end of Drainage Ditch No. 1, as established by said Board;

Your petitioners further represent that, as a part of said plan of drainage, there should be constructed a dike along the south and southeasterly side of said Big Sioux River where the same flows through the North East Quarter of Section Thirty-two (32) in Sverdrup Township, such dike to be of the length of thirty (30) or forty (40) rods.

Your petitioners further represent that the territory likely to be affected thereby embraces Sections Sixteen (16), Seventeen (17), Eighteen (18), Twenty (20), Twenty-one (21), Twenty seven (27), Twenty Eight (28), Twenty Nine (29), Thirty-Two (32), Thirty Three (33) and Thirty Four (34) in Sverdrup Township, and Sections Three (3), Four (4) Five (5), Eight (8), Nine (9), Sixteen (16), Seventeen (17), Nineteen (19), Twenty (20), Twenty One (21), Twenty Eight (28), and Twenty Nine (29) in Mapleton Township.

Dated April 9, 1908.

IVER R. PETERSON
IVER I. NELSON
BERNT MEKVOLD
W. O. QUINCY

Petitioners.

Filed in the office of the Auditor of Minnehaha County, S. D., this 10th day of April, 1908.

193 C. E. HILL,
County Auditor

Plaintiff offered in evidence page 113 of Ditch Record A, as follows:

January 8, 1909.

Further Petition.

To the Honorable Board of County Commissioners, of Minnehaha County, South Dakota:

The undersigned land owners in the valley north of Sioux Falls respectfully request, pursuant to the trip of inspection made by you on December 15, 1908, that in acting upon the petition of Iver R. Peterson and others for a drainage ditch in Mapleton Township you will cause the proposed drainage ditch to be extended further north and made a part of Ditch No. 1, also that as a part of said proposed drainage system, you will cause a ditch to be established on the west side of the Big Sioux River from a point above the Baltic dam southerly to a suitable place on the river in Section Eighteen (18) in Sverdrup Township, and that you will by a proper outlet on the east side of the river, provide for the taking care of the surplus water so dumped into the river at that point.

A. L. Berg
Ole J. Ustrud
G. T. Gunderson
O. G. Brende
John O. Aasen
P. M. Thompson
Ole O. Langness
H. G. Solem
T. A. Berven
Oluf Lyng
Mrs. Mary Lee
Mrs. Anne Larson by Agt.
K. Larson
J. H. Williamson
E. O. Fossum
John P. Risvold
Gunerius Thompson

Filed in the office of the Auditor of Minnehaha County,
194 S. D., this 8th day of January 1909.

C. E. HILL, County Auditor.

Plaintiff offered in evidence pages 121 to 123, inclusive, of Ditch Record A, as follows:

Resolution for Adjourned Hearing:

(Transcribed from Commissioners Record No. 6, Page 170-1-2-3)

On motion the following resolution was unanimously adopted:

Resolution:

Whereas, on April 10, 1908, Iver R. Peterson and others filed their petition with the County Auditor of Minnehaha County, South Dakota, for the establishment and construction of a certain drainage ditch in Mapleton Township in said County; and

Whereas, this Board did on June 12, 1908, adopt a resolution for the survey thereof; and

Whereas, Mr. S. Howe, County Surveyor, employed by this Board for making such survey, did on November 13, 1908, file his report thereof, together with maps and profiles, and

Whereas, this Board did on said last named date fix Friday, December 4, 1908, at the office of the County Auditor of said County as the time and place for the hearing of said petition, and did cause notice of said hearing to be given publication and posting, as required by law; and

195 Whereas, December 4, 1908, a petition was presented by A. L. Berg, and others for the extension of said ditch; and

Whereas, said matter has by successive adjournments been continued until April 9, 1909; and

Whereas, said engineer did on April 8, 1909 present his supplemental report of survey and plans and profiles; and

Whereas, this Board has inspected the route of said drainage ditch as described in said petition and as hereinafter described; and

Whereas, this Board deems it practicable, necessary and best that the route of said drainage ditch be varied from the route described in said petition and its northerly terminal points be materially changed; therefore

Be it Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the line of said drainage ditch be and it is hereby changed from the route described in said petition to run as follows: the same being substantially as petitioned for up to the point where the same

crosses the Madison branch of the Chicago, Milwaukee and St. Paul Railway Company, viz:

First Section.

Commencing at a point ten hundred forty-five (1045) feet north and fifty-eight (58) feet west of the Southeast corner of Section twenty-nine (29) in Township One Hundred and Two (102) North, Range Forty-nine (49); running thence north five hundred forty seven (547) feet; thence north 23 west thirty three hundred eighteen (3318) feet to a point fifty eight (58) feet west of the quarter quarter line in the North East Quarter (NE¼) of Section Twenty Nine (29), in said Township; thence north parallel with, and fifty-eight (58) feet west of said quarter quarter line through Section Twenty Nine (29), Twenty (20), Seventeen (17), and a
196 part of Section Eight (8) Twelve thousand nine hundred thirty five (12935) feet; thence north 50 East twenty seven hundred thirty two (2732) feet to a point thirty three (33) feet west of the west line of the right of way of the Chicago, Milwaukee and St. Paul Railway Company in the North West Quarter of Section Nine (9) in said Township; thence northerly parallel with and thirty three (33) feet west of the said right of way line nineteen thousand three hundred, sixty eight [(19386)] feet to a connection with a high water channel of the Big Sioux River in the South East Quarter of Section Twenty (20) in Township One Hundred and Three (103) North, Range Forty Nine (49).

Second Section:

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103) North, Range Forty Nine (49); running thence north 33 west thirty one hundred and fifty five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line of Section Seven (7) and Six (6) in said Township, and in Section Thirty One (31) in Township One Hundred and Four (104) North, Range Forty Nine (49) to the center line running East and West through said Section Thirty One (31); thence northeasterly to the creek near the northeast corner of said Section Thirty One (31), the said line being the center line of said proposed drainage ditch; that the width of said drainage ditch be and it is hereby fixed at forty (40) feet at the bottom thereof with a side slope of one and one-half feet to one; and that the fall of said

proposed drainage ditch be three (3) feet per mile from
197 north to south, and that the area required for right of way and dump space will be four (4) rods on each side of said line, except where it is adjacent to the right of way of the Chicago, Milwaukee and St. Paul Railway Company, and that the area required for right of way and dump space where said proposed line runs adjacent to the right of way of said Railway Company shall be two (2) rods on the easterly side of said line and six (6) rods on the westerly side of said line;

That in addition thereto the Big Sioux River be straightened in Section Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred Three (103) North, Range Forty Nine (49) in order to afford better means of communication between the lower end of Section Two (2) of said ditch and the upper end of Section One thereof;

Be It Further Resolved that this hearing be and it is hereby adjourned until Thursday May 6, 1909, at two o'clock P. M. at the office of the County Auditor of said County, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by the Laws of 1909, the same to be signed by the Chairman of this Board and attested by the County Auditor by publishing the same once in each week for two consecutive weeks in the Sioux Falls Daily Argus-Leader, and by posting copies of said notice in at least three public places near the route of said proposed drainage ditch as varied and extended, such posting to be made at least two weeks prior to the time of said hearing.

Adopted April 9, 1909.

THE BOARD OF COUNTY COMMISSIONERS MINNEHAHA COUNTY, SOUTH DAKOTA.
By Thos. McKinnon, Chairman.

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198 Plaintiff offered and there were received in evidence pages 135 to 136 of Ditch Record A, as follows:

Resolution Establishing Drainage Ditch No. 2:

The matter of the petition of Iver R. Peterson and others for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on April 10, 1908, coming on to be heard by the Board of County Commissioners of said County at a regularly adjourned

meeting on Thursday May 6, 1909, pursuant to notice heretofore given, and said Board having heard and considered said petition and all matters in support of the same and in opposition thereto; Now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said drainage ditch as extended and varied and as described and set forth in the resolution adopted by this Board on April 9, 1909, is conducive to the public health, convenience and welfare and is necessary and practicable for draining agricultural lands, and it is so found;

Be it Further Resolved that the said drainage ditch as described and set forth in the said resolution of April 9, 1909, be and it is hereby named and designated "Drainage Ditch No. 2";

Be it Further Resolved that the said Drainage Ditch No. 2 be and the same is hereby established;

Be it Further Resolved that in the construction of said drainage ditch the rights of flowage of Wm. G. Milne, the owner of the mill at or near Baltic, S. D., will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch, where the same joins with the creek near the northeast corner of Section Thirty One (31) in Dell Rapids Township that it will not diminish or interfere with such rights of flowage and that a head gate or other protection will be
199 established if necessary, to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

Be it Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same be made a special order for Friday May 7, 1909, at nine o'clock A. M.,

On motion, the Board adjourned to May 7, 1909 at 9 o'clock A. M.

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200 Plaintiff offered and there were received in evidence pages 48 to 60 inclusive of Ditch Record B, as follows:

October 7, 1910.

The Board having had under consideration for several days the matter of the preliminary Assessment of Proportion

of Benefits which was being prepared by J. H. Gates, Attorney with the assistance of Engineer Wagner and the same being completed, on motion the following resolution was adopted:

Resolution Fixing Proportion of Benefits
Drainage Ditch No. 2.

Whereas the Board of County Commissioners of Minnehaha County, South Dakota, has established the Drainage Ditch No. 2, and has fixed the damages arising therefrom and has been investigating and considering the proportion of benefits that will accrue to the lands, tracts and lots within the drainage area of said drainage ditch; and

Whereas in arriving at this determination of the proportion of benefits it has considered not only the benefits which will accrue directly by virtue of the construction of said drainage ditch, but also the indirect benefits by virtue of such drainage being an outlet for connecting drains that may hereafter be constructed; and

Whereas said Board is of the opinion that the drainage area of Drainage Ditch No. 1 is benefitted by the establishment and construction of Drainage Ditch No. 2, and that both of said drainage ditches are mutually interdependent, and should virtually be considered as one drainage system; and

Whereas in the determination of the proportion of benefits herein fixed and determined upon the several premises embraced within the drainage area of Drainage Ditch No. 1 the proportion of benefits as finally fixed and equalized in the matter of said Drainage Ditch No. 1 have been taken into consideration; and

201 Whereas the number of acres set opposite each tract hereinafter described represent the actual number of acres of land within said tract that are benefitted, and excluding therefrom land taken by said drainage ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said drainage ditch the area therefor taken by the drainage is excluded; and

Whereas in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat in the County Auditor's Subdivision of the particular quarter section in which the land is located, on file in the Register of Deeds' office of said County, and in the description of lands herein by reference to books and pages of deed records

such references are to the deed records in the office of said Register of Deeds; and

Whereas, in the consideration of such proportion of benefits said board has assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section Twenty, in Township One Hundred Three North, Range Forty-nine, West Fifth P. M., owned by Martha R. Roberts, and containing ten acres, be benefitted "One", and taking said tract as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sioux Falls, Wayne, Mapleton, Sverdrup and Dell Rapids; the benefits to the County of Minnehaha; and the benefits to the several railroad companies hereinafter described, arising and accruing by the establishment and construction of Drainage Ditch No. 2, be, and they are hereby fixed and determined in the following proportions, viz:

202 (Here follows descriptions of lands in Sections 4, 5, 6, 7, 8, 9, 17, 18, 19, 30, and 31, in Township 101, Range 49: Sections 13, 24 and 25, in Township 101, Range 50; Sections 3, 4, 5, 8, 9, 16, 17, 19, 20, 21, 28, 29, 31, 32, and 33, in Township 102, Range 49; Sections 5, 6, 7, 8, 9, 16, 17, 18, 20, 21, 27, 28, 29, 32, 33 and 34 in Township 103, Range 49; Sections 29, 31, and 32, Township 104, Range 49; and of certain lots in the town of Renner; and of lots and blocks in the following additions to Sioux Falls, to-wit: Berwick; Brookings; Brooks; Bunkers; Central Park, Englewood; Harrison; Lakeview; Lincoln Park; McClellan's Second; Merdith's First; Merdith' Second; Millard Park; North Boulevard; North Park; North Park Second; Sioux Falls Improvement Co.; Summit; West Lawn; and West Park, with the names of the owners and the proportion of benefits assessed to each. The 1⅛ miles of highway and dedicated streets within drainage area described herein and the property hereinafter described in the resolution levying the assessment herein is all of the real estate of the plaintiff of any kind described or referred to in said petition. A large amount of property situated in a southerly direction from the ditch and its outlet, commonly called "the spillway", and not attempted to be assessed under the proceedings initiated by the filing of the petition of F. L. Blackman, and others, attached to and made a part of the answer herein, and which property is described in the "Drainage Ditch Notice" attached to and made a part of the bill of complaint herein is likewise not described in this exhibit.

Following the description of lands, lots and blocks above referred to and omitted here for the purpose of diminishing the record, are the descriptions of railroad and certain other properties, and the conclusion of the exhibit, which are as follows:

203

Name	Description	Acres	Proportion of Benefits.
City of Sioux Falls	One and one eighth miles of highways and dedicated streets within the drainage area.....		.090
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area		.320
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area		.060
Mapleton Township	Twelve miles and 52 rods of laid out and established highways within the drainage area		8.723
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area		17.710
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area		1.936
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area		9.100

Name	Description	Acres	Proportion of Benefits.
Chicago, St. Paul, Minneapolis & Omaha R. R. Co.	Rignt-of-way as laid out and located across Section 18. Township 101, Range 49, and Section 13, Township 101, Range 50, West 5th P. M., within the drainage area (1.5 miles)	18	20.320
South Dakota Central Railway Co.	Right-of-way as laid out and located across Sections 4, 5 and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49 West; 5th p. m. within the drainage area (2 6 miles)	20.80	59.980

204

Chicago, Milwaukee & St. Paul Railway Co.	Right-of-way as laid out and located across Sections 4 and 9, Township 101, Range 19, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29 and 33, Township 103, Range 49, and Section 32, Township 104, Range 49 West, 5th p. m. within the drainage area (the above being the Sioux Falls and Egan line); also across Sections 5, 8, and 9, Township 102, Range 49 West, 5th P. M., within the drainage area (being the Renner and Madison line) Total 14.5 miles	167.06	383.130

Be it further Resolved that Thursday, the 3rd day of November, 1910, at two o'clock P. M. at the office of the County Auditor of said County be, and it is hereby fixed as the time and place for the equalizing of said proportion of benefits, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909 of said State, such notice to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Daily Argus Leader once in each week for two consecutive weeks, and by posting copies of said notice in at least three (3) public places near the route of said drainage ditch, said posting and the last publication of said notice to be made at least ten (10) days prior to the time of said hearing.

Adopted October 7th, 1910.

THOMAS McKINNON, Chairman.

Attest:

(Seal) Henry Howe, County Auditor.

205 Filed in the office of the Auditor of Minnehaha County, S. D., this 7th day of October 1910.

HENRY HOWE,
County Auditor.

Plaintiff offered and there were received in evidence pages 61 to 71, inclusive, of Ditch Record "B", being a record of the notices of hearing on the question of equalization of benefits of Ditch No. 2. This notice of hearing named the same

persons and the same property specified in the resolution of the County Commissioners fixing the proportion of benefits of Ditch No. 2.

Plaintiff offered and there were received in evidence pages 153 to 165, inclusive, of Ditch Record "B", the same being a record of assessment made by the County Commissioners for Drainage Ditch No. 2. This assessment named the same persons and the same property specified in the resolution fixing the proportion of benefits of Drainage Ditch No. 2 and the assessment was made as provided for in said resolution, a material portion of which, appearing on page 153 thereof, is as follows:

"The work of the construction of Drainage Ditch No. 2 of Minnehaha County, South Dakota, having been completed, and the appeals pending in the Circuit Court of this State, and in the Circuit Court of the United States, having been settled, and the contractors constructing the same having taken warrants upon Drainage Ditch No. 2 Fund for their services, and the entire cost of the establishment and construction, including all expenses of every kind and nature of said drainage ditch, having been ascertained by the
206 Board of County Commissioners of said County to be the sum of $18,106.19". * * * * * * *

"The following is a description of the property assessed, the names of the owners thereof, as appears from the records in the office of the Register of Deeds of said County at the date of the filing of the petition for such drainage, the units of proportion of benefit as equalized, and the amount of each assessment".

On said page 154, the following material portion appears:

"Name of Owner.	Description.	Proportion of Benefits.	Amount of Assessment.
Abbie P. Sherman Annie C. Phillips, and Flora C. Phillips,	Tract 3 of NW¼ of Sec. 17. Twp. 101. R. 49,	.030	$ 1.90"

And on said page 155 the following material portion appears:

Southwestern Investment Company,	N. 50 Rds. of Tract 1 of SW¼ of Sec. 19, Twp. 101. R. 49,	.245	15.53"

And on said page 159 the following material portion appears:

"City of Sioux Falls,	Block A, Berwick's Add. to Sioux Falls,	.075	4.75
"E. S. W. Parker,	Lots 1 & 2, Block 7, Berwick's Add. to Sioux Falls,	.003	.19
G. W. Shattuck,	Lots 3 & 4, Block 7, Berwick's Add. to Sioux Falls,	.003	.19
Martha G. Shattuck,	Lots 5 & 6, Block 7, Berwick's Add. to Sioux Falls,	.003	.19
F. W. Williams,	Lots 7 & 8, Block 7, Berwick's Add. to Sioux Falls,	.003	.19
207			
Martha G. Shattuck,	Lots 9 & 10, Block 7, Berwick's Add. to Sioux Falls,	.003	.19
G. W. Shattuck,	Lots 5 & 6, Block 8, Berwick's Add. to Sioux Falls,	.003	.19
Martha G. Shattuck,	Lot 12, Block 8, Berwick's Add. to Sioux Falls,	.001	.06
Abiel Abbott,	Lots 1, 2, 3, 4, 5, & 6, Block 9, Berwick's Add. to Sioux Falls,	.008	.51
C. B. Rosengren,	Lot 3, Block 10, Berwick's Add. to Sioux Falls,	.001	.06
G. W. Shattuck,	Lots 4, 5, 6, 7, 8 & 9, Block 10, Berwick's Add. to Sioux Falls,	.008	.51"

And on said page 164 the following material portion appears:

"City of Sioux Falls,	1⅛ miles of highways and dedicated streets within the drainage area,	.090	5.70"

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208 It is stipulated that filed herein as a part of the answer of the defendants are correct copies of the following records of the Board of Commissioners of Minnehaha County, with reference to Drainage Ditch No. 1 and 2, to-wit: the petition of F. L. Blackman and others upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had, the order for filing said petition, the resolution for survey under said petition, the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman and others, the published notice of hearing petition, (such notice not being attached to the answer, but having been filed after the filing of the answer with a

stipulation that it might be considered as a part of the answer), and resolution establishing Drainage Ditch No. 1 and 2. Said exhibits were offered in evidence by plaintiff and received in evidence.

(The foregoing exhibits relating to Drainage Ditch No. 1 and 2 are printed herein as a portion of the answer of the defendants and are consequently not herewith reprinted.)

Plaintiff's exhibit "A" was identified by the witness F. E. Ward as one of the records of the office of the County Auditor of Minnehaha County, and was offered in evidence by plaintiff.

To the offer in evidence of plaintiff's exhibit "A" the defendants and intervening defendants objected as incompetent, irrelevant and immaterial to any issue in the case, the same not being pleaded in plaintiff's bill of complaint
209 and a part of their case. For the further reason that the apportionment made and set forth in plaintiff's bill of complaint affirmatively appears to be an apportionment made during the year 1921. Plaintiff's exhibit "A" was received in evidence subject to objection and is as follows:

210 Filed
Dec 15 1921
At .....M
Jerry Carleton, Clerk

Plaintiffs A
Exhibit B. O. C.

Drainage Notice

To Whom It May Concern:

Notice is hereby given that Tuesday, April 25th, 1919, at Two o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, at the Court House in the City of Sioux Falls, in said County, have been fixed by the Board of County Commissioners of said County as the time and place for equalizing the proportion of benefits to the several lands, tracts, lots, roads, streets and railroad right-of-way embraced within the district of Drainage Ditch No. 1 and 2, and benefitted by the construction of said Drainage Ditch, and that the route of said Drainage Ditch No. 1 and 2 is as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of Section twenty-nine (29) Township One Hundred Two (102), Range Forty-nine (49), West of the 5th P. M.,

running thence south parallel to the adjacent highway two thousand and eighty-five (2085) feet to station one hundred and fourteen (114); also commencing at a point Six hundred and seventy-four (674) feet north, and about thirty-five (35) degrees west of said station number one hundred and fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south forty-five (45) degrees, east three thousand seven hundred (3700) feet to Station number zero (0), the same being on high water line, thence south fifty-nine (59) degrees and thirty-six (36) minutes, east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact loca-
211 tion of drainage ditch Number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five (1035) feet north and fifty-eight (58) feet west of the southeast corner of Section twenty-nine (29), in Township One Hundred and Two (102), Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north five hundred and forty-seven (547) feet, thence north twenty-three (23) degrees, west Thirty-three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the Northeast Quarter of Section Twenty-nine (29), in said Township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17), and a part of Section Eight (8), Twelve thousand nine hundred and thirty-five (12,935) feet, thence north fifty (50) degrees east, twenty-seven hundred and thirty-two (2732) feet to a point thirty-three (33) feet west of the west lines of the right of way of the Chicago, Milwaukee & St. Paul Railway Co., in the Northwest Quarter of Section Nine (9), in said Township, thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with the high water channel of the Big Sioux River, in the southeast Quarter of Section Twenty (20), in Township One Hundred and Three (103), north of Range Forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18), in Township One Hundred and Three (103), Range Forty-nine (49);
running thence north thirty-three (33) degrees west
212 thirty one hundred fifty-five (3155) feet to a point
sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8), in said Township; thence north parallel with and sixty (60) feet west of the quarter line in Section Seven (7) and Six (6) in said Township, and in Section Thirty-one (31), in Township One Hundred and Four (104), North of Range Forty-nine (49), to the center line running east and west through said Section Thirty-one (31); thence northeasterly to the creek near the northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River has been or is being straightened and the channel changes made as follows: Channel changes on Sections Five (5) and Seven (7), Township One Hundred and One (101), Range Forty-nine (49); Channel changes on Section Thirty-two (32), Twenty-nine (29), Twenty (20), Eighteen (18), Seventeen (17), Eight (8) and Five (5), Township One Hundred and Two (102), Range Forty-nine (49); and Channel changes on Sections Thirty-two (32), and Twenty-nine (29), Township One Hundred and three (103), Range Forty-nine (49); the same being in accordance with the lines of said Drainage Ditch as actually constructed and for which the said Board of County Commissioners has heretofore assessed condemnation damages; that maps and profiles of said Drainage Ditch are now on file in the office of the County Auditor of said County, to which reference is hereby made.

That there have been included within the drainage area of Drainage Ditch 1 and 2 the entire drainage area of Drainage Ditches No. 1 and No. 2 heretofore established and constructed, and additional territory contiguous thereto, which is benefitted by the establishment and construction of said
Drainage Ditch No. 1 and 2, and that in the judgment
213 of said Board of County Commissioners all of said territory is interdependent, and is considered as one drainage system, that in the determination of the proportion of benefits fixed upon the lands and premises embraced within said drainage area, the amounts of the assessments heretofore made in the matter of Drainage Ditch No. 1 and Drainage Ditch No. 2 have been taken into consideration.

That in the consideration and assessment of benefits, as hereinafter set forth, the said Board of County Commissioners have assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section 20, in Township 103, Range 49, West of the 5th P. M., owned by Martha R. Roberts, and containing ten acres, is benefitted "one"; also that Lot 1, in Block 22 of J. L. Phillips' Addition, owned by G. Keriakedes, containing a single lot, is benefitted "one", and that County Auditor's Tract 14 of the Southwest Quarter of Section 16, Township 101, Range 49, except the east 132 feet thereof, owned by Albert Larson and George E. Larson, is benefitted "one", and taking the said lands, tracts and lots as a unit, the proportion of benefits to each and all of the lands, tracts, lots, roads, streets and railroad right-of-way and the description of each tract of land affected by said drainage, and the names of the owners thereof, as they appear from the records in the office of the Register of Deeds of Minnehaha County, South Da-
214 kota, at the date of said petition and at the date of filing said petition, [and at the date of filing said petition,] was fixed as follows:

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Fred Nelson	W½ of NE¼	4	101	49	57.00	6.897
State of South Dakota	E½ of NE¼ of NW¼	4	101	49	19.5	2.952
State of South Dakota	W½ of SE¼ of NW¼	4	101	49	19.5	2.952
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry. Co. and S. D. Central Ry.) that part of SW¼ Lying South and West of the center line of Drainage Ditch No. 1	4	101	49	12.33	1.863
South of South Dakota	(Except right-of-way of C. M. & St. P. Ry) W½ of NW¼	4	101	49	70.6	10.684
Fred Nelson	SE¼ of NW¼	4	101	49	40.0	6.05
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry) that part of SW¼ lying North and East of the center line of Drainage Ditch No. 1	4	101	49	131.53	19.898
Mary C. Brace	NW¼ of SE¼	4	101	49	30.00	4.538
Mary Brix	Tract 1 of SE¼	4	101	49	3.50	.0532

Mary C. Brace	(Except Tracts 1 and 2) SW¼ of SE¼	4	101	49	8.00	1.21
Hans Ruvald	(Except right-of-way of S. D. Central Ry) NE¼ of NE¼	5	101	49	35.04	5.299
Olander Beason	NW¼ of NE¼	5	101	49	39.66	6.001
Sam Helm	SW¾ of NE¼	5	101	49	40.00	6.05
Hans Ruvald	(Except right-of-way of S. D. Ry) SE¼ of NE¼	5	101	49	34.45	5.215
A. C. Jensen	NE¼ of NW¼	5	101	49	36.22	5.481
D. A. Scott	NW¼ of NW¼	5	101	49	38.00	5.748
F. H. Johnson	SW¼ of NW¼	5	101	49	38.00	5.750
Hans Ruvald	SE¼ of NW¼	5	101	49	38.00	5.750
Hans C. Ruvald	NE¼ of SW¼	5	101	49	39.50	5.977
216						
Mary C. Brace	(Except Blocks 34, 35, 49, 50 and 61 of N. Boulevard Addition to Sioux Falls) S½ of SW¼	5	101	49	66.50	9.588

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
F. H. Johnson	NW¼ of SW¼	5	101	49	38.50	5.699
State of South Dakota	(Except right-of-way of S. D. Central Ry Co.) NE¼ of SE¼	5	101	49	34.45	5.215
Hans Ruvald	NW¼ of SE¼	5	101	49	40.00	6.05
Mary C. Brace	(Except Blocks 4, 6, 9, 13 and 29 of N. Boulevard Addition to Sioux Falls, and except right-of-way of S. D. Central Ry. Co.) S½ of SE¼	5	101	49	62.66	9.474
D. A. Scott	N¼ of SE¼	6	101	49	40.00	4.84
F. H. Johnson	S½ of NE¼	6	101	49	42.00	5.082
F. H. Johnson	N½ of SW¼	6	101	49	14.00	1.694
George E. Barkley	S½ of SW¼	6	101	49	40.00	4.84
F. H. Johnson	N½ of SE¼	6	101	49	73.00	8.803
George E. Barkley	SW¼ of SE¼	6	101	49	38.50	4.659
A. G. Erskine	Tract 1 of SE¼	6	101	49	23.00	2.783
Frances G. Carpenter	Tract 2 of SE¼	6	101	49	15.00	1.815
Frances G. Carpenter	NE¼ of NE¼	7	101	49	40.00	4.84
Frances G. Carpenter	SE¼ of NE¼	7	101	49	40.00	4.84

H. O. Gates & E. J. Sharon	W½ of NE¼	7	101	49	79.50	9.295
H. O. Gates & E. J. Sharon	E½ of NW¼	7	101	49	50.00	6.05
217						
F. H. Johnson	SW¼ of NW¼	7	101	49	5.00	0.805
E. J. Sharon & F. L. Blackman	The unplatted part of W½ of SE¼ and of E½ of SW¼ of (Except that tract lying North of Block 37 of Meredith's Second Addition to Sioux Falls, and South of center line of Mullberry St., extended West and East of center line of Harvard St., extended and West of center line of Hooker St. extended; also except that portion of Tract 1 lying between Monroe St., extended West and the center line of Manchester Street extended West	7	101	49	37.00	4.477

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
B. A. Burtch & Henry Brookhouse, Jr.	That part of Tract 1 of SW¼ lying N. of Block 37 Meredith's Second Addition to Sioux Falls, and S. of center line of Mullberry St. extended West and East of center line of Harvard St., extended and West of center line of Hooker St. extended.	7	101	49	1.50	1.815
Henry Brookhouse, Jr.	That part of Tract 1 of SW¼ lying between Monroe St. extended and West of center line of Manchester Street extended West,	7	101	49	1.50	0.182
Richard J. Ford	NW¼ of SW¼	7	101	49	18.00	2.178
J. A. Redfield	N½ of SW¼ of SW¼	7	101	49	15.00	1.815
J. A. Redfield	SE¼ of SW¼ of SW½	7	101	49	7.5	0.908
Frances G. Carpenter	N½ of NE¼	8	101	49	80.0	9.68
Frances G. Carpenter	N½ of NW¼	8	101	49	80.0	9.68
C. E. McKinney	N½ of SW¼	8	101	49	80.0	9.68
E. B. Northrup	SW¼ of SW¼	8	101	49	40.0	4.84

Elmer S. Gilbert	SE¼ of NE¼ of SE¼	8	101	49	5.0	1.10
Frances G. Carpenter	(Except Block 40 of Central Park Add. to Sioux Falls) SW¼ of NW¼	8	101	49	37.50	4.537
218						
Frances G. Carpenter	(Except Blocks 5, 8, 13, and 21 of Central Park Add. to Sioux Falls) SW¼ of NE¼	8	101	49	30.00	3.63
Frances G. Carpenter	NW¼ of NW¼ of SE¼ of NE¼	8	101	49	2.50	0.302
State of South Dakota	That part lying East of the right-of-way of the C. M. & St. P. Ry. Co. of S½ of NW¼	9	101	49	14.5	1.755
Frances C. Carpenter	(Except Blocks 33, 48 and 49 of Central Park Add. to Sioux Falls) SE¼ of NW¼	8	101	49	32.50	3.933
Catherine W. Peck & Porter P. Peck	(Except Block 1 and Lots 10, 11 and 12 of Block 34 of Millard Park Add. to Sioux Falls) Tract 1 of NW¼	17	101	49	83.92	10.152

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Catherine W. Peck & Porter P. Peck	Tract 2 of SW¼	17	101	49	12.6	1.524
Catherine W. Peck & Porter P. Peck	Tract 4 of NW¼	17	101	49	0.3	0.036
Maria Winker	Tract 1 of SW¼	17	101	49	12.0	1.452
Francis D. Hoskins	Tract 2 of SW¼	17	101	49	1.85	0.205
Frances G. Carpenter	Tract 3 of SW¼	17	101	49	1.1	0.133
Security & Guaranty Co.	(Except lots 1, 2, 3, 4, 5, and 6 of Block 3, Lincoln Park Add. to Sioux Falls) NE¼ of NE¼	18	101	49	37.25	4.513
Porter P. Peck	SE¼ of NE¼	18	101	49	35.00	4.235
August Gustafson	SW¼ of NE¼	18	101	49	40.00	4.84
August Gustafson	SE¼ of NW¼	18	101	49	40.00	4.84
219						
W. H. Lyon	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SW¼	18	101	49	33.96	4.114
W. H. Lyon	SW¼ of NW¼	18	101	49	37.00	4.477
S. A. Gehrig	(Except right of way of C. M. & St. P. Ry. Co) NE¼ of SW¼	18	101	49	38.48	4.858

Marcus Russell	W½ of NW¼ of SE¼	18	101	49	30.00	2.42
Marcus Russell	SW¼ of NE¼ of NW¼ of SE¼	18	101	49	2.5	0.301
Marcus Russell	N½ of NE¼ of NW¼ of SE¼	18	101	49	5.0	0.805
Soo Valley Granite Co.	That part of NW¼ of NW¼, lying East of the Big Sioux River (Except Block 89 of Sioux Falls Imp. Co Add to Sioux Falls					0.805
S. Widmark	Tract 1 of NW¼	18	101	49	2.0	0.242
Soo Valley Granite Co.	That part of NW¼ of NW¼ lying West of Big Sioux River (Except Tract 1 and lots 1, 2, 3, 4, 12, 13, 14, 15, 16, 17, & 18 of Block 91 of Sioux Falls Imp. Co. Add. to Sioux Falls	18	101	49	14.00	1.694

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
George J. Morris	(Except right-of-way of C. St. P. M. & O. Ry. Co) East 10 acres of S½ of SW¼	18	101	49	9.37	1.137
German State Bank	(Except right-of-way of C. St. P. M. & O. Ry Co) W. 70 acres of S½ of SW¼	18	101	49	64.35	7.792
C. C. Bratrud	E½ of NE¼	19	101	49	9.5	1.149
Laura A. Darling	S½ of NE¼	19	101	49	2.0	0.242
Den Donahoe & W. M. Donahoe	(Except Block 13 of West Lawn Add. to Sioux Falls) E½ of NW¼	19	101	49	77.5	8.525
E. V. Rowley	W½ of NE¼ of NW¼ of NW¼	19	101	49	5.0	0.550
Ludwig Seubert	SE¼ of NE¼ of NW¼ of NW¼	19	101	49	2.5	0.275
220						
Jean Obert	NE¼ of NE¼ of NW¼ of NW¼	19	101	49	2.5	0.275
Dan A. Donahoe	NW¼ of NW¼ of NW¼	19	101	49	9.0	0.990
Dan A. Donahoe	S½ of NW¼ of NW¼	19	101	49	19.0	2.090
Daniel A. Donahoe	SW¼ of NW¼	19	101	49	38.00	4.180

Amelia Bauch	(Except the N. 50 rods) Tract 1 of SW¼	19	101	49	14.5	1.595
W. H. Fullerton, Thomas Fullerton, Geo. J. Fullerton & Leopold Guertin	Tracts 2 & 3 of SW¼	19	101	49	7.45	0.825
Thomas F. Loughran & Louis Bauch	Tract 4 of SW¼	19	101	49	8.0	0.880
Mary R. Guertin	North 4 acres of Tract 5 of SW¼	19	101	49	4.0	0.440
J. H. Fernyhough	S 4 acres of Tract 5 of SW¼	19	101	49	4.0	0.440
Daniel A. Donahoe Den Donahoe & Wm. Donahoe	Tract 8 of SW¼	19	101	49	0.75	0.082
Daniel A. Donahoe Den Donahoe and Wm. Donahoe	Tract 10 of SW¼	19	101	49	8.0	0.880
Stella I. Simpson	N½ of NW¼	30	101	49	18.0	1.980
Stella I. Simpson	SW¼ of NW¼	30	101	49	32.0	3.520
Harry A. Chetham	NW¼ of SW¼	30	101	49	20.0	2.200
J. T. Norris	SW¼ of SW¼	30	101	49	33.0	3.630

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Lottie Frank and Ethel F. Neister	(Except the right-of-way of C. St. P. & M. O. Ry. Co. and except the West 13 rods and 4 ft) E½ of NE¼	13	101	50	42.0	5.082
Lottie Frank and Ethel F. Neister	W½ of NE¼	13	101	50	30.0	3.630
Lottie Frank and Ethel F. Neister	W. 13 rods and 4 ft. of E½ of NE¼	13	101	50	7.5	0.908
Hayward Investment Co.	(Except right-of-way of C. St. P. M. & O. Ry Co) E½ of SW¼	13	101	50	30.9	3.729
221						
W. H. Lyon	(Except right-of-way of C. St. P. M. & O. Ry Co) NE¼ of SE¼	13	101	50	32.53	3.933
Lottie Frank and Ethel F. Neister	(Except right-of-way of C. St. P. M. & O. Ry Co) NW¼ of SE¼	13	101	50	36.97	4.477
Louis Lissinger	S½ of SE¼	13	101	50	73.0	8.833

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Charley Gibson	A tract beginning at the N/E. Corner of running thence W. 320 ft. thence S. 120 ft. thence S. 70 degrees E. 320 ft. thence N. 20 degrees E. 52 ft. thence North 180 ft. to beginning	24	101	50	1.78	0.217
Louis P. Caldwell	(Except the tract last above described) NE¼ of NE¼	24	101	50	33.7	4.078
William Gage	NW¼ of NE¼	24	101	50	8.0	2.198
P. M. Smith	W½ of NW¼	3	102	49	20.7	1.773
John Sittig	E½ of NE¼	4	102	49	77.14	9.329
Ole E. Eggen	W½ of NE¼	4	102	49	78.49	9.492
Gurine Peterson	E½ of NW¼	4	102	49	78.04	11.527
Ole T. Aspass	(Except right-of-way of C. M. & St. P. Ry. Co.) W½ of NW¼	4	102	49	69.65	9.672
Ole T. Nessen	NE¼ of SW¼	4	102	49	40.00	5.95
Andrew P. Brende	SE¼ of SW¼	4	102	49	40.00	5.835
Martin H. Oyen and Cleopatra H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) W½ of SW¼	4	102	49	72.00	9.272
Ole T. Nessen	SE¼	4	102	49	118.00	14.278
Ole Thompson Aspass	E½ of NE¼	5	102	49	72.37	11.052
O. O. Gilseth	NW¼ of NE¼	5	102	49	37.4	4.934
O. O. Gilseth	W¾ of SW¼ of NE¼	5	102	49	29.0	3.828
O. O. Gilseth	SE¼ of SE¼ of SW¼ of of NE¼	5	102	49	1.5	0.198
John Brekke	E½ of SE¼ of SW¼ of NE¼	5	102	49	5.0	0.66
222						
John Brekke	SE¼ of NE¼ SW¼ of NE¼	5	102	49	1.5	0.199
O. O. Gilseth	(Except right-of-way of C. M. & St. P. Ry Co.) NW¼	5	102	49	40.00	4.80
P. J. Merakergaard	(Except right-of-way of C. M. & St. P. Ry. Co) SW¼	5	102	49	73.4	8.048
223						
Martin H. Oyen and Cleopatra H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) SE¼	5	102	49	140.48	20.915
Erick O. Evjebak and Olaf Gilseth	Tract 1 of SE¼	5	102	49	9.32	2.186

Martin H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) E½ of NE¼	8	102	49	72.3	11.653
Martin H. Oyen	That part North and East of right-of-way of C. M. & St. P. Ry Co. of W½ of NE¼	8	102	49	2.0	0.264
Ole Gunderson	That part South and West of right-of-way of C. M. & St. P. Ry Co., of W½ of NE¼ (except the north 50 rods of that part West of river	8	102	49	65.4	9.537
J. L. Ingalls	The North 50 rods of that part West of River of W½ of NE¼	8	102	49	3.0	0.64
Ole Gunderson	(Except the South 50 rods of) NE¼ of NW¼	8	102	49	22.00	2.904

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Ole Gunderson	The South 30 rods of NE¼ of NW¼	8	102	49	22.00	2.904
Ole Gunderson	S½ of NW¼	8	102	49	38.00	5.475
Ole Gunderson	NE¼ of SW¼	8	102	49	40.00	5.85
Iver Nelson	(Except 2½ acres in square form in SE Corner) NW¼ of SW¼	8	102	49	17.5	2.310
M. O. Benrud	2½ acres in square form in SE corner of NW¼ of SW¼	8	102	49	2.5	0.33
Jonas Olsen	SW¼ of SW¼	8	102	49	30.00	3.96
Ole Gunderson	SE¼ of SW¼	8	102	49	39.00	5.735
224						
Nellie A. Walkins	(Except 1 acre in square form in NW corner) NE¼ of SE¼	8	102	49	38.16	5.575
School District No. 2	1 acre in square form in NW Corner) of NE¼ of SE¼	8	102	49	0.84	0.136
Ole Gunderson	W½ of SE¼	8	102	49	76.0	12.705
C. H. Renner	SE¼ of SE¼	8	102	49	38.0	8.156
Andrew P. Brende	N½ of NE¼	9	102	49	50.00	6.05
Alfred Christianson	S½ of NE¼	9	102	49	38.00	4.598
Ole T. Nessen	NE¼ of NW¼	9	102	49	32.00	4.752

Martin H. Oyen	That part West of the Southern Minn. R. R. right-of-way of W½ of NW¼ (except right-of-way of Madison Line of C. M. & St. P. Ry. Co.	9	102	49	41.4	5.565
Alfred Christianson	That part East of the Southern Minn. R. R. Right-of-way of W½ of NW¼	9	102	49	31.0	4.604
Andrew P. Brende	SE¼ of NW¼	9	102	49	40.00	5.313
Jonas Olsen	(Except the plat of Olsen's Add. to Renner) E½ of SW¼	9	102	49	71.85	9.24
225						
C. H. Renner	(Except rights-of-way of C. M. & St. P. Ry Co. and except the town plat of Renner) W½ of SW¼	9	102	49	69.7	9.71
Christian Christianson	N½ of SE¼	9	102	49	20.00	2.42

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Jonas Olsen	S½ of SE¼	9	102	49	18.00	2.078
Jonas Olsen	NW¼ of NE¼	16	102	49	2.00	0.242
Barney Finnegan	SW¼ of NE¼	16	102	49	23.00	2.783
John Bliss	E½ of NW¼	16	102	49	75.00	9.075
Leonard Renner	(Except right-of-way of C. M. & St. P. Ry Co) W½ of NW¼	16	102	49	73.00	9.92
Michael P. Brende	NE¼ of SW¼	16	102	49	40.00	4.84
Mary P. Brende	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SW¼	16	102	49	36.9	5.02
Ole O. Velden	(Except right-of-way of C. M. & St. P. Ry. Co) SW¼ of SW¾	16	102	49	36.95	4.948
Ole O. Velden and Thomine O. Velden	SE¼ of SW¼	16	102	49	33.0	3.993
Mary P. Brende	NW¼ of SE¼	16	102	49	19.0	2.299
S. P. Brende	SW¼ of SE¼	16	102	49	25.0	3.025
F. I. Renner	E½ of NE¼	17	102	49	77.0	11.944
Gertie R. Peterson	NW¼ of NE¼	17	102	49	38.00	5.841
Gertie R. Peterson	N½ of SW¼ of NE¼	17	102	49	19.5	3.001
Iver R. Peterson	S½ of SW¼ of NE¼	17	102	49	19.5	3.001

Gertie R. Peterson	NE¼ of NW¼	17	102	49	39.0	5.733
Ingeberg Peterson	NW¼ of NW¼	17	102	49	18.0	2.376
Bernt Mekvold	SW¼ of SW¼	17	102	49	33.0	4.356
Bernt Mekvold	W 26 2/3 acres of SE¼ of NW¼	17	102	49	26.67	3.726
226						
Gertie R. Peterson	N½ of East 13 Acres of SE¼ of NW¼	17	102	49	6.5	0.105
Iver R. Peterson	S½ of East 13 acres of SE¼ of NW¼	17	102	49	6.5	0.105
C. C. Fleischer	E½ of SW¼	17	102	49	80.00	11.673
C. C. Fleischer	NW¼ of SW¼	17	102	49	37.0	4.884
T. P. Horton	E½ of SW¼ of SW¼	17	102	49	18.0	3.376
Nels I. Nelson	W½ of SW¼ of SW¼	17	102	49	20.0	2.84
Jonas Olsen	E½ of SE¼	17	102	49	78.00	12.092

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. J. Orstad	W½ of SE¼	17	102	49	78.00	12.732
W. O. Quincy	E½ of NE¼	19	102	49	3.00	0.396
Henry J. Schimmel	NE¼ of NE¼	20	102	49	39.00	6.318
Albert N. Allis	W½ of NE¼	20	102	49	78.00	12.049
O. S. Pendar	SE¼ of NE¼	20	102	49	39.00	6.318
Albert N. Allis	E½ of NW¼	20	102	49	76.00	11.207
W. O. Quincy	W½ of NW¼	20	102	49	74.00	9.768
R. J. Huston	N½ of SW¼	20	102	49	73.00	10.238
R. J. Huston	NW¼ of SE¼	20	102	49	39.00	6.025
Chas. E. Kaufman	S½ of SW¼	20	102	49	70.00	9.84
O. S. Pendar	E½ of SE¼	20	102	49	78.00	12.684
O. S. Pendar	SW¼ of SE¼	20	102	49	38.00	6.103
Ole O. Volden and Thomine O. Volden	NW¼ of NE¼	21	102	49	12.00	1.452
E. Larson	(Except right-of-way of C. M. & St. P. Ry. Co.) NW¼	21	102	49	151.85	19.473
Michael P. Brende	E½ of SW¼	21	102	49	39.5	4.785
Paul H. Brende and Martha O. Brende	(Except right-of-way of C. M. & St. P. Ry. Co.) NW¼ of SW¼	21	102	49	36.95	3.025

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O. S. Pendar	(Except right-of-way of C. M. & St. P. Ry. Co) SW¼ of SW¼	21	102	49	35.95	4.891
J. A. Erickson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼	28	102	49	142.25	18.890
Alfred Christensen	(Except right-of-way of C. M. & St. P. Ry Co.) SW¼	28	102	49	118.20	19.521
Chas. E. Kaufmann	NE¼	29	102	49	154.5	24.43
Chas. E. Kaufmann	NE¼ of NW¼	29	102	49	39.0	5.748
Carrie Erickson and John A. Erickson	W½ of NW¼	29	102	49	57.0	7.524
M. P. Brende and S. P. Brende	(Except tract 1) SE¼ of NW¼	29	102	49	2.5	0.320

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
M. P. Brende and S. P. Brende	Tract 1 of SW¼	29	102	49	36.0	5.052
Erick O. Eggen	(Except Tracts 1 and 2) NE¼ of SW¼	29	102	49	10.2	1.658
M. P. Brende and S. P. Brende	Tract 1 of SW¼	29	102	49	7.8	1.270
Ole O. Eggen	Tract 2 of SW¼	29	102	49	21.5	3.486
Carrie Erickson and John A. Erickson	(Except right-of-way of S. D. Central Ry Co) W½ of SW¼	29	102	49	38.62	6.259
Ellen Berg and Mary Schodjt	(Except right-of-way of S. D. Central Ry Co.) SE¼ of SW¼	29	102	49	36.49	5.911
Chas. E. Kaufmann	NE¼ of SE¼	29	102	49	39.00	7.309
Mary Schodjt and Ole P. Schodjt	(Except ⅛ acre next below described) NW¼ of SE¼	29	102	49	36.5	6.681
School District No. 17	A tract in the Southeast corner (8 rods North and South by 10 rods East and West) NW¼ of SE¼	29	102	49	0.38	0.062

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Mary Schodjt and Ole P. Schodjt	SW¼ of SE¼	29	102	49	35.25	6.24
State of South Dakota	SE¼ of SE¼	29	102	49	35.5	6.786
G. E. Eggen, Guru E. Eggen, Ole E. Moen, Gurine E. Moen and Edward E. Moen	E½ of NE¼	31	102	49	5.0	0.584
K. O. Jellum	E½ of SE¼	31	102	49	43.0	5.106

State of South Dakota	E½ of NE¼	32	102	49	72.9	12.025
Mary Schojdt and Ole P. Schojdt	(Except right-of-way of S. D. Central Ry Co) NW¼ of NE¼	32	102	49	35.88	5.913
Joe H. Whitman	(Except Right-of-way of S. D. Central Ry Co.) SW¼ of NE¼	32	102	49	37.78	6.230
G. E. Eggen, Guru E. Eggen, Ole E. Moen Gurine E. Moen, and Edward E. Moen	(Except right-of-way of S. D. Central Ry Co) N½ of NW¼	32	102	49	66.85	10.929
G. E. Eggen, Guru E. Eggen, Ole E. Moen, Gurine E. Moen, and Edward E. Moen	SW¼ of NW¼	32	102	49	40.0	6.6

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
J. M. Whitman	That part West of River of N½ of SE¼ of NW¼	32	102	49	6.0	0.831
State of South Dakota	That part East of River of N½ of SE¼ of NW¼	32	102	49	13.0	2.151
Ezra M. Shotwell	North 3 acres of S½ of SE¼ of NW¼	32	102	49	3.0	0.488
W. H. Lyon	South 5 acres of North 8 Acres of S½ of SE¼ of NW¼	32	102	49	5.0	0.488
Thomas Paulson	South 2 acres of N½ of S½ of SE¼ of NW¼	32	102	49	2.0	0.330
N. E. W. Brakke	S½ of S½ of SE¼ of NW¼	32	102	49	10.0	1.650
229						
K. O. Jellum	SW¼	32	102	49	152.0	35.08
State of South Dakota	NE¼ of SE¼	32	102	49	37.50	6.190
J. E. Colton	(Except right-of-way of S. D. Central Ry Co) NW¼ of SE¼	32	102	49	37.98	6.270
Thomas S. Nolan	(Except right-of-way of S. D. Central Ry Co.) SW¼ of SE¼	32	102	49	38.01	6.270
State of South Dakota	(Except right-of-way of S. D. Central Ry. Co.) SE¼ of SE¼	32	102	49	36.69	6.096
Francis A. Miller	(Except right-of-way of C. M. & St. P. Ry Co.) N½	33	102	49	110.2	14.531

State of South Dakota	(Except right-of-way of C. M. & St. P. Ry. Co) N½ of SW¼	33	102	49	76.0	10.285
O. Benson	(Except right-of-way of C. M. & St. P. Ry Co) S½ of SW¼	33	102	49	72.0	10.140
O. Benson	W½ of SE¼	33	102	49	60.0	7.26
Ole O. Langness	(Except right-of-way of C. M. & St. P. Ry. Co.) NE¼ of NW¼	5	103	49	10.29	1.131
Baltic Creamery Co.	A tract 10½ rods West and East by 15 rods North and South in NE corner of NW¼ of NW¼	5	103	49	0.85	0.93
Olaf N. Lyng	(Except the tract last above described) NW¼ of NW¼	5	103	49	33.93	3.732

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
J. O. Langness	That part South of River of SW¼ of SW¼	5	103	49	8.0	0.88
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co) SE¼ of NW¼	5	103	49	3.0	0.330
230						
Sena C. Langness	NE¼ of SW¼	5	103	49	36.75	4.315
John Langness	Tract 1 of SW¼	5	103	40	11.00	1.33
A. J. Floren	Tract 2 of SW¼	5	103	49	6.00	0.726
Gunerius Thompson	Tract 3 of SW¼	5	103	49	3.57	0.392
Gunerius Thompson	Tract 4 of SW¼	5	103	49	1.0	0.11
Gunerius Thompson	Tract 5 of SW¼	5	103	49	34.43	4.165
Gunerius Thompson	(As shown in Book 5 of Plate Page 51) Lot 1 of Tract 6 of SW¼	5	103	49	28.41	3.125
Gunerius Thompson	(Except the tract last above described) Tract 6 of SW¼	5	103	49	2.84	0.312
Gunerius Thompson	Tract 7 of SW¼	5	103	49	27.0	2.97
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SE¼	5	103	49	1.50	0.182
Halvor Gunderson	(Except right-of-way of C. M. & St. P. Ry Co.) North 3 acres of SW¼ of SE¼	5	103	49	1.0	0.121
J. O. Langness	(Except the North 3 acres and except the right-of-way of C. M. & St. P. Ry Co) SW¼ of SE¼	5	103	49	17.33	8.097

Mari Lee, Libbie Lang Carrie Lee, Etta M. Lee, Tilda Lee, Mabel O. Lee, and Thomas E. Lee	NE¼ of NE¼	6	103	49	38.81	4.827
	and S½ of NE¼	6	103	49	69.83	9.106
	and N½ of SE¼	6	103	49	75.82	9.876
John Williamson	NW¼ of NE¼	6	103	49	38.60	5.320
Even O. Fossum	NE¼ of NW¼	6	103	49	35.11	5.793
Knud Larson	W¼ of NW¼	6	103	49	43.00	6.958
Lina Hanson	N½ of N½ of SE¼ of NW¼	6	103	49	9.05	1.484
K. P. Sorklime	(As described in Book 53 of Deeds, page 434) Lot 1 of SE¼ of NW¼	6	103	49	17.84	2.911

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Gunerius Thompson	That part South of Lot 1 as last above described of SE¼ of NW¼	6	103	49	9.50	1.568
Gunerius Thompson	N½ of NE¼ of SW¼	6	103	49	18.08	2.985
Gunerius Thompson	S½ of NE¼ of SW¼	6	103	49	18.09	2.985
A. L. Berg	S½ of SW¼	6	103	49	59.75	9.302
Gunerius Thompson	SE¼ of SW¼	6	103	49	35.18	5.805
Gunerius Thompson	S½ of SE¼	6	103	49	77.82	10.164
Gunerius Thompson	N½ of NE¼	7	103	49	77.0	10.074
Julia Johnson	S½ of NE¼	7	103	49	78.32	10.247
Ole J. Ustrud and H. O. Ustrud	NE¼ of NW¼	7	103	49	38.18	5.705
Knut O. Larson	W½ of NW¼	7	103	49	59.75	9.302
Ole O. Ustrud and C. C. Sando	SE¼ of NW¼	7	103	49	36.18	5.970
Magnild Floren	NE½ of SW¼	7	103	49	36.18	5.970
Ole O. Floren	W½ of SW¼	7	103	49	34.40	5.594
Ole O. Floren	SE¼ of SW¼	7	103	49	35.18	5.855
Julia Johnson	N½ of SE¼	7	103	49	78.32	10.247
John Thompson	SW¼ of SE¼	7	103	49	38.82	5.338
John P. Risvold	Tract 1 of SE¼	7	103	49	8.21	0.397
Anders S. Aas	Tract 2 of SE¼	7	103	49	15.50	2.035
Ingeberg Risvold	Tract 3 of SE¼	7	103	49	12.00	1.320
Peder P. Risvold	Tract 4 of SE¼	7	103	49	4.87	0.536
Sivert E. Kringen	(Except right-of-way of C. M. & St. P. Ry Co) N½ of NE¼	8	103	49	38.67	4.679

John P. Risvold	(Except right-of-way of C. M. & St. P. Ry Co.) SW¼ of NE¼	8	103	49	36.00	4.356
John P. Risvold	North 25 acres of SE¼ of NE¼	8	103	49	21.00	2.541
Peder P. Risvold	South 15 acres of SE¼ of NE¼	8	103	49	15.00	1.815

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. M. Christianson, Halvor Gunderson and Maria Langness	NE¼ of NW¼	8	103	49	35.50	3.905
Gunerius Thompson	As shown in Book 5 of Plats, page 51, Tract 1 of NW¼ of NW¼	8	103	49	6.70	0.737
Gunerius Thompson	(Except Tract 1 of last above described) NW¼ of NW¼	8	103	49	29.16	3.208
Annie M. Kringen	(As described in Book 26 of Deeds, page 507) SW 4½ acres of SW¼ of NW¼	8	103	49	4.5	0.495
John O. Langness	(Except the Tract last above described) SW¼ of NW¼	8	103	49	33.50	3.685
Jens Erickson	SE¼ of NW¼	8	103	49	39.00	4.290
Jens Erickson	NE¼ of SW¼	8	103	49	39.00	4.290
Sara Vollan	NW¼ of SW¼	8	103	49	37.50	4.125
Anders P. Risvold	North 30 acres of SW¼ of SW¼	8	103	49	29.50	3.245
Peder P. Risvold	South 10 acres of SW¼ of SW¼	8	103	49	9.00	0.99
Anders P. Risvold	N½ of SE¼ of SW¼	8	103	49	19.50	2.145
Peder P. Risvold	S½ of SE¼ of SW¼	8	103	49	18.80	2.035
Peder P. Risvold	NE¼ of SE¼	8	103	49	40.00	3.960
Peder P. Risvold	The North 11 acres of that part East of right-of-way of C. M. & St. P. Ry. Co. of NW¼ of SE¼	8	103	49	11.00	1.210
Anders P. Risvold	(Except right-of-way of C. M. & St. P. Ry. Co. and except the N. 11 acres East of such right-of-way) NW¼ of SE¼	8	103	49	25.00	2.750

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Anders P. Risvold	(Except right-of-way of C. M. St. P. Ry Co) SW¼ of SE¼	8	103	49	35.00	3.850
Lars Paulson, G. P. Wilson and G. T. Nyhus	SE¼ of SE¼	8	103	49	39.00	3.861
Sara Vollan	SW¼ of NW¼	9	103	49	8.00	0.968
Sara Vollan	N½ of SW¼	9	103	49	47.90	4.421
Torger H. Nyhus	SW¼ of SW¼	9	103	49	39.00	3.861
Peder P. Risvold	SE¼ of SW¼	9	103	49	38.00	4.235
Ole Johnson	NW¼ of NE¼	16	103	49	37.10	4.040
Torger H. Nyhus	SW¼ of NE¼	16	103	49	38.00	3.762
Peder Risvold	NE¼ of NW¼	16	103	49	39.00	4.247
John Johnson	NW¼ of NW¼	16	103	49	39.00	3.470
Paul A. Risvold	S½ of NW¼	16	103	49	78.00	8.151
Gilbert G. Brende	N½ of SW¼	16	103	49	78.00	8.151
Gilbert G. Brende	SW¼ of SW¼	16	103	49	40.00	4.40
Gilbert G. Brende	SE¼ of SW¼	16	103	49	40.00	3.96
Ole G. Brende	W½ of SE¼	16	103	49	78.00	7.722
Ole G. Brende	SE¼ of SE¼	16	103	49	4.00	0.484
G. T. Nyhus	NE¼ of NE¼	17	103	49	39.00	4.290
Sara Vellan	(Except right-of-way of C. M. & St. P. Ry Co.) W½ of NE¼	17	103	49	70.00	7.700
Gilbert G. Brende and O. L. Brende	SE¼ of NE¼	17	103	49	39.00	4.290
Gilbert T. Gunderson	E½ of N.W¼	17	103	49	77.00	8.470
Peter P. Risvold	N.W¼ of NW¼	17	103	49	37.00	4.070
Gilbert T. Gunderson	SW¼ of NW¼	17	103	49	40.00	4.400
G. T. Nyhus	Tract 1 of SW¼	17	103	49	7.40	1.018
Thomas O. Brende, Thorsten O. Brende, and Joseph O. Brende,	Tract 2 of SW¼	17	103	49	2.18	0.300

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Ingeberg Gunderson and Gilbert T. Gunderson	Tract 3 of SW¼	17	103	49	4.70	0.647

Ingeberg Gunderson and Gilbert T. Gunderson	Tract 4 of SW¼	17	103	49	1.00	0.138
Olaf B. Floren	Tract 5 of SW¼	17	103	49	4.80	0.66

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 6 of SW¼	17	103	49	2.04	0.281
Clara Schneider	Tract 7 of SW¼	17	103	49	1.34	0.185
Torger N. Nyhus	Tract 8 of SW¼	17	103	49	3.00	0.413
Sarah Vollan	Tract 9 of SW¼	17	103	49	2.96	0.407
E. G. Brende	Tract 10 of SW¼	17	103	49	3.00	0.413
Iver Paulson	Tract 11 of SW¼	17	103	49	1.03	0.142
E. G. Brende	Tract 12 of SW¼	17	103	49	2.00	0.275
G. T. Gunderson	Tract 13 of SW¼	17	103	49	21.56	2.965
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 14 of SW¼	17	103	49	18.00	2.477
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 15 of SW¼	17	103	49	28.80	3.960
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 16 of SW¼	17	103	49	35.72	3.929
Nidres Norwegian Evangelical Lutheran Congregation	Tract 17 of SW¼	17	103	49	8.60	0.946
Knud Thompson and Jacob Olson	Tract 18 of SW¼	17	103	49	1.83	0.252
Erick H. Oien	NE¼ of SE¼	17	103	49	39.00	4.290
Bortinus Pederson	(Except right-of-way of C. M. & St. P. Ry Co.) W½ of SE¼	17	103	49	70.65	7.772
Mali Johnson	SE¼ of SE¼	17	103	49	40.00	4.400
John O. Aasen	(Except Tracts 1 and 2) NE¼	18	103	49	126.79	17.709
235						
Peder P. Risvold	Tract 1 of NE¼	18	103	49	10.14	1.115
Ole J. Stordahl	Tract 2 of NE¼	18	103	49	1.40	0.154
Andrew Swenson, Aas	NW¼	18	103	49	51.65	8.523
Ole J. Ustrud	That part East of River of NE¼ of SE¼	18	103	49	11.67	1.805

Martha R. Roberts	NE¼ of NE¼	20	103	49	40.00	4.400
B. G. Flamoe	(Except right-of-way of C. M. & St. P. Ry Co.) NW¼ of NE¼	20	103	49	34.50	3.795

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit
Haagen O. Skatvold	(Except right-of-way of C. M. & St. P. Ry Co.) S½ of NE¼	20	103	49	70.20	9.653
Frederick Johnson and Jens Johnson and Torbjorn Olson	Tract 1 of NW¼	20	103	49	4.28	0.589
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. H. Thompson, Fred R. Thompson, Rueben V. Thompson, Mabel J. Thompson and Carl M. Thompson	(Except Tract 1 and except the Tract next Hereinafter described) NE¼ of NW¼	20	103	49	10.00	1.375
James J. Flamoe	A tract as described in Book 67 of Deeds, page 106, in NE¼ of NW¼	20	103	49	10.00	1.375
John J. Almlie, Jr.	NW¼ of NW¼	20	103	49	3.33	0.456
Bernt J. Flamoe	SE¼ of NW¼	20	103	49	8.10	1.114
Peter Paulson	(Except right-of-way of C. M. & St. P. Ry Co.) E½ of SE¼	20	103	49	63.85	8.752
Haagen O. Skatvold	NW¼ of SE¼	20	103	49	15.00	2.063
Peter Paulson	(Except Tract 1) that part lying East of River of SW¼ of SE¼	20	103	49	13.00	1.788
236						
G. T. Nyhus	Tract 1 of SE¼	20	103	49	1.60	0.220
Mattha R. Roberta	North ½	21	103	49	251.75	26.687
Peter Paulson	W½ of SW¼	21	103	49	79.0	10.461
Erick G. Brende	E½ of SW¼	21	103	49	79.0	8.690
Erick G. Brende	SE¼	21	103	49	101.42	8.796
Martha Roberts, John H. Roberts and Thomas S. Roberts	E½ of SW¼ of SW¼	27	103	49	2.00	0.242
Erick O. Eggen and D. D. Russell	W½ of SW¼ of SW¼	27	103	49	17.75	1.764
G. T. Nyhus	(Except 5 acres next described) n½ of NE¼	28	103	49	29.75	6.911

E. G. Brende	5 acres being 10 rods N. and S. at East end, and no rods N. and S. at West end, extending across the North side of N½ of NE¼	28	103	49	3.00	0.363

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
G. T. Nyhus	S½ of NE¼	28	103	49	78.00	7.414
O. S. Thompson	(Except the East 19 acres) E½ of NW¼	28	103	49	60.24	7.449
G. T. Nyhus	East 19 acres of E½ of NW¼	28	103	49	18.76	2.089
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) W½ of NW¼	28	103	49	73.15	10.077
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) N½ of SW¼	28	103	49	70.90	9.405
O. S. Thompson	E.18½ acres of E½ of SW¼ of SW¼	28	103	49	17.80	2.452
Ole Peterson	W 1¾ acres of E½ of SW¼ of SW¼	28	103	49	1.70	2.343
Ole Peterson	(Except right-of-way of C. M. & St. P. Ry Co) W½ of of SW¼ of SW¼	28	103	49	12.95	1.837
Thomas S. Roberts	SE¼ of SW¼	28	103	49	39.00	5.225
237						
G. T. Nyhus	N., 3½ acres of N½ of SE¼	28	103	49	1.50	0.165
Erick O. Eggen	(Except the N 3½ acres) N½ of SE¼	28	103	49	76.50	7.153
Thomas S. Roberts	SW¼ of SE¼	28	103	49	39.00	4.29
Nils E. Eggen	SE¼ of SE¼	28	103	49	39.00	3.861
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. H. Thompson, Fred R. Thompson, Reuben V. Thompson, and Carl Thompson	Tract 1 of NE¼	29	103	49	30.00	4.188
Joseph G. Thompson	Tract 2 of NE¼	29	103	49	15.00	2.178
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) Tract 3 of NE¼	29	103	49	61.31	9.477
O. S. Thompson	N½ of SE¼	29	103	49	52.00	7.908
O. S. Thompson	N½ of SE¼	29	103	49	3.00	0.696

Ole Peterson	SE¼ of SE¼	29	103	49	29.00	4.374
Andrew J. Aasen	N½ of NE¼	32	103	49	67.20	9.399
Andrew J. Aasen	SW¼ of NE¼	32	103	49	37.00	4.477

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. Thompson, Fred R. Thompson, Mabel Thompson and Carl Thompson	N½ of SE¼ of NE¼	32	103	49	19.50	3.159
Joseph C. Thompson	S½ of SE¼ of NE¼	32	103	49	19.50	3.159
Andrew J. Aasen	E½ of NW¼	32	103	49	11.00	1.225
Thomas Hendrickson	E½ of SW¼	32	103	49	80.00	2.640
James L. Finnegan	N½ of SE¼	32	103	49	76.00	11.282
John Finnegan	SW¼ of SE¼	32	103	49	36.00	4.752
Margaret L. Finnegan	SE¼ of SE¼	32	103	49	37.20	5.584
238						
Martha R. Roberts, John H. Roberts and Thomas S. Roberts	NE¼ of NE¼	33	103	49	39.00	3.861
Thomas S. Roberts	NW¼ of NE¼	33	103	49	39.00	4.719
Gurine Peterson	S½ of NE¼	33	103	49	80.00	8.800
Thomas S. Roberts	NE¼ of NW¼	33	103	49	39.00	5.792
Andrew J. Aasen	(Except right-of-way of C. M. & St. P. Ry. Co) NW¼ of NW¼	33	103	49	32.10	4.631
Bertha Peterson, Alice C. Peterson, John O. Thompson, Wm. H. Thompson, Fred Thompson, Reuben V. Thompson, and Mabel Thompson and Carl Thompson	(Except right-of-way of C. M. & St. P. Ry Co) SW¼ of NW¼	33	103	49	33.00	4.967
Gurine Peterson	SE¼ of SW¼	33	103	49	40.00	5.94
Anne O. Haugen, Amanda E. Haugen and Jennie A. Haugen	E½ of SW¼	33	103	49	79.00	11.732
Joseph C. Thompson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SW¼	33	103	49	33.00	5.000

Thomas Hendrickson and B. B. Hendrickson	(Except right-of-way of C. M. & St. P. Ry Co.) SW¼ of SW¼	33	103	49	32.10	4.863
Gurine Peterson	N½ of SE¼	33	103	49	80.00	8.800
Gurine Peterson	SW¼ of SE¼	33	103	49	39.00	4.719
Gurine Peterson	SE¼ of SE¼	33	103	49	39.00	3.861
Martha K. Roberts, John H. Roberts and Thomas S. Roberts	NW¼ of NW¼	34	103	49	20.75	2.061
Gurine Peterson	SW¼ of NW¼	34	103	49	21.00	2.079
239						
Gurine Peterson	W½ of SW¼	34	103	49	35.50	3.526
Lars Simonson	SW¼ of SW¼	29	104	49	6.67	0.784
C. R. Mattern	SE¼ of SW¼	29	104	49	12.67	1.394
John M. Bruaas	(Except right-of-way of C. M. & St. P. Ry Co) S½ of SE¼	29	104	49	14.00	1.540
Lars Simonson	E½ of NE¼	31	104	49	37.00	5.088
Hans Nelson	SW¼ of NE¼	31	104	49	20.00	2.888
Lars Simonson	SE¼ of NW¼	31	104	49	11.67	1.926
P. G. Thompson	NE¼ of SW¼	31	104	49	32.85	5.421
Ole L. Mule	S½ of SW¼	31	104	49	19.60	3.234
P. G. Thompson	SE¼ of SW¼	31	104	49	35.18	5.805
P. M. Thompson	NE¼ of SE¼	31	104	49	39.00	4.978
Julie L. Moe and Julie L. Hustoft	NW¼ of SE¼	31	104	49	39.82	5.476
Oluf N. Lyng	E½ of SW¼ of SE¼	31	104	49	19.50	2.682
P. G. Thompson	W½ of SW¼ of SE¼	31	104	49	19.32	2.657
Oluf N. Lyng	SE¼ of SE¼	31	104	49	38.00	4.717
John M. Bruaas	(Except the right-of-way of C. M. & St. P. Ry Co.) N½ of NE¼	32	104	49	38.00	3.300
Mali P. Langness	(Except right-of-way of C. M. & St. P. Ry Co) S½ of NE¼	32	104	49	50.00	5.500
Mali P. Langness	E½ of NW¼	32	104	49	53.00	5.968
Lars Simonson	W½ of NW¼	32	104	49	53.00	7.013
Mali P. Langness	N½ of SW¼	32	104	49	78.00	8.580

Randi A. Floren	SW¼ of SW¼	32	104	49	38.00	4.279
Columbia Creamery Co.	A tract as described in Book 59 of Deeds, Page 70, in SE¼ of SW¼	32	104	49	.11	0.012

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Mrs. M. O. Nyhus	(Except the Tract last above described) SE¼ of SW¼	32	104	49	36.00	3.960
Mali P. Langness	(Except right-of-way of C. M. & St. P. Ry Co) N.W¼ of SE¼	32	104	49	1.73	0.120
A. J. Pettingill	The West 500 ft. of Tract 9 of SE¼	32	104	49	1.73	0.190
A. J. Pettingill	(Except that part in St. Oluf Mill Tract as shown in Book 5 of Plats, page 63) Tract 3 of SE¼	32	104	49	7.29	0.802
Wm. J. Milne	That St. Oluf Mill Tract as described in Book 5 of Plats, page 63, being part of Tracts 2, 3, and 9 of SE¼	32	104	49	4.37	.4607

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. L. Ferguson	SW¼ of NE¼	24	101	50	32.32	3.555
C. L. Ferguson	SE¼ of NE¼	24	101	50	38.50	4.235
John Johnson	SE¼ of NW¼	24	101	50	12.64	1.390
Chas. L. Ferguson	SE¼ of NW¼	24	101	50	12.64	1.320
Ed Clark	NE¼ of SW¼	24	101	50	5.30	0.583
M. L. Fusselman	SE¼ of SW¼	24	101	50	3.31	0.364
Geo. Parsons	NW¼ of NE¼	25	101	50	40.00	4.400
Geo. Parsons	NW¼ of NE¼	25	101	50	40.00	4.400
Harry A. Chetham	SW¼ of NE¼	25	101	50	40.00	4.400
Harry A. Chetham	SE¼ of NE¼	25	101	50	40.00	4.400
Geo. A. Parsons	NE¼ of NW¼	25	101	50	12.64	1.390
Harry A. Chetham	SE¼ of NW¼	25	101	50	12.30	1.353
Harry A. Chetham	NE¼ of SE¼	25	101	50	40.00	4.400

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Harry A. Chetham	NW¼ of SE¼	25	101	50	40.00	4.400
Harry A. Chetham	W½ of SW¼ of SE¼	25	101	50	20.00	2.200

Harry A. Chetham	SE¼ of SE¼	25	101	50	40.00	4.400
Johnson Bros. Land Co.	E½ of SW¼ of SE¼	25	101	50	20.00	2.200
Harry A. Chetham	NE¼ of SW¼	25	101	50	16.78	1.845
G. A. Castle	SE¼ of SW¼	25	101	50	8.23	0.905
Ludwig Seubert	NE¼ of NE¼	36	101	50	40.00	4.400
Ludwig Seubert	NW¼ of NE¼	36	101	50	36.47	4.011
Dennis & Dennis	SE¼ of NE¼	36	101	50	27.54	3.029
John DeBok	NW¼ of SW¼	31	101	49	30.05	3.305
Wm. H. Lyon	SW¼ of SW¼	31	101	49	4.86	0.534
John DeBok	SW¼ of NW¼	31	101	49	40.00	4.400
John DeBok	NW¼ of NW¼	31	101	49	38.23	4.205
Roger L. Dennis	Tract 1	31	101	49	6.63	0.729
Roger L. Dennis	Tract 2	31	101	49	2.03	0.223
Roger L. Dennis	Tract 3	31	101	49	13.31	1.467
Roger L. Dennis	Tract 4	31	101	49	15.54	1.709
Roger L. Dennis	Tract 5	31	101	49	30.47	3.351

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Roger L. Dennis	Tract 6	31	101	49	5.13	0.564
Roger L. Dennis	Tract 7	31	101	49	4.76	0.523
Roger L. Dennis	Tract 8	31	101	49	10.34	1.137
Roger L. Dennis	Tract 12	31	101	49	9.83	1.081
Roger L. Dennis	Tract 13	31	101	49	13.29	1.461
Roger L. Dennis	Tract 14	31	101	49	25.13	2.764
Roger L. Dennis	Tract 15	31	101	49	9.81	1.079
Roger L. Dennis	Tract 16	31	101	49	8.30	0.931
Roger L. Dennis	Tract 17	31	101	49	21.80	2.398
Roger L. Dennis	Tract 18	31	101	49	2.50	0.275
Roger L. Dennis	Tract 19	31	101	49	13.08	1.438
242						
Roger L. Dennis	Tract 20	31	101	49	17.03	1.873
Roger L. Dennis	Tract 21	31	101	49	12.03	1.323
Roger L. Dennis	Tract 22	31	101	49	10.02	1.102
Geo. Henderson	S½ of SW¼ of SW¼	32	101	49	16.80	1.848

Thos. Quigley	NW¼ of SW¼ and N½ of SW¼ of SW¼	32	101	49	36.76	2.573
Frank Corey and F. A. Ayers—	S½ of SE¼ of SW¼	32	101	49	12.40	1.364
Joe Seubert	N½ of SE¼ of SW¼ and NE¼ of SW¼	32	101	49	45.30	3.171
Pauline Zetlitz	Except Plat of Hazelville, SE¼	32	101	49	72.05	6.484
Norman O. Hamlin	Lot 2 of S½ of NE¼	32	101	49	28.00	2.520
Norman O. Hamlin	Lot 3 of S½ of NE¼	32	101	49	2.65	0.291
Arne Zetlitz	Lot 4 of S½ of NE¼	32	101	49	7.20	0.504
Wm. Jones	Lots 1, 2, 3 and 4 of Plat of Hazelville, SE¼	32	101	49	3.70	0.407
J. Walkins and C. S. McDonald	Lot 28 of Walkins & McDonald's Plat of W½ of NW¼	33	101	49	23.10	2.541
J. Walkins and C. S. McDonald	Lot 27 of Walkins & McDonald's Plat of W½ of NW¼	33	101	49	17.00	1.870
Chas. Eckert	E½ of NW¼	33	101	49	49.74	5.471

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Oscar Harpel	NW¼ of SW¼	33	101	49	17.85	1.888
G. B. Tuthill	All lying South of River in NE¼	33	101	49	16.22	1.784
243						
Julius Kuh	All lying North of River in NE¼	33	101	49	70.50	7.755
A. W. Tuthill	N½ of NW¼	34	101	49	24.36	2.679
Chas. Eckert	SW¼ of SW¼	27	101	49	15.58	1.713
Chas. Eckert	SE¼ of SW¼	27	101	49	24.60	2.904
Clark Coats Estate	NE¼ of SW¼	27	101	49	30.30	3.333
Clark Coats Estate	NW¼ of SE¼	27	101	49	20.90	2.299
Clark Coats Estate	SE¼ of NW¼	27	101	49	10.55	1.160
Clark Coats Estate	SW¼ of NE¼	27	101	49	27.63	3.039
Clark Coats Estate	NW¼ of NE¼	27	101	49	14.17	1.558
Clark Coats Estate	SW¼ of SE¼	22	101	49	28.58	3.143
Clark Coats Estate	NW¼ of SE¼	22	101	49	8.50	0.935
Clark Coats Estate	NE¼ of SW¼	22	101	49	21.50	2.365

Name of Owner	Description	Lot	Block	Proportion of Benefit
	Town of Renner			
Leonard Renner	Lots 1, 2, 3, 4, 5, 6, 7 and	8		0.094
	Olson's Addition to Renner			
Jonas Olson		1		0.012
H. W. Ross Lumber Co.	Lots 2, 3, and	4		0.033
Jonas Olson	Lots 5 to 13, inclusive			0.101
H. W. Ross Lumber Co.	Lots 14, 15, 16, 17, 18 and	19		0.062
Jonas Olson	Lots 20, 21, 22, 23 and	24		0.051
	Berwick Addition to Sioux Falls.			
Grant Lines	Lot 1 and	2	1	0.05
Grant Lines		3	1	0.025
Grant Lines		4	1	0.025
Grant Lines	Lots 5 and	6	1	0.05
Grant Lines	Lots 7, 8, 9, 10, 11 and	12	1	0.15
244				
Security Savings Bank	Lots 1, 2, 3 and	4	2	0.10
Security Savings Bank	Lots 5, 6, 7, 8, 9, 10, 11 and	12	2	0.20
Frank C. Frizzel	Lots 1 and	2	3	0.05
E. N. Frizzell	Lots 3, 4, 5 and	6	3	0.10
Grant Lines	Lots 7 and	8	3	0.05
E. N. Frizzell	Lots 9 and	10	3	0.05
F. C. Frizzell	Lots 11 and	12	3	0.05
A. D. Horton			4	0.20
Elwin N. Potter			5	0.225
Security Savings Bank			6	0.083
F. L. Blackman	Lots 1 and	2	7	0.05
F. L. Blackman	Lots 7 and	8	7	0.05
F. L. Blackman	Lots 11 and	12	7	0.05
F. C. Frizzell	Lots 1, 2, 3 and	4	8	0.10
J. N. Weston	Lots 7 and	8	8	0.05
Name of Owner	Description	Lot	Block	Proportion of Benefit
F. C. Frizzell	Lots 9 and	10	8	0.05
F. E. Payne		11	8	0.025
Security Savings Bank	Lots 1, 2, 3, 4, 5 and	6	9	0.15
Mathias Blumer		7	9	0.025

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Security Savings Bank		8	9	0.025
Security Savings Bank	Lots 9, 10, 11 and	12	9	0.10
J. N. Weston	Lots 1 and	2	10	0.10
J. N. Weston	Lots 10, 11 and	12	10	0.075
State of South Dakota	East Half of		11	0.041
State of South Dakota	Lots 1, 2, 3, 4, 5, 6, 7, 8 and	9	12	0.225
State of South Dakota	Lots 10, 11 and	12	12	0.075
State of South Dakota	Lots 1, 2, 3, 4, 5 and	6	13	0.113
Elwin N. Potter	Lots 7, 8, 9, 10, 11 and	12	13	0.15
State of South Dakota			14	0.175
Security Savings Bank			15	0.30
245				
Grant Lines	Lots 1 and	2	16	0.05
Grant Lines		3	16	0.025
Grant Lines		4	16	0.025
Grant Lines		5	16	0.025
Grant Lines		6	16	0.025
Grant Lines	Lots 7, 8, 9, 10, 11 and	12	16	0.15
W. C. Archer	Lots 1 and	2	17	0.05
Security Savings Bank	Lots 3 and	4	17	0.05
Dorothy Golden	Lots 5 and	6	17	0.025
Dorothy Golden	Lots 7, 8, 9 and	10	7	0.05
W. C. Archer	Lots 11 and	12	17	0.025
Sophia Krull	Lots 1, 2 and	3	18	0.037
Sophia Krull		4	18	0.12
Sophia Krull	Lots 5 and	6	18	0.12
Sophia Krull	Lots 10 and	11	18	0.024
C. L. Norton		12	18	0.12
State of South Dakota			19	0.20
State of South Dakota			20	0.31
State of South Dakota	Lots 1, 2 and 3	4	21	0.105
State of South Dakota	Lots 7, 8, 9, 10, 11 and	12	21	0.15
State of South Dakota			22	0.041
Security Savings Bank	Lots 1, 2 and	3	24	0.075
Security Savings Bank		4	24	0.025

J. C. Boynton		5	24	0.025
L. J. Modde		6	24	0.025
M. W. Potter	Lots 7 and	8	24	0.05
Elwin N. Potter		9	24	0.025
Elwin N. Potter	Lots 10, 11 and	12	24	0.075
E. B. Mallet			25	0.02
State of South Dakota			27	0.033
State of South Dakota	Lots 1, 2 and	3	28	0.075
246				
State of South Dakota	Lots 4, 5, 6, 7 and	8	28	0.125
State of South Dakota			29	0.02
State of South Dakota			30	0.02
Security Savings Bank		2	31	0.012
Jas. Kennedy		3	31	0.025
Security Savings Bank		4	31	0.025
Security Savings Bank	Lots 5 and	6	31	0.05
Security Savings Bank	Lots 7 and	8	31	0.05

Brookings' Addition to Sioux Falls.

Wigant Ludewig	Lots 4, 5, 6, 7, 8, 9, 10, 12 and	13	5	0.325
Hans C. Ruvald	Lots 1, 2 and	3	11	0.075
Hans Ruvald	Lots 1 and	2	12	0.065
H. Ruvald	Lots 3, 4 and	5	12	0.015
Hans C. Ruvald		6	12	0.032

Brooks' Addition to Sioux Falls.

Grant Lines	Lots 14, 15, 16 and	17	1	0.075
Name of Owner	Description	Lot	Block	Proportion of Benefit

Bunker's Addition to Sioux Falls.

Hans Ruvald	Lots 1, 2, 3, 4, 5, 6 and	7	1	0.162
N. S. Johnson		8	1	0.02
Geo. C. Hull		9	1	0.02
Hans Ruvald	Lots 10, 11, 12, 13 and	14	1	0.10
Hans Ruvald		15	1	0.02
Hans Ruvald	Lots 16 and	17	1	0.04
Hans Ruvald	Lots 18, 19 and	20	1	0.06
Hans Ruvald		1	2	0.02
Hans Ruvald	Lots 2, 3, 4, 5, 6 and	7	2	0.06
Joseph Elott	Lots 8 and	9	2	0.02

Hans Ruvald		10	2	0.02
Hans Ruvald		11	2	0.02
O. C. Cadwell		12	2	0.02
247				
Hans Ruvald	Lots 13, 14, 15, 16, 17, 18, 19 and 20		2	0.15

Central Park Addition to Sioux Falls.

Chas. Dailey	Lots 1 and	2	1	0.04
Hans Ruvald	Lots 3 and	4	1	0.04
J. H. Fernyhough		5	1	0.02
F. T. Williams		6	1	0.02
Bessie Haas	Lots 7 and	8	1	0.04
J. H. Fernyhough	Lots 9 and	10	1	0.04
Benjamin F. Barnes	Lots 11, 12 and	13	1	0.06
J. H. Fernyhough	Lots 14, 15 and	16	1	0.06
John P. Shoemaker			2	0.30
Frances G. Carpenter			3	0.30
Henry D. Norris			4	0.30
Diantha A. Hurd			5	0.30
Henrietta Levinger			6	0.30
Diantha A. Hurd			12	0.30
Mariette Blomiley			13	0.30

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Frances G. Carpenter			14	0.30
Clara L. Hambright	Lots 1, 2, 3 and	4	15	0.08
Abe Davison and Sippie Davison	Lots 5, 6, 7 and	8	15	0.08
Michael Marousek	Lots 9, 10, 11 and	12	15	0.08
Clara L. Hambright	Lots 13, 14, 15 and	16	15	0.08
Frances G. Carpenter			16	0.30
Frances G. Carpenter			17	0.30
Anne E. Ploog			18	0.30
Frances G. Carpenter			19	0.30
Frances G. Carpenter and G. T. Greeley	Lots 1, 2, 3 and	4	20	0.08
Nora Connell	Lots 5, 6, and 7 and	8	20	0.08

F. G. Carpenter and G. T. Greeley	Lots 9, 10, 11, 12, 13, 14, 15 and 16		20	0.16
248				
W. R. Timpe and H. L. Schroeder	Lots 1, 2 and	3	21	0.06
F. L. Blackman		4	21	0.02
Mattie M. Hanson	Lots 5, 6, 7 and	8	21	0.08
F. L. Blackman	Lots 9 and	10	21	0.04
F. L. Blackman		11	21	0.02
F. L. Blackman		12	21	0.02
D. J. Carpenter		13	21	0.02
W. R. Timpe and H. L. Schroeder	Lots 14, 15 and	16	21	0.06
Mary C. Brace			30	0.30
F. L. Blackman			31	0.30
Frances G. Carpenter	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and	14	32	0.28
May Sanders and May B. Sanders	Lots 15 and	16	32	0.04
Earl H. Roster			33	0.30
Frances G. Carpenter			40	0.30
Frances G. Carpenter			48	0.30
George H. Brace			49	0.30

Name of Owner	Description	Lot	Block	Proportion of Benefit
A. Gale, C. A. Greeley, C. C. Carpenter, and G. H. Brace	Outlet "A"			0.075
Geo. H. Brace and James Jameson, Trustees,	Outlet "B"			0.075
Geo. H. Brace and James Jameson, Trustees	Outlet "C"			0.075

Englewood Addition to Sioux Falls.

Marcus Russell		1	0.225
William Fuller		2	0.225
Marcus Russell		3	0.225
249			
Annie A. W. Nock		4	0.225
James B. Adams		12	0.225
Marcus Russell		13	0.225

Mark M. Powers			14	0.225
Marcus Russell			15	0.225
Marcus Russell			16	0.225
Marcus Russell			17	0.225
James B. Adams			18	0.225
F. I. Russell		1	19	0.015
F. I. Russell		2	19	0.015
M. T. Botsford	Lots 3 and	4	19	0.03
Addie B. Woodworth	Lots 5, 6, 7 and	8	19	0.06
Marcus Russell	Lots 9, 10 and	11	19	0.045
Sarah Walker		12	19	0.015
Alice M. Steinbach		13	19	0.015
Lillie M. Darrow	Lots 14, 15 and	16	19	0.045
F. L. Blackman	Lots 1, 2, 3 and	4	20	0.06
F. I. Russell		5	20	0.015
Marcus Russell		6	20	0.015
F. I. Russell	Lots 7 and	8	20	0.03
Marcus Russell	Lots 9, 10, 11, 12, 13, 14, 15 and	16	20	0.12
F. I. Russell		1	21	0.015

Name of Owner	Description	Lot	Block	Proportion of Benefit.
S. D. Kennedy	Lots 2, 3, 4 and	5	21	0.06
F. I. Russell		6	21	0.015
M. J. Tinkham	Lots 7 and	8	21	0.03
F. I. Russell	Lots 9, 10, 11, 12, 13 14, 15 and	16	21	0.12
Marcus Russell			22	0.225
Marcus Russell			27	0.225
Marcus Russell			28	0.225
250				
Marcus Russell			29	0.225
Edward A. Benson and Charles E. Anderton,			30	0.225
Marcus Russell			31	0.225
Marcus Russell	Lots 1, 2, 3 and	4	32	0.06
F. I. Russell	Lots 5 and	6	32	0.03
James Martin	Lots 7 and	8	32	0.03
E. T. Newhall	Lots 9, 10 and	11	32	0.045

Joe Kirby		12	32	0.015
Marcus Russell	Lots 13, 14, 15 and	16	32	0.06

Harrison Addition to Sioux Falls.

A. P. Burtch	Lots 5, 6 and	7	16	0.075
Porter P. Peck			17	0.225
Porter P. Peck			18	0.225
O. C. Potter	Lots 1, 2 and	3	19	0.06
Oscar C. Potter	Lots 4, 5, 6, 7, 8, 9, 10, 11 and	12	19	0.18
Lester D. Sharon			20	0.225
G. H. Grebel			21	0.225
G. H. Grebel	Lots, 2, 3, 4, 5, 6, 7 and	8	22	0.14
W. L. Oaks			25	0.225
G. H. Grebel			26	0.225
G. H. Grebel			27	0.225
G. H. Grebel			28	0.225
G. H. Grebel			29	0.225

Name of Owner	Description	Lot	Block	Proportion of Benefit
Oscar C. Potter			30	0.225
Porter P. Peck			31	0.225
Porter P. Peck			32	0.225

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Lincoln Park Addition to Sioux Falls.

P. P. Peck	Lots 1 and	2	3	0.20
P. P. Peck	Lots 3 and	4	3	0.20
P. P. Peck	Lots 5 and	6	3	0.20

McClellan's Second Addition to West Sioux Falls.

John McClellan Estate	Lots 1, 2, 3, 4, 5, 6, 7, 8, and	9	29	0.27
G. T. Blackman, Administrator of John McClellan Estate	Lots 17 and	18	29	0.06
M. O. Thompson Estate	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and	14	30	0.275
M. O. Thompson Estate		15	30	0.004

Meredith's First Addition to Sioux Falls.

F. L. Blackman			1	0.225
Herbert C. Everson and Hattie A. Everson			4	0.225

Chas. A. Scott	Lots 1, 2 and	3	8	0.06
R. E. Bach and Fred Diver	Lots 4, 5 and	6	8	0.06
Sam Smith		7	8	0.02
J. H. Fernyhough	Lots 8 and	9	8	0.04
R. E. Bach and Fred Diver	Lots 10, 11 and	12	8	0.06
Melvin J. Brooks			9	0.225
S. J. Stoneall			16	0.225
Mariette Blomiley			17	0.225
Soren Monson			18	0.225
Soren Monson			23	0.225
Marion Chase			24	0.225
Thos. Scanlon			25	0.225
Thos. Scanlon			26	0.225
W. H. Lyon			31	0.225

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Name of Owner	Description	Lot	Block	Proportion of Benefit
Thos. Scanlon	Lots 1, 2, 3, 4, 5 and	6	32	0.12
Thos. Scanlon	Lots 7, 8, 9, 10, 11 and	12	32	0.12

Meredith's Second Addition to Sioux Falls.

E. J. Sharon			33	0.225
E. J. Sharon			34	0.18
Horatio A. Burtch			37	0.14
A. G. Erskine			38	0.225
A. G. Erskine	Lots 1, 2 and	3	39	0.06
A. G. Erskine	Lots 4, 5, 6, 7, 8 and	9	39	0.12
A. G. Erskine	Lots 10, 11 and	12	39	0.065
John E. Batheal			40	0.225
A. G. Erskine			43	0.225
Horatio A. Burtch			44	0.225
F. L. Blackman and E. J. Sharon			45	0.14
F. L. Blackman and E. J. Sharon			46	0.14
F. L. Blackman and E. J. Sharon			47	0.225
Horatio A. Burtch			48	0.115

W. H. Lyon			56	0.075
F. L. Blackman and E. J. Sharon			57	0.20
F. L. Blackman and E. J. Sharon			58	0.18
I. E. Kosier			59	0.06
Carrie Lundell			60	0.115
I. E. Kosier			74	0.18
E. R. Loucks	Lots 1 and	2	75	0.035
I. E. Kosier	Lots 4, 5, 6, 7, 8, 9, 10, 11 and	12	75	0.165

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Millard Park Addition to Sioux Falls.

Porter P. Peck			1	0.135
Porter P. Peck	Lots 10, 11 and	12	34	0.035

Name of Owner	Description	Lot	Block	Proportion of Benefit.

North Boulevard Addition to Sioux Falls.

Geo. H. Brace			4	0.225
Mary C. Brace			8	0.225
Mary C. Brace			9	0.225
Mary C. Brace			13	0.225
Mary C. Brace			29	0.225
Geo. H. Brace			34	0.225
Chas. Brigham, John C. Spofford and Geo. H. Brace			35	0.225
Mary C. Brace			49	0.225
Mary C. Brace			50	0.225
Mary C. Brace			61	0.225

North Park Addition to Sioux Falls.

Lilly E. Braley	Lots 1 and	2	1	0.04
James A. Guest	Lots 3, 4, 5 and	6	1	0.08
Hans Ruvald	Lots 7 and	8	1	0.04
Hans Ruvald	Lots 9 and	10	1	0.04
Hans Ruvald	Lots 1, 2, 3, 4, 5, 6 and	7	2	0.14
Hans Ruvald		8	2	0.02
John Kadinger	Lots 9, 10, 11 and	12	2	0.08
Hans Ruvald		13	2	0.02
Hans Ruvald	Lots 14, 15 and	1616	2	0.06

Name of Owner.	Description	Lot	Block	Proportion of Benefit.
Hans Ruvald		1	3	0.02
Hans Ruvald		2	3	0.02
254				
Hans Ruvald		3	3	0.02
Hans Ruvald	Lots 4, 5, and	6	3	0.06
H. Ruvald	Lots 7, 8 and	9	3	0.06
H. Ruvald		10	3	0.02
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	3	0.12
H. Ruvald			4	0.30
Emma J. Nelson	Lots 1 and	2	5	0.04
Emma J. Nelson	Lots 3, 4, 5, 6, 7 and	8	5	0.12
Emma J. Nelson	Lots 9, 10, 11, 12, 13, 14, 15 and	16	5	0.16
Hans Ruvald	Lots 1, 2, 3, 4 and	5	6	0.10
John Frederickson, Peter Holland and Hans Ruvald		6	6	0.02
Hans Ruvald	Lots 7 and	8	6	0.04
Hans Ruvald	Lots 9 and	10	6	0.08
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	6	0.16
Henry Teimeier	Lots 1 and North Half of	2	7	0.03
F. W. Fieper	Lots 3 and South half of	2	7	0.03
F. W. Pieper	Lots 4 and	5	7	0.04
F. W. Pieper		6	7	0.02
F. W. Pieper	Lots 7 and	8	7	0.04
E. C. Lord		9	7	0.02
H. Ruvald	Lots 10 and	11	7	0.04
Hans Ruvald	Lots 12, 13, 14, 15 and	16	7	0.10
Hans Ruvald	Lots 1 and	2	8	0.04
Hans Ruvald	Lots 3, 4 and	5	8	0.06
H. Ruvald	Lots 6 and North Half of	7	8	0.03
255				
Hans Ruvald	Lots 8 and South Half of	7	8	0.03
Lena H. Bessler		1	10	0.02
F. H. Bessler		2	10	0.02
P. B. Hunt	Lots 3, 4 and	5	10	0.06
J. M. Warren	Lots 10, 11 and South Half of	12	10	0.05

Lena Bessler	Lots 13 and North Half of	12	10	0.03
Hans Ruvald	Lots 1 and	2	11	0.04
Louise Guest Estate	Lots 3 and	4	11	0.04
Hans Ruvald	Lots 5, 6 and	7	11	0.06
H. Ruvald		8	11	0.02
Peter P. Simson	Lots 1 and	2	12	0.04
Hans Ruvald		3	12	0.02
Name of Owner	Description	Lot	Block	Proportion of Benefit.
H. Ruvald		4	12	0.04
Hans Ruvald	Lots 5, 6, and	7	12	0.06
H. Ruvald		8	12	0.02

North Park Second Addition to Sioux Falls.

Julia W. Anderson			1	0.30
Hans Ruvald			2	0.30
Hans Ruvald			3	0.40
Ira Cox			4	0.30
Hans Ruvald			5	0.30
Hans Ruvald			6	0.30
Theron S. Swain and Henry E. Shaw			7	0.30
Hans Ruvald			8	0.30

Hans Ruvald			9	0.30
Hans Ruvald			10	0.30
Ira Cox			11	0.30
Julia W. Anderson	Lots 1 to 16, inclusive		12	0.30
Hans Ruvald	Lots 17 and	18	12	0.05
Julia W. Anderson	Lots 19, 20, 21, 22, 23 and	24	12	0.15
Hans Ruvald			13	0.30
Dan Hamway	Lots 1, 2 and	3	14	0.063
Thomas E. Powers	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12 and	13	14	0.275
Dan Hamway	Lots 14, 15 and	16	14	0.063
Hans Ruvald			15	0.40
Geo. J. Fullerton	Lots 1 and	2	16	0.05
S. Olney		3	16	0.02
S. Olney		4	16	0.02

S. Olney		5	16	0.02
H. Ruvald		6	16	0.02
H. Ruvald	Lots 7 and	8	16	0.04
Edward H. Story		9	16	0.02
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Hans Ruvald		10	16	0.02
Hans Ruvald		11	16	0.02
Hans Ruvald		12	16	0.02
Hans Ruvald		13	16	0.02
W. W. Ormiston		14	16	0.02
Hans Ruvald		15	16	0.02
Hans Ruvald		16	16	0.02
Hans Ruvald	Lots 1 and	2	17	0.04
Hans Ruvald	Lots 3, 4, 5, 6, 7 and	8	17	0.12
257				
Hans Ruvald	Lots 9 and	10	17	0.04
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	17	0.12
H. Ruvald	Lots 1 and	2	18	0.04
Hans Ruvald		3	18	0.02
Hans Ruvald		4	18	0.02
Hans Ruvald	Lots 5 and	6	18	0.04
S. E. White		7	18	0.02
Hans Ruvald	Lots 8, 9, 10, 11, 12 and	13	18	0.12
Hans Ruvald	Lots 14, 15 and	16	18	0.06
Hans Ruvald			20	0.30
H. Ruvald	Lots 1, 2 and	3	21	0.06
H. Ruvald		4	21	0.02
H. Ruvald		5	21	0.02
H. Ruvald		6	21	0.02
H. Ruvald	Lots 7 and	8	21	0.04
Hans Ruvald	Lots 9, 10, 11, 12, 13, 14, 15 and	16	21	0.16
Hans Ruvald	Lots 1, 2, 3, 4, 5 and	6	22	0.12
H. Ruvald		7	22	0.02
Hans Ruvald		8	22	0.02
H. Ruvald	Lots 9 and	10	22	0.04
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	22	0.12

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Hans Ruvald			23	0.30
Wigant Ludewig			24	0.45
Sioux Falls Improvement Co's Addition to Sioux Falls.				
S. E. Reinius			89	0.20
Soo Valley Granite Co.	Lots 1, 2, 3, and	4	91	0.046
Sarah Foster	Lots 12, 13 and	14	91	0.025
J. Reichard and J. W. Reichard	Lots 15 and	16	91	0.02
258				
Moses Hawkins		17	91	0.012
James W. Bowles		18	91	0.012
Summit Addition to Sioux Falls.				
Harry J. Brown		1	17	0.025
Soo Valley Investment & Construction Co.		2	17	0.025
Anna Hillner	Lots 23, 24, 25 and	26	17	0.10
F. L. Blackman		1	18	0.025
Margaret M. Matthews and Hannah L. Matthews		2	18	0.025
Alex Matthews		3	18	0.025
Bertha M. Ferguson		4	18	0.025
F. L. Blackman	Lots 5, 6 and	7	18	0.025
J. B. Fearon		8	18	0.025
J. H. Fernyhough		9	18	0.025
F. L. Blackman	Lots 16, 17, 18 and	19	18	0.10
A. W. Ibach		20	18	0.025
F. L. Blackman	Lots 21, 22, 23, 24, 25 and	26	18	0.15
West Park Addition to Sioux Falls.				
David R. Rector	Lots 1 and	2	1	0.05
Augusta C. Fowler	Lots 14 and	15	1	0.05
Sioux Falls Trust Co.		16	1	0.025
Sioux Falls Trust Co.	Lots 17, 18, 19 and	20	1	0.10
Sioux Falls Trust Co.	Lots 1, 2, 3, and	4	2	0.075
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Sioux Falls Trust Co.	Lots 5, 6 and	7	2	0.075

Sioux Falls Trust Co.		8	2	0.025
Sioux Falls Trust Co.	Lots 9, 10, 11, 12 and	13	2	0.125
Sioux Falls Trust Co.		14	2	0.025

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Board of Education of the City of Sioux Falls	Lots 15, 16, 17 and	18	2	0.075
Sioux Falls Trust Co.	Lots 19 and	20	2	0.025
Sioux Falls Trust Co.	Lots 13 and	14	3	0.05
Sioux Falls Trust Co.	Lots 15 and	16	3	0.05

J. L. Phillips Addition to Sioux Falls.

Manchester Biscuit Co.	Lots 1, 2, 3, and	4	25	0.833
Chicago, Milwaukee & St. Paul Ry Co.,	Lots 5, 6, 7, 8 and	9	25	2.291
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 10, 11, 12, 13, 14, 15, 16, 17 and	18	24	3.094
Geo. B. Cone	Lots 1 and	2	24	0.480
F. M. Mills		3	24	0.229
W. I. Thompson and J. W. Wadden		4	24	0.229
Madison Mill & Grain Co.		5	24	0.229
W. I. Thompson		6	24	0.229
Rock Island Plow Co.	Lot 7 and North Half of	8	24	0.343
Luella A. Jones	Lot 9 and South Half of	8	24	0.343
W. K. Van Brunt	Lots 1, 2 and North Half of	3	23	0.859
Van Brunt-Overland Co.	South Half of Lot 3 and North Half of	4	23	0.480
Geo. H. Brace	South Half of Lot 4, and Lots 5 and	6	23	1.145
J. N. Weston		7	23	0.572
German Savings Bank		8	23	0.687
Joe Tosini	North Half of	9	23	0.480
Carl Look	South Half of	9	23	0.572
G. Kiriakedes		1	22	1.145
Inez Van Eps		2	22	1.145

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Name of Owner	Description	Lot	Block	Proportion of Benefit.
Lacotah Building Co.	Lot 3 and north half of	4	22	1.719
Frank Angel	South half of	4	22	0.572
Inez C. Van Eps		5	22	1.145

Mary Zentel		6	22	1.145
E. B. Northrup		7	22	1.145
R. F. Pettigrew		8	22	1.145
M. C. Smith		9	22	1.145
H. A. Homan	Lot 17 and North Half of	16	21	6.874
E. L. Smith	Lot 15 and South half of	16	21	1.489
L. A. Kelley	Lots 13 and	14	21	1.375
J. W. Jones		12	21	0.480
W. Braley and Geo T. Blackman	West 100 ft. of Lots 10 and	11	21	0.480
J. W. Jones	East 50 feet of lots 10 and	11	21	0.229
J. P. Edmison	Undivided ½ lots 4, 5 and	6	26	3.437
E. L. Smith	Undivided ½ lots 4, 5, and	6	26	3.437
Chicago, Rock Island & Pacific Ry Co.	West 44 feet of Lots 7, 8 and	9	26	0.412
H. T. Parmley	East 42 feet of West 86 Feet of Lots 7, 8, and	9	26	0.412
Pete Ellingson and John Ellingson	East 42 Feet of West 128 Feet of Lots 7, 8 and	9	26	0.412
P. Ellingson	East 22 feet of lots 7, 8, and	9	26	0.229
Koenig Realty Co.	Lots 10, 11 and	12	15	0.685
G. T. Greeley	North Half of Lot	13	15	0.115
Josephine Levinger	South Half of Lot	13	15	0.115
E. J. Daniels		14	15	0.229

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C. C. Bratrud		15	15	0.229
G. T. Bratrud	North Half of	16	15	0.115
F. Hyde	South Half of	16	15	0.115
Inez C. Van Eps	Lots 17 and	18	15	0.480

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Chas. Look and W. H. Look	Lot 10 and South Half of	11	14	0.344
John Tossini	North Half of	11	14	0.115
Wm. Reynolds		12	14	0.229
John McKee	Lot 13 and South Half of	14	14	0.344
G. H. Perry Estate	North Half of Lot 14 and lot	15	14	0.344
Chas. S. Lund		16	14	0.229
Wm. Tate	South Half of	17	14	0.115
G. L. Nadel	North Half of	17	14	0.115

Beach Parshall Realty Co.		18	14	0.229
Robert R. Plane		10	13	0.229
L. Koplow	Lot 11 and South half of	12	13	0.344
W. I. Thompson	North Half of Lot 13 and South 117 Feet of	13	13	0.688
F. J. Solari and S. J. Solari	North 33 Feet of	13	13	0.688
F. J. Solari and S. J. Solari		14	13	0.229
Pat Shannon	South Half of	15	13	0.115
A. M. Whitman	North Half of	15	13	0.115
Geo. W. Eagon	South Half of	16	13	0.115
C. O. Bailey	North Half of	16	13	0.115
Albert Anderson		17	13	0.229
Victor Anderson and Albert Anderson		18	13	0.229

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F. S. Emmerson Estate		1	21	0.344
Chas. Kaufmann	North Half of	2	21	0.172
G. T. Greeley	South Half of	2	21	0.172
E. L. Smith	North Half of	3	21	0.172
E. L. Smith	South Half of Lots 3 and Lot	4	21	0.515
E. B. Northrup		5	21	0.229
Will A. Beach	North Half of	6	21	0.114
A. K. Pay	South Half of	6	21	0.114

Name of Owner	Description	Lot	Block	Proportion of Benefit.
G. T. Greeley		6	21	0.229
S. K. Grigsby	South Half of	9	21	0.114
Wm. Carswell	North Half of	9	21	0.114

Burlington's Sub-Division of Lots 10 to 13. Block 26 of J. L. Phillips' Addition.

A. H. Stites	Lots 1, 2 and	3	26	2.750
Farley & Denton Co.		4	26	0.916
Brown Drug Co.	Lots 5, 6 and	7	26	2.750

Morningside Addition to Sioux Falls.

Howard Holden		1	3	0.022
Wm. Weslund	Lots 2 and	3	3	0.648

Caroline Langager		4	3	0.022
Laura A. Brown		5	3	0.022
David Vesper	Lots 8 and	9	3	0.048
F. I. Hardimon	Lots 10, 11, 12, 13 and	14	3	0.114

Gale's Addition to Sioux Falls.

Frank C. Hardimon	Lots 1, 2 and	3	25	0.343
Chicago, Rock Island & Pacific Ry. Co.	Lots 1, 2, 3, 4, 5 and	6	24	0.550
Anna Bakken	West 50 Feet of Lots 1 and	2	26	0.091
263				
Ludwig Seubert	East 100 feet of Lots 1 and	2	26	0.137

Morse's Addition to Sioux Falls.

Stephen Donahoe, Den Donahoe, Dan Donahoe, and Wm M. Donahoe	East Half of		1	0.480
Anna Barrett		7	1	0.069
Stephen Donahoe, Den Donahoe, Dan Donahoe and Wm. M. Donahoe	Lots 8, 9, 10 and	11	1	0.400

Millspaugh's Addition to Sioux Falls.

Chicago, Rock Island and Pacific Ry Co.	Lots 1 and	2	13	0.137
Girton-Adams Ice Co.	Lots 1, 2, 3, 4 and	5	14	0.412
P. O. Stiver	Lots 6, 7, 8, 9, 10, 11 and	12	14	0.641
Girton-Adams Ice Co.	Lots 13, 14, 15 and	16	14	0.321
Name of Owner	Description	Lot	Block	Proportion of Benefit
P. O. Stiver	Lots 1 and	2	15	0.137
Girton-Adams Ice Co.	Lots 3, 4, 5 and	6	15	0.114
P. O. Stiver	Lots 8, 9, 10 and	11	15	0.366
Girton-Adams Ice Co.	Lots 12, 13, 14 and	15	15	0.344
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 16 and	17	15	0.183
Girton-Adams Ice Co.	Lots 10, 11 and	12	28	0.114
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 13, 14 and	15	28	0.275
P. O. Stiver	Lots 16, 17 and	18	28	0.175
P. O. Stiver	Lots 1, 2, 3, and	4	16	0.275
J. L. Brookings	Lots 13 and	14	16	0.137
P. O. Stiver	Lots 8, 9, 10, 11, 12, 13 and	14	27	0.412

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Daniels' Addition to Sioux Falls.

Susan Burke			4	0.480
Chicago, Milwaukee & St. Paul Ry. Co.			5	0.343
Girton-Adams Ice Co.	Blocks 12 and		13	0.916
Kittery Realty Co.	Blocks 10 and		11	1.031

Van Eps' Addition to Sioux Falls.

Joe Tosini	Lots 6, 7, 8, 9, 10, 11 and	12	2	0.229
Jos. Tosini	Lots 1, 2 and	3	1	0.137
Jos. Tosini	Lots 1, 2, 3, 4, and	5	2	0.229
Jos. Tosini	Lots 1, 2 and	3	3	0.069
Inez C. Van Eps	Lots 1, 2, 3, 4, 5, and	6	8	0.275
Inez C. Van Eps	Lots 10, 11 and	12	8	0.137
Inez C. Van Eps	Lots 1, 2, 3, 4, and	5	24	0.114
William Lackay		6	24	0.011
Inez C. Van Eps	Lots 1, 2, 3, 4, 5, 6, and	10	18	0.229
Inez C. Van Eps			19	0.069

Brookings & Edmunds' Addition to Sioux Falls.

Wm. H. Thomas	Lots 10, 11 and	12	31	0.685
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Parlin & Orendorf Plow Co.	Lot 13 and South Half of	14	31	0.344
O. S. Jones Seed Co.	North Half of Lot 14 and South Half of	15	31	0.229
R. A. Wyman	North Half of	15	31	0.115
Jewett Bros. & Jewett	Lots 16, 17 and	18	31	0.685

Braley's Addition to Sioux Falls.

W. Braley		1	1	0.025
W. Braley	Lots 9, 10, 11, 12 and	13	1	0.125
W. Braley			2	0.425
W. Braley			3	0.475

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W. Braley	Lots 1, 2, 3, 4, 5, 6, and	7	4	0.175
C. R. Lewis	Lots 8, 9 and	10	4	0.075
W. Braley	Lots 11, 12, 13, 14, 15, 16, 17, 18, 19 and	20	4	0.25

W. Braley	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and	10	5	0.25
W. Braley	Lots 11, 12, 13 and	14	5	0.175
W. Braley	Lots 1, 2 and	3	6	0.125
Geo. F. Boyle	South 88 Feet of	4	6	0.050
W. Braley	North 44 Feet of	4	6	0.025
W. Braley	Lots 5, 6, 7 and	8	6	0.175
W. Braley			7	0.35
W. Braley			8	0.375
Lois W. Jellies		1	9	0.075
W. Braley	Lots 2, 3, 4, 5 and	6	9	0.375
W. Braley			10	0.50
W. Braley			11	0.50
W. Braley			12	0.625
W. Braley	Lots 1, 2, 3 and	4	13	0.10
Anna Vaghn		5	13	0.025
W. Braley	Lots 6, 7, 8, 9, 10, 11 and	12	13	0.175
H. W. Bullard		13	13	0.025

Name of Owner	Description	Lot	Block	Proportion of Benefit.
W. Braley	Lots 14 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and	30	13	0.425
W. Braley	Lots 1 and	2	14	0.05
W. Braley	Lots 3 and	4	14	0.05
W. Braley	Lots 25, 26, 27, 28, 29 and	30	14	0.15
W. Braley	Lots 1 and	2	15	0.025
W. Braley	Lots 26, 27, 28, 29 and	30	15	0.125

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Silver Park Addition to Sioux Falls.

Great Western Investment Co.	Blocks 1, 2, 3, 4 and	5	1.375
Charles N. Hare		7	0.165
F. R. Webber		8	0.275
F. O. Lyford	Blocks 10 and	24	0.357
Great Western Investment Co.	Blocks 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and	23	3.575
N. B. Turner		25	0.275
E. A. Flanders	Blocks 26 and	27	0.550
Great Western Investment Co.	Blocks 28, 29, 30, 31, 32, 33, 34, 35 and	36	2.475

Annie E. Skinner	Blocks 37 and	42	0.550
A. G. Holmes		38	0.275
David B. Stewart	Blocks 39, 40, 41 and	42	1.10
Great Western Investment Co.		48	0.247
Great Western Investment Co.	Blocks 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63 and	64	5.500

Unplatted Lands Situated in Sections 16, 21, and 22, Township 101, Range 49, Within the City of Sioux Falls.

Equitable Realty Company's Sub-division of Tract 1 of the Northwest Quarter of Section 16.

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Dakota Iron Store	Lot 2			1.145
Dakota Iron Store	Lot 3			1.145
Dakota Iron Store	Lot 4			0.480
International Harvester Co.	Lot 1			0.916
Dakota Iron Store	Lots 8 and 9			0.480
Equitable Realty Co.	Lot 5			1.375
267				
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 6			1.833
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 7			1.833
Equitable Realty Co.	Lot 10			2.290

Equitable Realty Company's Sub-Division of Northeast Quarter of Northwest Quarter of Section 16.

Equitable Realty Co.	Lot 1	0.480
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 2	0.685
W. F. Hesse	Lot 3	1.375
Chicago, Milwaukee & St. Paul Ry. Co.	Depot Grounds on Southwest Quarter of Northwest Quarter, Section 16	2.062
Chicago, Milwaukee & St. Paul Ry. Co.	Tract 3 of Northwest Quarter, Section 16	0.683
Chicago, Milwaukee & St. Paul Ry. Co.	Tract 4 of Northwest Quarter Section 16	0.915
Edward Ellis	Tract 5 of Northwest Quarter, Section 16	0.229

Larabee Mills Co.	Lot 5 of Sioux Falls Light & Power Co.'s Sub-Division of the Northeast Quarter of Northwest Quarter, Section 16	2.00
Northern States Power Co.	Lot 4 of Sioux Falls Light & Power Co's Sub-Division of the Northeast Quarter of Northwest Quarter, Section 16,	2.00
Larabee Mills Co.,	Lot A, Tract 12 of Northwest Quarter, Section 16,	0.29
Northern States Power Co.,	Tracts 6 and 7 of Northeast Quarter, Section 16,	2.583
Name of Owner	Description	Proportion of Benefit
Watertown & Sioux Falls Ry. Co.	Benefit to Bridge and Trackage across Sioux River on Northwest Quarter, Section 16	4.583
268		
Guy Strahon	Tract 21 of Southwest Quarter Section 16 (Except W. 30 ft.)	0.687
A. S. Held and John Schetzel	West 30 Feet of Tract 21 of Southwest Quarter, Section 16,	0.480
F. H. Hollister	Tract 23 of Southwest Quarter, Section 16,	0.687
Emerson-Brantingham Implement Co.	Tract 23 of Southwest Quarter, Section 16	0.480
Mary C. Brace	Tract 24 of Southwest Quarter, Section 16	0.720
Etta Esta Boyce and A. B. Fairbanks	Tract 25 of SW¼ of Sec. 18	2.062
J. M. Freese	Tract 4 of Southwest Quarter, Section 16	2.750
Sioux Falls Gas Co.	Tract 3 of Southwest Quarter, Section 16	4.479
Chicago, Rock Island & Pacific Ry. Co.	Tract 29 of Southwest Quarter, Section 16	3.437
Chicago, Rock Island & Pacific Ry Co.	Tracts 1 and 2, Southwest Quarter, Section 16	3.437
J. H. Donahoe	Tracts 13 and 15, Southeast Quarter, Section 16.	5.155
Northern States Power Co.	Tracts 15, 16, and 20, Southwest Quarter, Section 16	5.840
Illinois Central Ry. Co.	Depot Grounds on Southwest Quarter, Section 16,	3.895

Chicago, Rock Island & Pacific Ry. Co.	Lots A and B. Sub-Division Tract 17, Southwest Quarter, Section 16	0.480
S. H. Hurst and T. McKinnon	Lot C, Sub-Division Tract 17, Southwest Quarter, Section 16.	0.480
T. McKinnon	Lot D, Sub-Division Tract 17, Southwest Quarter, Section 16	0.343
S. H. Hurst	Lot E, Sub-Division Tract 17, Southwest Quarter, Section 16	0.229
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Depot Grounds on Southwest Quarter, Section 16.	4.583
Great Northern Ry. Co.	Depot Grounds on Southwest Quarter, Section 16.	3.437
Farley-Loetscher Co.	Lots D and C of Franklin Investment Co's Sub-Division of Part of Tract 3 of Southwest Quarter, Section 16.	1.145

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Name of Owner	Description	Proportion of Benefit.
Franklin Investment Co.	Lots A and B of Franklin Investment Co's Sub-division of Part of Tract 3 of Southwest Quarter, Section 16.	1.145
H. R. Dennis	East 132 Feet of Tract 14 of Southwest Quarter, Section 16.	1.145
Albert Larson and Geo. E. Larson	Except East 132 Feet, Tract 14 of Southwest Quarter, Section 16.	6.874
A. C. Schoeneman	Tract 8 of Southwest Quarter, Section 16.	8.593
J. W. Tuthill	North 50 Feet of Tract 9 of Southwest Quarter, Section 16.	0.572
John C. Felger	Except North 50 Feet, Tract 9 of Southwest Quarter, Section 16.	1.145
John W. Tuthill Lumber Co.	Tract 12, Southwest Quarter, Section 16.	0.343
John W. Tuthill Lumber Co.	Tract 13, Southwest Quarter, Section 15.	2.750
John W. Tuthill Lumber Co.	Tract 7, Southwest Quarter, Section 15.	2.062
B. W. Harding	Tract 6, Southwest Quarter, Section 16.	0.687
A. J. Jordan	Tract 5, Southwest Quarter, Section 16.	2.062
John W. Tuthill Lumber Co.	Tract 7, Southeast Quarter, Section 16.	0.916

M. Margulies	Tract 8, Southeast Quarter, Section 16.	0.229
M. Margulies	Tract 10, Southeast Quarter, Section 16.	2.290
W. H. Lyon	All that part of Tract 2 of Southeast Quarter of Section 16 lying West of Franklin Avenue	1.375
Board of Education of the City of Sioux Falls.	All of Franklin Investment Co's Sub-Division of No. 1 of Part of Tract 2 of Southeast Quarter, Section 16.	1.833

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J. H. Drake	Tract 1, Southeast Quarter, Section 16,	2.062
Girton-Adams Ice Co.	Tract 12, Southeast Quarter, Section 16.	2.290
Sioux Falls Gas Co.	Tract 3 of Northeast Quarter, Section 21.	1.375
E. H. Hyde	Tract 12 of Northeast Quarter, Section 21	0.916
Girton-Adams Ice Co.	Tract 4 of Northwest Quarter, Section 22.	0.572
Joe Tosini	Tract 2, of Northwest Quarter, Section 22.	1.375
Inez C. Van Eps.	Tract 1 of Northwest Quarter, Section 22.	2.062
Ed Bell.	Tract 1 of Northeast Quarter Section 22.	0.229

Name of Owner	Description	Proportion of Benefit.
City of Sioux Falls	Parks, Water System, Highways and dedicated streets within the drainage area.	111.11
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area.	0.384
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.	0.072
Mapleton Township	Twelve miles and fifty-two rods of laid out and established highways within the drainage area.	10.468
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area.	21.252
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area.	2.323

Minnehaha County	Benefits arising from and to the safety and preservation of bridges within the drainage area.	
271		55.555
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50 West of the 5th P. M., within the drainage area (1.5 miles)	15.263
Watertown & Sioux Falls Ry. Co.	Right-of-way as laid out and located across Sections 4, 5, and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49, West of the 5th P. M., within the drainage area (2.69 miles),	
Chicago, Milwaukee & St. Paul Ry. Co.	Right-of-way as laid and located across Sections 4 and 9, Township 101, Range 49, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29, and 33, Township 103, Range 49, and Section 32, Township 104, Range 49, West of the 5th P. M., within the drainage area, (the above being the Sioux Falls and Egan line), also across Sections 5, 8 and 9, Township 103, Range 49, West of the 5th P. M., within the drainage area, (being the Renner and Madison line), total 14.5 miles	147.533

All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed, as stated, and the said determination of said Board made final.

Dated March 8, 1919.

A. G. RISTY
Chairman of the Board of County Commissioners of Minnehaha County, South Dakota.

Attest:

E. H. Shenkle
County Auditor

(Seal)

Filed in the office of the Auditor of Minnehaha County, S. D. this 8 day of March, 1919.

E. H. SKENKLE
272 County Auditor.

It is stipulated that attached to the bill of complaint herein is a true copy of the drainage ditch notice of hearing upon the question of equalization of apportionment of benefits of Drainage Ditch No. 1 and 2 on the 1st day of August, 1921, caused to be published by the Board of County Commissioners of Minnehaha County, South Dakota, said Drainage Ditch Notice being Marked "Exhibit C".

Exhibit "C" to the bill of complaint is offered in evidence by plaintiff and received in evidence.

(Exhibit "C" being printed herein as an exhibit to the bill of complaint, is not at this place reprinted.)

(Cross-Examination of witness F. E. Ward)

The proportion of benefits of Drainage Ditch No. 1 and 2 was not equalized upon the notice returnable April 25th, 1919, upon that date or at any other time. The proceeding was abandoned on account of errors in the published notice.

A. G. RISTY called and sworn as a witness for the plaintiff testified as follows:

(Direct Examination)

My name is A. G. Risty; I am one of the defendants in this action and am and for nine years have been a member of the Board of County Commissioners of Minnehaha County, South Dakota; for about seven years I have been Chairman of the Board; in the spring of 1919 the County Commissioners passed a resolution apportioning the benefits for Drainage Ditch No. 1 and 2; notice of hearing upon the proposed equalization of such benefits was published; the plaintiff's Exhibit "A" is the notice I refer to; I was a member of the Board at the time of making that apportionment of benefits.

273 Q. Please state to the Court, Mr. Risty, in what manner and upon what basis you determined, in the resolution referred to, the proportion of benefits to the Chicago, Minneapolis, St. Paul & Omaha Railway?

Objected to by defendants as incompetent, irrelevant and immaterial, the record now showing that the exhibit referred to by counsel in his question, that the proceedings therein were abandoned and are not the proceedings upon which the present actions were instituted, or the present controversy before the court.

Counsel for plaintiff: I state to the Court this is offered solely for the purpose of showing to the court the attempted application by the County Commissioners of the law which we are questioning.

The evidence received subject to objection.

A. Well, in all those cases we tried to take into consideration the right of way, the value of the line as compared with adjacent lands and the benefits that might be derived from this drainage proposition as to the maintenance of the track and the bridges and so on.

In determining the apportionment of benefits as stated in Exhibit "A" to the Chicago, St. Paul, Minneapolis & Omaha Railway, 1.5 miles; to the Watertown & Sioux Falls Railway Company, 2.60 miles; and to the Chicago, Milwaukee & St. Paul Railway Company 14.5 miles; I don't think we computed on a mileage basis; we may have had that number of miles in mind, but we tried all the while to base it on a certain unit, as I remember it.

Q. Just how, Mr. Risty, did you compare the alleged benefits to the three railway companies mentioned, with the
274 unit of agricultural lands to which you have just referred?

A. How we determined the units for the railroads?

Q. No. How you compared the alleged benefit to the railroads with the unit you have referred to.

A. Well, we arrived at—I don't remember what value we passed on that unit at that time (referring to the agricultural unit). We had the value fixed of the agricultural unit and the proportion of benefit that this drainage would be to that unit; when we came to the railroad question and other properties we took into consideration the benefits that they would derive and I might say we capitalized that—how much the average annual benefit would be to those properties, we might say to a certain piece of railroad, and having that amount fixed, we took the benefit that this unit of farm land was supposed to have and divided the benefits of the railroads—for instance we will say the unit of the farm land was $100; we would make the proportion of the benefit 25% or $20; then when we came to place a unit on other property af-

ter having exercised our judgment and made our investigation as to what those benefits might be, we arrived at a certain amount; we divided that by 25, the benefit of the farm unit and that gave us the number of units that we would assess up to that property or railroad, you might say if you wish; I am now testifying with reference to the procedure in 1919; we employed about the same procedure all the time.

Q. Mr. Risty, I call your attention to the fact that the units tentatively assessed to each railroad company in the drainage notice Exhibit "A" bears the same proportion to the mileage of said railway company in each case; with that in mind will you state to the court whether or not that attempted assessment was made by you upon a mileage basis?

A. The mileage basis—if it is the same number of
275 miles or if it is the same per mile for each company, then we must have estimated that the benefit was about the same and that gave the same number of units per mile.

In our attempted fixing of proportion of benefits which is in question in this lawsuit I don't think we used the mileage basis but I don't remember positively.

With reference to drainage Ditch No. 1 and 2 no warrants to any great amount have been issued since the time of fixing this proportion of benefits in the spring of 1919; it might possibly be that the cleaning of the ditch was not paid at that time; I don't remember that would be the kind of work that has been paid for since if it wasn't paid for before that; we have done some work around the foot of the spillway and so on since the publication of this notice in April, 1919, but I don't remember what it cost.

Q. In what manner, Mr. Risty, did you determine the benefit to the unit of agricultural land in 1919?

A. We made an estimate of what that land was worth according to our judgment and how much more it would be worth after it had the benefit of this drainage ditch, fair value, I don't remember we had any other basis to go on other than our own judgment as to the value of the land before the drainage and after the drainage.

We arrived at our determination with reference to the benefit of 111.11 units to the parks, water system, highways, and dedicated streets of the City of Sioux Falls without the drainage area in April, 1919, in just the same way as I stated to you that we arrived at the benefit to the railroads
276 and so on; what in our judgment we thought was the benefits; we fixed an amount that in our judg-

ment we thought was right and proper and divided by the benefit to the agricultural unit to get the number of units in regard to this other property; we based that judgment upon the fact that some of us, most of us, are farmers or were farmers and we all know the price of land—was selling it at that time; with reference to parks, water system, highways, and streets of the City of Sioux Falls we based our determination upon the same facts as we used in regard to all other property; we estimated according to our judgment and our investigation what these properties had cost and what benefit they were to the public, what loss they would be at in case they were annually overflowed; to some extent we used the cost of the parks of the City of Sioux Falls; the cost of the water system of the City of Sioux Falls was talked of; we made our determination on the estimate of the cost and the benefit that those properties would derive; we never had a hearing; it might be more and it might be less we didn't get far enough to hear the other side; we made an estimate of the damages that might accrue in case the highways and streets of Sioux Falls were overflowed; we based that estimate on our best judgment; suppose you have a building down along the Sioux here and have it overflow; the basement filled with water; your own estimate on what damage it would be to you and it would vary probably a great deal from mine; neither one might be correct. It is doubtful whether you and I would agree. I have stated he manner in which compared the benefits to the parks and water system, streets and highways of the City of Sioux Falls with the agricultural unit; we took the public highway that would be annual-
277 ly overflowed; we had in mind as road builders what damages that would be to that road; in our judgment we fixed the damages to be what we thought were right and the number of units on that piece of property; then we proceeded as in all other cases, divided by the benefit to our original unit; to get the number of units we first attempted to determine what the benefit was and then divided it to get the proportion; it is possibly a fact that the unit as used by us in the measurements in the spring of 1919 represented approximately $80.00 or $85.00 in cost; we used at 10A. unit; I am not certain whether the unit was supposed to have been benefitted $80.00 to $85.00 or $7.00 to $8.00 per acre, that might be it, I don't remember.

Q. I now call your attention, Mr. Risty, to the drainage notice provided for hearing on the 1st day of August, 1921, upon the equalization of benefits of drainage ditch No. 1 and 2 and call your attention to the benefits to roads, railroads,

etc. and ask you to state to the court in what manner and upon what basis you arrived at your determination with reference to the proportion of benefits to the Chicago, Rock Island & Pacific [Rr]., the Chicago St. Paul, Minneapolis & Omaha Ry., the Great Northern Ry., the Chicago, Milwaukee & St. [—] Ry., the City of Sioux Falls, and the Northern States Power Co., referring particularly to the benefits to the Hydro-Electric plant and water rights of the Northern States Power Co.

Mr. Bartlett: "That is objected to as incompetent, irrelevant and immaterial, not within the issues that can be tried by this Court in this collateral action, the same being a legislative matter and not subject to inquiry in this Court, it not having been alleged in plaintiff's bill of complaint herein that the Commissioners acted fraudulently or arbitrarily."

278 The Court: "Received, subject to objection."

A. As to the railroads and other property mentioned in this question we arrived in the manner stated before; we took into consideration the value of the right-of-way compared the right-of-way with adjacent lands and what protection from this water would benefit them and the savings it would be in upkeep of the railroad track, bridges, etc; in regard to the Hydro-Electric Co. plant we took into consideration the overflow and high waters that would clog up their turbines and put them out of working order for some time, and we had in mind the great overflow of 1881 when it swept out the lumber yards down there and took out the mill at the foot of the falls, and in our estimation after having taken all those things into consideration which I wouldn't mention all now, we arrived at the conclusion that this water, the drainage proposition was of immense value to the Water Power Co. and we figured on that with a good deal of care and then I think we arrived at the amount of $50,000.00; I wouldn't say positively that was the amount; we compared the benefits which we arrived at to the Northern States Power Co. with the benefit to our 1A tract of agricultural land as I have stated before; the benefit to that unit we said was $25.00; when we had estimated the benefits to the water power company was $50,000.00 we wanted to find out how many units that it represented and we divided it by 25 and that gave us the number of units that would be assessable to the water power company; I suppose there was no material increase in value of the railroad companies' rights-of-way and other property I have mentioned by the making of these two apportionments of benefit unless it might be increase in

value with the value of other property increased at
279 that time, but the expenses to be paid were more;
there were probably in the neighborhood of $250,000.00 of ditch warrants outstanding at the time we made this apportionment of benefits in 1919; I know there has been some issued since but I don't know how much; in estimating the benefits to various railroad companies in our last apportionment of benefits, we had about the same ideas as we did in 1919; we did not use the mileage basis or farm basis or street basis anywhere; we used the units.

Q. Just how did you use the units, that is what I am trying to find out?

A. When we find out what amount we have to raise—when we come to levy the assessment, the proportional benefits will be assessed to each unit—one unit may be 100%, another 150%, and some only 10%, others 25%; they won't all be alike, of course they are not benefitted alike; in arriving at our determination in 1921 of the last apportionment of benefits and the number of units of the benefit to the Chicago, Rock Island & Pacific [Rr.] Co. we took into consideration the damages that might be done to the railroad tracks with high water to the grades; and in regard to the bridges, bridges could be built smaller; wooden bridges generally have a duration of about ten years and if they could get along with smaller bridges or make grades instead of [tressel] works which would be a benefit to the company; we inquired minutely into those things but as I say haven't heard the other side; we might be away off; the hearing was not allowed and we didn't get any basis from you folks on that question; we determined that the benefit to the track of the Rock Island Ry. from the ditch was a certain specified amount in dollars and cents; I wouldn't say that we put those amounts on record; that is the way we arrived at our units; we took into consideration in de-
termining this benefit the fact that the Rock Island
280 might build a shorter bridge somewhere and that was
part of the basis of our assessment of benefits; after arriving at the amount of dollars and cents benefit we proportioned it by dividing by the value of the unit; in determining the proportion of benefits to the Chicago, St. Paul, Minneapolis, & Omaha, the Great Northern, the Chicago, Milwaukee & St. Paul Railroad Companies we followed the same procedure; the basis for our determination of the benefits with reference to the highways, streets, water supply, water plant, Sherman Park and Phillips Park in the City of Sioux Falls was as I have stated to you before; it may seem [arbitrarily] but in regard to county highways for instance, we knew pretty

well what it would take to keep them in good passable condition in seasons when there was any overflow and in seasons when there was no overflow; in regard to the streets and basements that have been flooded each year I made an estimate as to how much it would damage a basement if filled with water; same way to the streets, same way to the parks; If you had ever had a hearing those things would all have been adjusted. I wouldn't say absolutely that we did in 1921 the same as we did in 1919 with reference to the city; we had the same idea in mind when we gave it reconsiderations and wherever we saw we could improve, we did it to make a more equitable proportion; in my judgment and in the judgment of the commissioners the last proposition is better than the first one; I don't want to say we absolutely followed the methods of the first instance or we followed any particular practice in the last instance; it may be we did and possibly we didn't; in arriving at the determination that the benefit to the Hydro-Electric Co. plant of the Northern States Power Co. was about $50,000.00, we based our determination upon the following facts; in the first place we have a stream that tends to give a steady flow of water around the bend so that it will not go over the spillway; in one certain place about 3 miles northwest from
281 town outside of the ditch proper, the river broke through and would eventually have cut across the bottom and into the spillway and we dammed that up; then we took into consideration the high water backing up and filling up the gorge below their plant so that at certain times the water power would not be serviceable and that it would cost them fuel and other items to a great extent and then primarily, any water which overflowed would be apt to sweep out everything around that electric plant if they should have an overflow like 1881.

Q. You say there was danger of some ditch cutting
282 through and diverting the water out of the river?

A. Yes sir.

Q. State whether or not that was the Ditch No. 1 or ditches Nos. 1 and 2 which were constructed by the Board of County Commissioners, the records of which have been placed in evidence here.

A. Those ditches were established and built before my time on the Board and that might possibly have been that it was cutting into Ditch No. 1 and making that immense excavation, but I would not say. But it was necessary to have it dammed up according to the orders of the hydro-electric engineer; the ditch I refer to must have been probably the terminus of ditch No. 1; the engineer gave orders it had to be dammed up absolutely.

Q. In just what manner did you arrive at the fact that this alleged benefit to the Northern States Power Company amounted in dollars and cents to approximately $50,000.00?

A. After taking those things into consideration, that was our best judgment. We might have itemized it and added it up; I don't remember that; but according to our best judgment that would be reasonable assessment upon the water power company.

We based that judgment upon these benefits I have
283 stated to you; giving them a uniform flow of water in dry seasons and protecting them from overflow when we had an overflow season; I have stated practically everything that was taken into consideration in determining that the Northern States Power Co. was benefitted $50,000.00. if I remember right.

Q. I call your attention, Mr. Risty, to the alleged benefit in your apportionment of 1921 to the Chicago, Milwaukee & St. Paul Railway; benefits to right-of-way, tracks, embankments, bridges and grades across sections 4, 9, 18, 21, 22, Township 101 Range 49, and across sections 4, 9, 16, 21, 28, 33 Township 102 Range 49, and across sections 5, 8, 17, 20, 28, 29, 33 in Township 103, Range 49, and ask you to tell the court what you took into consideration in determining that the Chicago, Milwaukee & St. Paul Ry. Co. was benefitted 1678.9 units.

A. We took into consideration what it would damage the tracks—what the damage would be if those tracks washed out and the expense to rebuild them, and with the assistance of a competent railroad engineer we arrived at those figures that we have given there.

We assumed that except for this spillway these tracks of the Chicago, Milwaukee & St. Paul Railway would wash out and be under water for a certain period; I have seen the Milwaukee road under water 8 or 10 days at a time when they had to run their trains around to Pipestone on other railroads; I don't remember what proportion of its tracks we assumed would wash out; the distance used is about equal to the lands that overflow; those lands that overflowed and had the tracks on; of course it would overflow the tracks; I don't remember how many miles we estimated that to be; we tried to figure it out and our engineer worked it out and that was the number of miles; the tracks were on land subject to overflow, that is what determined the distance; with reference to the bridges of the Chicago, Milwaukee & St. Paul Railway in arriving at this benefit—I don't remember whether there is any more

bridges on the Milwaukee; yes, there is two; we took
284 into consideration that by diverting the great volume of water from the river into these ditches, their bridges would be less subject to destruction by the ice gorges and by high water and that they could be made smaller when they come to build new ones because they would not have such high waters; the water would be divided between the river and the ditches; in arriving at that feature of the benefit in dollars and cents, we figured out with our engineer what it would cost to build and maintain bridges of the size they have now and what it might cost to build them smaller and their relief when they were subject to overflow and ice gorges; these were the elements we had in mind.

After the filing of the Blackman petition in 1916 when it was decided that the spillway was to be repaired we employed engineers to go ahead and investigate that and it took about a year and a half before all of the preliminaries were taken care of so that we went to actual excavation on the structure; we employed a competent engineer and he laid the plans and we let the contract to a contracting company here, they were to have a percentage for their work; they proceeded to sink that shaft and make the channel of the spilling basin; to put it all in shape that it is at the present time; on the river we straightened a number of bends, made cuts across bends and straightened out the river to facilitate the flow of the water; I think Ditch No. 2 was cleaned about as far as Renner; then the time arrived that the ditch warrants did not sell any longer and we had no means to complete the work; there always were control gates at the head of Ditch No. 2; we made no change at the head of Ditch No. 2 after the filing of the Blackman petition if you call the end of it up there near Baltic where the ditch begins; it crosses the river at one certain place up there and if you have reference to where this lower
285 part is started, there we built a small dam of willows and earth to keep the water from coming out of the ditch entirely and doing damage that way; the route of the ditch was left the same as the route of Ditch No. 1 and Ditch No. 2, the old ditches; no changes were made in the initial point or terminal points of either ditch.

(Cross-Examination).

Prior to the attempt to fix the proportion of benefits in 1919, no topographical survey was made or thorough investigation upon which to base the assessments or fix the benefit. In order to save money we thought the old survey would answer; in making the proportional benefits we took the old

figures and old survey to avoid expense; we didn't get far enough to make any assessment on any particular tract of land; the Board abandoned that attempt to fix the proportion of benefits because of an error in adopting three units instead of one; after that time the Board caused a full topographical survey to be made by Chenoweth & Rettinghouse of this city and a thorough investigation of the benefits that would accrue to the various properties within the drainage area; Mr. Rettinghouse reported and explained to us the conditions which he found generally throughout the drainage area and the property that was benefitted; in making that report he stated to us the various elements that he considered as benefits and submitted to us the facts upon which he based his conclusions; Mr. Rettinghouse as our engineer made the computation with reference to this apportionment of benefits and the plans and we talked it over and he was practically the one that planned how it should be done; he done all the figuring and the computations; before we adopted the resolution of June 10, 1921, we had been fully advised as to the topographical situation and the elements that went into the fixing the proportion of benefits against each of the various pieces of property that were deemed to be benefitted; the board made a personal investigation of all the property within the drainage area and
286 determined the benefits before we adopted this resolution; we selected as a unit an acre of land about three miles north of town in the district between the river and the ditch and visited that unit in company with Mr. Rettinghouse; we determined that in our judgment that unit was benefitted by the improvement 25%; in reaching that conclusion it seems to me we valued the unit without the drainage at $100 and with the drainage at $125.00; it being our judgment that the real benefit to that unit was the sum of $25.00; after determining the value of this unit we proceeded to equalize and fix the proportion of benefits among the other property; the engineer accompanied us and had with him various figures and maps he had made showing these tracts, we referred to the map right along as we traveled; the Boa[illegible] proceeded to investigate the whole territory proposed to be assessed on this basis investigating first upon the east side of the river and then on the west side and then around the bend clear in through town; we looked over the railroad situation and other properties including the power plant, city streets, parks, and water system that in our judgment were affected; my judgment and the judgment of the board coincided almost entirely with the report of the engineer, Mr. Rettinghouse, with reference to these various proportions of benefit; after having made our investigation and having had the elements

of benefit explained to us by the engineer, the board exercised its judgment and concluded that these properties were actually relatively or approximately as the engineer had reported them, we considered as a basis for making assessments on these various properties the acreage of the right-of-way within the drainage area; with reference to the Great Northern Railroad property, Mr. Rettinghouse gave us the facts as to the area within the various territories; he pointed out to us that certain bridges would be benefitted by reason of it, that certain bridges might be shortened
287 by reason of having the water by-passed through the ditch; all of these facts together with the betterment or saving in maintenance on the roadbed were considered by the Board in determining and fixing the proportion of benefit as against the Great Northern Railroad; in like manner the engineer explained the amount of acreage of right of way of the Chicago, Rock Island & Pacific within the drainage area would be protected and benefitted the same as the adjacent farm lands; he pointed out that there was a certain length of its track that would be affected in having its maintenance cheapened by the drainage and that certain of its bridges might be shortened and were protected by reason of this drainage ditch by-passing the portion of the water that would come down the river; those amounts were all taken into consideration and passed upon by the Board in determining the amount of benefit our judgment indicated the Chicago, Rock Island & Pacific received; the Chicago, Milwaukee & St. Paul Railway extends almost the full length of this ditch and adjacent to it; in some places the track is right along the ditch and in other places it runs pretty close to the ditch all the way; it might possibly be 80 rods away where the ditch crosses the river at Renner; he explained the amount that this railroad benefitted upon the same proportion that the farm lands adjacent thereto; that the embankments, tracks and roadbeds were benefitted in the same manner by being made more substantial and requiring less upkeep; that there was a certain number of bridges that could be shortened and a certain bridge might be abandoned by reason of by-passing this water; these matters were all taken into consideration by the Board in determining the amount of benefit that we fixed against the railroad for its proportion and the amount of benefit was figured out by Mr. Rettinghouse for us in the manner in which I have testified on the basis of maintenance
288 and upkeep; the Chicago, Minneapolis & Omaha Railway extends directly across the project in two places and Mr. Rettinghouse explained to us that its right of way would benefit the same as adjacent land and that its roadbed

was benefitted by being more easily maintained; that there were a certain number of bridges over the Sioux River and adjacent thereto that were protected by the drainage; that a certain number of trestles might be shortened or abandoned and that by reason of these benefits the railroad company was actually benefitted a certain amount and it was in our judgment; we took all these matters into consideration and exercised our judgment in determining the amount to be fixed as against these various properties.

Mr. Rettinghouse, as our adviser, explained to us the number of miles or blocks of streets in the city of Sioux Falls that were within the drainage area and would be benefitted by being protected and drained by this drainage; also the benefits that would accrue to the two city parks and to the Sioux Falls water system and the elements of such benefit; the Board took all these elements into consideration in exercising its judgment and determining the amount of proportional benefits which it fixed against the city of Sioux Falls.

At the same time, Mr. Rettinghouse explained to the Board and the Board considered the elements of benefit which would accrue to the Northern States Power Co. by reason of the drainage; we went through that very thoroughly; the facts that the dam was put in adjacent to the river near Schjodts about three miles north of the city of Sioux Falls and that the controlling works in the nature of wiers were put in at Thompson's about ten miles north of the city were considered as elements of benefit to the Northern States Power Co. by reason of holding the water in the river and permitting it to flow down and over its power plant; to by-pass the flood water or a portion thereof through the ditch and save the
289 retarding effect of permitting that flood water to pass over the dams of the power company and pile upon and retard the whole power produced at the power plant also was considered an element of benefit; all of these matters were taken into consideration by the Board in determining the amount of benefit that should be fixed against the Northern States Power Co. The construction of this drainage project, several river cut-off channels, were put in up the river north of Sioux Falls, and in determining the Northern States Power Co. benefit the Board took into consideration the effect and influence of these cut-offs in hastening the flow of the flood water down the stream and shortening the time of floodage upon the power plant. All of these matters were taken into consideration by the board in exercising its judg-

ment of the amount that should be fixed, in the first instance as against the Northern States Power Company.

The work that the Board did upon this drainage project consisted of constructing the spillway, cleaning and widening and deepening the ditch between here and Renner, diking the ditch and putting in the dam at Schjodts and controlling works at the Thompson Bridge, and putting in these numerous river cut-offs.

The Court: Where is the Thompson Bridge?

A. Up where the ditch ends and turns into the river, and crosses the river and goes up on the other side.

The Court: How far is the Thompson Bridge from Sioux Falls?

A. About 12 or 14 miles.

The Court: How far is Renner from Sioux Falls?

A. 8 miles.

Q. Do you know the approximate present width of the ditch as it extends from Sioux Falls to Renner, or
290 thereabouts?

A. No, I don't. That would be a mere guess.

Q. Isn't it in the neighborhood of 80 to 100 feet?

A. It probably is as far North as Renner.

Where we diked the ditch had taken the channel of the creek; there hadn't been dirt enough taken out to make a dike and when the floods came it backed up on the farm lands to the west of it; we diked there probably five or six feet high; and protected these farm lands from overfloow from the ditch after that; the dam at Schjodts covered the break in the bank of the river of about 150 feet wide and had the effect of keeping the water from the river from flowing in the bayou that is tapped by the ditch.

After the attempted assessment made in 1919, some work was still to be done in cleaning a portion of the ditch from Renner to the railroad tracks; settlement for this work had not been fully made.

Q. And this dam at Schjodt's that has finally been made to stand was not in at that time?

A. No, it was not.

Q. And some repair work has been done on the spillway since that time, has it not?

A. Yes, the control work at the bridge at Thompson's was put in since that time, but at the initial point of the ditch we haven't made any change.

Exhibit "1" is a copy of a map of the territory affected by drainage ditch No. 1 and 2 submitted by Mr. Rettinghouse to the Board as a part of his report.

We had a map similar to this upon which the percentages were marked before us when we made the inspection of the drainage area before making the apportionment of benefits, on June 10th last.

Exhibit "L" offered in evidence by defendants and received in evidence.

291 Q. Mr. Risty, in applying and using this unit as explained by Mr. Rettinghouse to you, and as followed by the Board in fixing these apportionments of benefits of the various properties affected, you stated that you determined what the actual benefit to the unit selected was, and that its value was twenty-five dollars? A. Yes sir.

Q. Did you use that value of twenty-five dollars as the actual benefit to the unit in determining the apportionment of benefits which each of the various classes of lands aside from farm land should be assessed in this drainage proceedings?

A. We did. This was in regard to farm lands.

Q. And your engineer figured out the total benefit to each of these various pieces of property and divided that benefit by twenty-five, the value of the unit, to determine the number of units to be fixed against these various pieces of property?

A. Yes, that is the way we determined the number of units.

Q. That applies generally to all of the plaintiffs in these actions? A. Yes sir.

Q. Your understanding is that in determining the amount of the assessment upon this basis, that the total number of units are added together to determine the number of units, and the total cost of the ditch is computed and the total cost is divided by the number of units to get the actual assessed valuation of a unit? A. Yes sir.

F. W. WARD recalled on behalf of plaintiffs testified as follows:

The plaintiff's Exhibits "B" and "C" are part of the files and records of my office.

Exhibit "B" was offered in evidence by plaintiff and received in evidence. It is the resolution of the County
292 Commissioners of Minnehaha County, fixing the proportion of benefits on drainage ditch No. 1 and 2, dated June 10th, 1921; it is not printed here because it describes the same property, names the same persons, and fixes the same units as are described, named and fixed in Exhibit "C" printed as a part of the bill of complaint herein.

Exhibit "C" was offered in evidence by plaintiff and received in evidence. It is the same as Exhibit "C" printed herein as a part of the bill of complaint and for that reason is not reprinted here.

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293 H. E. BARLOW, called and sworn on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am civil engineer of the Chicago, St. Paul, Minneapolis & Omaha Railway; the Sioux Falls-Mitchell branch of the Omaha enters the City of Sioux Falls from the west, crossing the big Sioux River and the bottoms approximately three miles west of the city. The line then swings somewhat to the south and enters the city on the southeastern corner again crossing the Big Sioux River and through the station grounds runs approximately north and south; the spillway is a couple of miles north of the line of the Omaha; in the west portion of the City of Sioux Falls there is a spur track known as the west side spur, which branches off from the main line a short distance west of the westerly course of the Big Sioux River, and runs approximately north and south for a distance of about a mile; the Omaha railroad has no agricultural lands in the City of Sioux Falls other than its right of way and depot grounds or in the drainage district involved in this controversy; all of its property consists of its railroad right-of-way, station grounds and appurtenances and is used exclusively for railroad purposes.

I know Mr. Rettinghouse, the engineer of the County
294 Commissioners in this drainage ditch matter; I called upon him at his office in Sioux Falls and had an extended conversation with him during which he very kindly outlined the method by which he had arrived at the amount of benefits; this conversation was in February or March last; the information was given me by Mr. Rettinghouse but not in confidence; the method he used in arriving at the total benefits deals primarily with the question of bridges; at the point

where the Omaha crosses the bottoms west of town, we have in addition to a hundred foot steel span over the main channel, an approach bridge approximately 233 feet long, and two other bridges east of the main river bridge, one 126 ft. and one somewhat shorter; in addition to these bridges we have a small one span pile bridge considerably west of these bridges which takes care of local drainage only and is not concerned in this question; Mr. Rettinghouse has figured that by reason of the diversion of a certain amount of flood waters of the Big Sioux River by means of the spillway constructed by the County authorities, the Omaha Railway would be justified in filling in certain of these approaches, particularly our bridges known as 129 and 130, aggregating 239 feet in length; these are the bridges a mile east of the main bridge over the river west of town about three miles out; he has figured that it would cost to rebuild these bridges about $25 a foot or $5975; he has assumed that it will be necessary to rebuild these wooden structures about once in ten years; he has therefore figured that the average annual expenditure would be one-tenth of $5975; he has capitalized this amount at 7% arriving at $8536; then he has deducted the cost of filling these bridges and the riprap necessary to protect the dam; he has used this at $2000, which deducted from the $8536 makes a net of $6536 benefit on account of filling bridges
295 129 and 130; in a similar manner he has figured that we could fill the approaches to the two steel spans we have here in town, where the amount of pile bridging is 166 ft. going through the same proposition and capitalizing the annual expenditures and deducting the cost of filling he has arrived at $2930; these bridges which we have here in town are what are known as through bridges; the supports are above the track, and Mr. Rettinghouse has figured that if the Omaha Company thought it desirable it might rebuild those bridges and substitute the deck built character construction which is a cheaper type construction, and by using shorter girders and necessitating two additional piers, this type of construction could be used, and he has planned that to reproduce these bridges as through structures would cost $45,500 and with the deck plate girder type would cost $25,500, making a difference of $20,000; then there is one other item which relates to the maintenance of the roadbed of the mile and ¾ length of track we have west of town in the district; this track has an embankment varying from 3 to 4 ft. to 10 or 12 ft; he has figured that on account of the diversion of a part of the flood waters, the embankment would be less, consequently the amount of labor that would have to be expended in keeping up the track would be less by an amount equal to

$100 per year; he has capitalized this $100 at 7% arriving at $1400; in summarizing all of these items he arrived at the total benefit of $30,866; now the assessment of the Omaha is fixed at 839.45 units; if 1 unit is approximately $9.50, the total assessment would be $7975; the total amount of benefit divided by the total number of units would make an average value of about $38 for the unit; he has assessed us at approximately 25.8% of the total benefits; figuring the one unit as $9.50.

The situation at the west crossing is that we cross the valley approximately at right angles; the valley is quite wide at this point; the track is on an embankment and has
296 these 4 openings; three of them are at a distance of about ¼ of a mile; the land north of the track on the upstream side is cultivated to a considerable extent, not in the immediate vicinity of the bridges, but a short distance each way from the river the land is cultivated; in a time of normal high water this land is flooded and on account of the likelihood of holding this water an unnecessary length of time on this bottom land if we don't have considerable opening there through our embankment and taking into consideration the danger to the roadbed that might result if we closed the opening, it is my opinion that we would be unjustified in reducing the size of our openings or the length of them; in my opinion there are absolutely no benefits resulting to those bridges west of the city or to the railroad west of this city by virtue of this drainage ditch construction.

Referring to the bridge west of the depot in the City of Sioux Falls and taking up the question of the substitution of the belt girders for the trestles; the fact of the matter was that the Omaha Company has no intention of making any changes in these bridges; the bridges are amply strong for the locomotives we are now running or which we anticipate we will run in the future; there is absolutely no reason for disturbing the bridges at all; furthermore, if we should decide ever to substitute the plate girders we could do so and still have the light iron at about the high water of 1881.

There is one other point that has not been covered and that is in regard to filling the pile approaches; there are short approaches at each end; the west approach is 62 or 63 feet; and the east approach is 103 ft; we have felt that we could fill both of these approaches whenever we got around to it and could at any time; as a matter of fact it would involve considerable expense and we have felt it would
297 be better economy to maintain that type of approach; as to the filling of those approaches the drainage ditch construction has no effect one way or the other.

I have figured up the acreage the right-of-way of the Omaha Railroad in the drainage district amounts to; we have 22 acres on the main line, 21.2 of which is on the west bottom and 5.89 acres on the west side spur previously described; these figures, include .8 of an acre in the vicinity of the bridge out here in the city and includes all the right-of-way within the drainage district sought to be assessed.

(Cross-Examination)

I have been in the business of civil engineering something over 22 years and have occupied my present position since the first of March 1920; it is a fact that water in flood seasons permitted to stand along side of the embankment which supports the tracks of the railway has a tendency to weaken that embankment and it necessarily requires a greater outlay of money to keep the bank in solid form; as a general proposition the more water standing there the more effect it has.

Q. Do you know when these bridges were built west of town?

A. I think our records disclose that they were built about 1880 or 1879, along in there.

Q. Then these extra full bridges were built at a time when all the water was coming down the river?

A. Yes sir; the engineer building the bridges would naturally have in view that they would take care of all the water that came down the river; if the evidence should disclose in this case that from 1/3 to ½ of the water that comes down the river was diverted and does not pass under this bridge, it would not be the reasonable conclusion that at least part of the bridge could be done away with; I don't know how much water stood out there last year north of those bridges on the uphill side of those embankments; I don't know how much water there was the year before, or the year before that.

Q. You do not know any of the data, but you are willing to swear you got no benefit, notwithstanding the fact
298 that you do not know how much water stood there?

A. Yes, I am willing to say that.

I think it had no effect whatever; if only ½ of the water came down the river last year that previously went under the bridges there would have been no benefit to our embankment in the solidity of the same and in the cost of the maintenance of it; it would make no difference how much water comes down the river unless it should go over the track and begin to wash the bottom out; I stated as a general proposition that when the embankment stood in water it had a tendency to weaken

it and make a higher cost of maintenance; this fact is not true at this place and our embankment would stand all amounts of water; there is a peculiar reason why it should.

It is not a fact that we cannot run over that bridge the same class or weight of engines that bring our trains from St. Paul and Minneapolis to Sioux Falls; that bridge would not have to be changed if we wanted to run the same class or weight of engines to Mitchell; my company has not put in any different trestles since this spillway has been constructed; I have been in Sioux Falls several times; I think I was here in 1919; I think I was here in 1917 or 1918, and went over the ditch matter at that time; our former chief engineer had at one time under consideration the question of the shortening of the bridge just east of here; my understanding is that the spillway is designed for 2000 second feet and could take an overload of 500 more, making a total of 2500.

299 (Redirect Examination)

The special reasons why water standing by this railroad embankment did not affect it is that this particular embankment is very wide and deep and very heavily overgrown with vegetation and sod; in the vicinity of the river course where any washing has ever taken place are thoroughly protected by rip-rap; for this reason I believe that water standing along this particular embankment would have no effect on it in so far as the labor that would have to be expended in maintaining the track is concerned; that is the answer that I would make to the claim of benefits made by Mr. Rettinghouse in regard to saving $100 a year maintenance; my understanding is there has been no decrease in the force employed on the section since the construction of the spillway in 1918 and that would be the determining factor as to saving in maintenance account.

The reason why trains the same as come from St. Paul to Sioux Falls cannot be run to Mitchell is that we have other bridges between here and Mitchell which would not permit of the running of heavier locomotives; the bridge in Sioux Falls is restricted in our time card; we do not permit our heavier engines to go over it at the present time; as a matter of fact there is no reason why the heavy engines that operate down here cannot go over this particular bridge although it is restricted in our time card; there is no reason why the heavier engines should run any further than Sioux Falls if they cannot go clear through to Mitchell; Mr. Rettinghouse the engineer of the drainage district, was the former chief engineer

of the Omaha road who had under consideration the question of changing the bridge at Sioux Falls.

C. GEELAND, called and sworn on behalf of the plaintiffs, testified as follows:

300 (Direct Examination)

I am road master of the Chicago, St. Paul, Minneapolis & Omaha Railway from Worthington to Mitchell and from Luverne to Doone, and I have been since August 15, 1905; prior to becoming roadmaster, I was section foreman and extra gang foreman; I was section foreman at Montrose; I started working for the Omaha in April, '80, and was employed by that road during 1881; I remember the flood waters of 1881; I was in Sioux Falls when the water was the highest; I am familiar with that portion of the Omaha Railroad in the City of Sioux Falls and west of the City comprised in the area sought to be assessed for the construction of drainage in this drainage district No. 1 and 2, and have been familiar with it since 1908; there is very little noticeable difference in the water conditions along that line of the Omaha railroad subsequent to the construction of the new spillway in 1918; I realize that more water has come down and stood on the bottoms, but it spread out such a wide territory across the bottoms that it didn't raise it very much; I wouldn't say that there has been more water on the bottoms west of the city and north of the Omaha Railway track since the construction of the spillway than there was before, but to my knowledge there is fully as much; I have seen the water conditions each year beginning with 1918 and have visited that part of the line and know how much water there was; the water that has collected in the field north of the track does not seem to have had any bad effect, that is, it doesn't seem to make any more particular work across that bottom; I can't say it has a bad effect one way or the other either before or after the construction of the spillway; the construction of the spillway and other works in Drainage Ditch No. 1 and 2 has made no apparent difference

301 one way or the other as to the flood waters of the river and as to the line of railroad of the Omaha west of the city and east of the river; I can't say that there is any particular noticeable difference in regard to the water conditions at the bridge in the city of Sioux Falls before and after the construction of the new spillway; I am familiar with the course of the river through the City of Sioux Falls and have seen it each year since I have been roadmaster; so far as effects the maintenance and operation of the railroad, the dif-

ference is very little ; in fact as far as the operation of the railroad is concerned, it doesn't affect the river being a little high or low west of the depot; it never has had any effect before or after the construction of the spillway with the exception of one year, that was 1881; that was the year there was an ice gorge formed in the southeastern part of the city; that gorge held the water back and when the ice gorge broke there was a flood which flooded the track about the location of the present station; the Omaha has never been troubled with water at its station or at its bridge west of the station since 1881.

(Cross-Examination)

I have been familiar with this particular part of the river between here and Montrose since 1880; in my travels back and forth over this road from year to year I have never set any permanent structures to indicate the course of the water at any particular year; when I say that the water is the same now as 5 or 10 years ago, that is the best of my judgment; in 1881 it washed out the whole line; in 1907 the waves had cut down into the bank and there was some riprap put there for fear it might wash; the water caused us additional expense and maintenance that year; if the water should pile up in the same way as it did in 1907, it would not be necessary to put riprap in again.

302 Q. You say the [heighth] of this water has been practically the same every spring? Were you advised of the fact that from one-third to one-half of the water coming down the valley had been diverted from your railroad?

A. Yes sir.

Q. Still the [heighth] of the water remains about the same each spring as to your railroad track?

A. Not the same every spring.

The [heighth] of the water as to the railroad track varies with each season but is relatively the same; if there should be an increase of 30% to 50% of the amount of water coming down the Sioux River the effect upon the track would be very little, if any; it would not require any more riprap and would stand up just as well as it does now; we would not need any greater flood bridges than we have now; we did need them in 1881 but it was then fixed out there to take care of the flood water we have left the same amount of lineal feet of flood bridges since 1881 to take care of the flood waters even since the spillway has been put in.

(Redirect Examination)

The riprap which was put in in 1907 was put in on the west spur which is possibly 400 ft. west of the main channel; it was on that branch or spur which runs north of the main line and the water has never since made any trouble; no other riprap has been put in.

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303 B. A. WAITE, called as a witness on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am B. A. Waite of Des Moines, Iowa; am assistant Engineer of the Chicago, Rock Island and Pacific Railway. I have been Assistant Engineer of the Dakota division coming into Sioux Falls frequently. I became connected with the line that runs into Sioux Falls in 1907; from then down to the present time I have been on this division, five or six years, and while I was working in Chicago and in Davenport I worked on this territory part of the time. Am a Civil Engineer, practicing that profession since 1892. Am familiar with the right of way and the bridges and railroad tracks of the Rock Island Railroad within this drainage district. I have here a map showing the property owned by the Chicago, Rock Island & Pacific Railway within the City limits of Sioux Falls, marked Rock Island Exhibit "1". That is a correct blue print representing the right of way, the property owned by the Rock Island Railroad within the City limits of the City of Sioux Falls. The red pencil mark outlines the property owned by the Rock Island Railway.

Rock Island Exhibit "1" is offered in evidence by the plaintiffs and received.

I have computed the number of acres of property owned by the Rock Island Railroad within Drainage Districts No. 1 and 2, and as far as I can tell it is about thirty acres (30) or a little less. There are two bridges on the Rock Island across the Big Sioux River, one two miles east of town and one just north of the depot. The Rock Island comes into Sioux Falls from the southeast, crossing the river the first time two miles southeast of the City. It then comes up the west side of the river into Sioux Falls. It then crosses the river again within
the City limits at the foot of 9th Street; that is a spur
304 known as the Bismark spur. The trains do not cross
this bridge. The Rock Island station is on the west side of the river on 10th Street. The Rock Island Railway

Company has no property within this Drainage District that is used for agriculture and none of it has even been so used. All of its property is used for railroad purposes, location of side tracks, industrial tracks, station grounds, roundhouse grounds and right of way of the main line. The Rock Island has no more property within the City of Sioux Falls or within this drainage area than is necessary for railroad purposes. The first half mile of the track from the east bridge toward the City is about eight feet above the average water of the Big Sioux River and is practically level with the adjoining ground near all the rest of the distance, and inside of the City limits it is above the level of the river about fifteen to twenty feet. That is true throughout the course of the line, except at the east end over the bottom where it is about eight feet above the river. Neither the track nor the embankment of the Rock Island has ever been reached by high water within my knowledge, and neither the track nor the right of way has ever been affected by high water from the Big Sioux River since I have known it. I have here a blue print of a cross section of the bridge about two miles southeast of town marked Rock Island Exhibit "2". I have checked the measurements over at this time and it is correct. There is in the center of this bridge a true span made of steel and then it has piled approaches. The approach on the east end is ninety-seven feet (97) and on the west end one hundred ninety feet (190), making a total bridge, including approaches, of four hundred nineteen feet (419). From the top of the tie to the bottom of the river is twenty feet.

Rock Island Exhibit "2" is offered in evidence and received.

305 I also have a cross section of the Bridge at 9th Street inside the City of Sioux Falls marked Rock Island Exhibit "3". This shows the construction of the bridge, with the exception of the pile portion, which has been re-built since that plat was made. The plat was made in 1913 and part of the piling on the east end has been filled in since then. It was filled in gradually, took several years from 1913 to 1915 and the land on either side of the bridge was filled in as we filled in the approach. The shore line has been filled out on either side of the approach so the approach was of no use there.

The exhibit is offered and received in evidence.

In regard to the bridge southeast of town, we have never had any trouble with that bridge from high water to my knowl-

edge, either before or after the building of the spillway. As an engineer I would not dare to fill in any of the bridge or any of the approaches at the present time, because at the present the waterway is no more than would be required according to our way of figuring the waterway required. We figure the drainage area on Dunn's tables and a certain proportion of that is the waterway required according to the area drained, and under such computation we have no more waterway under this bridge than is required for the area drained. The approaches to this bridge have not been in any way affected by the building of the spillway and the spillway has had no effect upon the bridge that I know of.

In regard to the bridge in the city at 9th Street, I understand it is proposed by Mr. Rittenhouse to eliminate one section of that bridge, that is the south or east one hundred ten feet (110) steel span truss. The bridge now is three hundred seven (307) feet long. If that span was taken out the bridge would be one hundred ninety-seven (197) feet long. I
306 would not dare to cut that bridge down to one hundred ninety-seven feet. The bridge as it is now is about the same length as the other railroad bridges on this stream. I believe they have two one hundred foot (100) spans, and if we eliminate one hundred ten (110) feet this bridge would be shorter than the other bridges. This bridge on 9th Street was raised by the Rock Island before I came here. This span that is contemplated to be eliminated by the drainage engineer is filled in about half way. There is no water under it at the present time, the current is under the other end of the bridge. This was caused by the building out of approaches and driveways, pushing out the shore line. The spillway has nothing to do with the filling of this river on either side. It has been caused by the buildings being extended towards the river. There is at the present time a garage known as the Homan Garage directly west of this span in the bridge and extending out at least half of the length of the approach, so that a line from the warehouse on the east side of the bridge to the corner of the garage would strike the middle of this span. I would not consider that it was reasonable engineering to eliminate any of this bridge. Since I have known this property the water of the Big Sioux River has never been over any of the track in any place, and I have known it since 1907.

(Cross-Examination).

It is twenty feet (20) from the rails on the bridge two miles south of town to the bottom of the river. This bridge was built in 1886. Either this bridge or replacements of it. Since

1907 it has been in the same condition. I have never compared this with the Great Northern Bridge down the river. I have never observed this bridge at extreme high water. From the area of the waterway required I would say that none of the approaches to this bridge could be filled in. I asked Mr.
307 Rittenhouse in regard to the watershed in this drainage area, and I think he said it was 4500 square miles. That was the whole watershed. I do not know the slope of the land from north to south per mile. I do not know the velocity of the water, but from our rules we could not reduce the length of the bridge. The steel span in the center is 127 feet with pile approaches. These piles are treated and should last 20 to 30 years. We do not know just how long creosote piling will last.

I said that one of the approaches to the bridge within the City had been filled in gradually along about 1914. It has not caused us any trouble since then. Where the filling is there was formerly a trestlework. Under the present condition of the river since 1914 it has not been necessary to have as much approach to the bridge as when it was constructed. The shore line that I spoke about from the Homan Garage to the warehouse, that is in a bend in the river. I do not know the difference in elevation of the two bridges and I do not know the velocity of the water at either one of them.

Q. And still upon this information that you don't seem to possess as to the fundamentals as to how much water this river carries, the slope of the land, or the difference in the [heighth] of the land, you still wish to be understood that it would not be safe, in your judgment, to shorten these bridges?

A. Yes sir.

I do not know what would be the effect on the bridge here in town if the amount of water flowing down the river should be increased thirty to fifty per cent. I think the one east of town would be all right, but I am not sure about the one here in town. The high water has never reached our embankment that I know of. I do not believe that the water has ever crossed our right of way. I do not remember of it. I
308 have not been here very often for the last year, once before in the last six months, but have been here before. My headquarters are at Des Moines. I have been here at high water periods. I could not tell you just what year, but I have been connected with this end of the railroad intermittently. I could not remember the year that they had high water when I was here.

(Redirect Examination.)

In regard to the filling in of the piling on the bridge in the City known as the Bismark Spur, the land adjacent had been built out to the end of the piling so there was nothing but dead water that stood under it. The water could not flow under the piling on account of the land having been filled in on each side.

C. E. Dean Called as Witness on Behalf of the Plaintiffs Testified as Follows:

(Direct Examination.)

I live in St. Paul and am a bridge foreman on the Chicago, Rock Island & Pacific. I am a bridge foreman upon the division running into Sioux Falls. I began work here in the fall of 1893 and left this division in 1913, so that from 1893 down to 1913 I have known this railroad running into the City of Sioux Falls, with the exception of the years 1905, and 1906, when I was with another railway. From 1893 to 1897 I was a bridgeman. From 1897 to 1905 I was bridge foreman, and from 1907 to 1912 I was master carpenter on this division. I was familiar with the two bridges on the Rock Island within this drainage district at the time I was here and down to 1913. I remember when the bridge across the Big Sioux at the foot of 9th Street in the City of Sioux Falls was raised. It was raised about four feet on two spans, but the old approaches were left alone. That was just before or about the time of the breakup of the ice in the spring. We contemplated a flood. The report came that there was an ice gorge
309 up the river. We expected it to break loose and have heavy water. It had been a hard winter and the ice was heavy, but it did not materialize. We had no trouble from it. The bridge was lowered a little after that, but not put back where it was originally. I think the permanent raise was about two and one-half feet and the ends dropped down to their original position. During the time that I was on the division we never had any trouble with the bridge southeast of town. I was here in 1907 when the spillway was put in, was master carpenter. I never have noticed any perceptible change in the condition of the water flowing under these two bridges before or after the building of the spillway. I have no record of high water marks myself. The building of the drainage ditch and the spillway has never benefitted these bridges in any way that I know of. From an engineering standpoint I cannot say but from a practical standpoint I would not fill in either of these bridges at the present time.

I base my opinion upon the fact that the engineers as a rule do not give enough waterway. I have taken many an opening —for instance—a four foot opening I put in once on the engineer's orders and afterwards had to be a seventy foot opening. During the time that I have known the Rock Island property within the City of Sioux Falls the railroad track has never been under water. The water has never been up on the embankments at any place to my knowledge.

(Cross-Examination.)

I was here in the high water of 1911. There was no damage that I know of. I have not been here at any other time of high water except in 1897. I have never made any definite measurements of the water in the river. I do not know the amount of watershed that the river and the ditch drain, I do not know the elevation of the land from our right of way north and I do not know how fast the water flows. I do not know the amount of water that comes down the river, or that comes down the drainage ditch. If the water was in-
310 creased fifty per cent I do not believe the bridges would stand it. The present bridges represent the same length of span that was here in 1893. Only the spans have all been renewed. There have been piers put in. The piles we are using now are creosoted piles. Piles not creosoted last about ten or twelve years, and this is true of hard wood culverts.

S. O. PERKINS, Called as a Witness on Behalf of the Plaintiffs Testified as Follows:

(Direct Examination.)

I am an inspector on the Rock Island Railroad. I have been connected with the bridge and building department as bridge foreman and master carpenter. I was master carpenter on the division running into Sioux Falls from January 1, 1913, to June 1, 1920. During that time I was familiar with the two bridges on the Rock Island in the City of Sioux Falls. During that time there never was any high water that damaged or threatened to damage these two bridges in any way. The water has never been upon the embankment of the right of way of the Rock Island at any time to my knowledge. I have worked upon these bridges more or less. As a bridge man I would not think it safe or advisable as a railroading proposition to fill in any part of these two bridges. From my experience I have been obliged to put in several larger openings at different points where we have had similar openings. We

have had to increase the length of the openings on account of high water, and I would not think it safe to close up any of these openings.

(Cross-Examination)

I do not know the number of acres of watershed drained by this ditch or by the Big Sioux River or the elevation of the land or the excessive or average rainfall for a year in this drainage district, and I do not know the capacity of the spillway to take care of the water from the ditch, but I want the court to understand that these spans could not be safely shortened. That is based upon the fact that several times I have had to make openings larger and that is the foundation of my testimony.

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311 A. F. PILCHER Called as a Witness on Behalf of the Plaintiffs testified as follows:

(Direct Examination).

I am general agent of the Rock Island Railroad at Sioux Falls. Have been here since June, 1890. I was the agent of the Rock Island until 1914 and since then the general agent. I have been familiar with the property of the Rock Island within this drainage district for thirty-one years. The Rock Island has no property within this drainage district that has ever been used for agriculture and none of it is used for agriculture at the present time. It is all used for railroad purposes, roundhouses, stations and railway tracks. It has no land that is not necessary for railroad purposes at the present time. The right of way and the rails upon the track in the city are about 20 feet above the water in the Big Sioux River at ordinary times. Two miles south of town, at what is known as the Cherry Creek bridge, they are about eight feet above the water. The right of way has never had any water standing on it in the Big Sioux River since I have known it, that is since 1890. None of the roadbed of the railway has ever been washed by the Sioux River. There has never been any difficulty with the bridge southeast of town in handling floods. In regard to the bridge at the foot of 9th Street in the City, in 1897 there were rumors that an ice gorge had formed and as a precautionary measure we raised this bridge at the foot of 9th Street but we found out it was not necessary. The high water did not develop. The Big Sioux River has never been out of its banks here in the City of Sioux Falls since 1890.

(Cross-Examination).

I live in Sioux Falls and worked for the Rock Island Railroad Company in 1916, 1917 and 1918 and at that time knew about this new ditch going in. I saw the publications in the newspapers. I knew it was being constructed. I went over to the spillway and saw it in the course of construction. I know of no reason why the land of the Chicago, Rock
312 Island & Pacific Railway Company could not be used for agricultural purposes if not covered with the railroad tracks. It has agricultural land as a basis.

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313 C. M. BASSETT called and sworn on behalf of the plaintiff testified as follows:

(Direct Examination)

My name is C. M. Bassett; I live in Sioux City; I have been a civil engineer 24 years; I am assistant engineer of the Great Northern Railway Company; I have been in its engineering department 9 years; at the present time I have jurisdiction of the entire Sioux City Division, including all of Minnehaha County, South Dakota; I have been in charge of that Division since the spring of 1916; during that period of time I have made frequent trips to Sioux Falls, and over the lines throughout Minnehaha County; for two years 1916-17 I was in Sioux Falls practically all the time; since then I have been here practically every week. I am familiar with what is known as drainage ditch Number 1 and 2, and the spillway; I am also assistant engineer of the Watertown and Sioux Falls Railroad Company; its line is located along the ditch for about 3½ miles; every spring I have been to the spillway; then I have been over the entire line of the ditch and looked at the various head-works and retaining dams; the line of the Great Northern enters the city of Sioux Falls from a northeasterly direction at a point about a mile and a half from the mouth of the spillway; that is the nearest point on the line of the Great Northern to the mouth of the spillway; the course of the line of the Great Northern as it goes through the city of Sioux Falls and around south of the City and down through Section 31 is as follows: We enter in a northeasterly direction and then through town we go practically north and south and then we swing southeasterly towards Yankton; Exhibit 1 is a plat I prepared or caused to

be prepared, showing the location of the line of the Great Northern over the area referred to and the general location of a portion of drainage ditch Number 1 and 2 and the location of the bridges along the line of the Great Northern within the area referred to; the plan is drawn to scale, 1 mile to the inch.

Plaintiff offered and there was received in evidence, Great Northern Exhibit 1. It is as follows:

MINNEHAHA COUNTY, SOUTH DAKOTA
Township No. 102 N.
Range No. 49 W.
5th P.M.

313a (Great Northern Exhibit 1, Map Showing location of lines of Great Northern Railway Company.)

314 The acreage of the right of way and station grounds of the Great Northern Railway within the area in question, Sections 16, 27 and 31, Township 101, Range 49, is 27.14; the acreage of the station grounds included in that is 6.09; tract 11 consisting of approximately one and one half acres is not included within the 27 and a fraction acres; tract 11 lies at the north end of our bridge 146 and on the west side of the main line; it is between the Omaha and Great Northern rights of way and the Milwaukee is on the north; it is just south of Tenth Street; it would be on Eleventh Street if it were extended out; it is an irregular tract; it was originally purchased for station grounds and is part of the station grounds of the Great Northern; it is bounded on the east by our grade; on the north, the Great Northern and Milwaukee connection; on the west the Omaha grade and on the south the river; the tracts of the various railway companies bounding it I would say are about ten feet above the natural surface of the ground; tract 11 has never been used for agricultural purposes; I would not consider it agricultural land; it is not accessible; it is bounded by the river and three railroad rights of way on there is no road into it; no one could get into it to farm it; it is not feasible for that purpose. I am familiar in a general way with the channel and banks of the Big Sioux River from a point near our bridge in the city of Sioux Falls; the North bridge down to and through Section 31; to the south of town the banks of the river are well defined; there is a deep channel there and the river is confined to that channel, through town there is a greater chance; the channel is wider and the banks are
315 not so steep; as you go further north the channel again deepens and it is confined, the valley is narrowed considerably south of town; I am acquainted with Mr. Rettinghouse; I had a conversation with him in reference to the manner or basis upon which he based his opinion and report to the Board of County Commissioners with reference to the alleged benefit to the right of way, bridges, tracks and embankments of the Great Northern Railway from Drainage ditch No. 1 and 2 and the spillway in question; the first conversation with him was in early spring of this year; the last one was about ten days ago, I think it was last week; during the first conversation Mr. Rettinghouse stated that he had figured we could shorten our bridge and had figured out the cost of renewing those and the cost of filling and made deductions and based his figure on that amount capitalized at seven per cent, and divided by twenty-five per cent, was what our assessment came to—the number of units.

"Q. In your conversation approximately ten days ago, did he go more into detail with reference to the subject?

A. Yes sir.

Q. State the substance of that conversation.

Objected to as not binding upon the defendant commissioners.

Overruled.

A. We have two bridges within the area, and he stated bridge 150-7 that that bridge was about the right size, and bridge 146-0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures, and figured on the amount saved by the shortening of the bridge.

316 Counsel.

At this time, if the Court please, the defendants object and ask that the question be stricken, and objects to the testimony of this witness on behalf of the plaintiff company, and to the proposition of whether or not the plaintiffs are benefitted or not, or the extent thereof, by the drainage project, for the reason the same is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction in the said matter in these proceedings, and proceeded with the construction and repair of the ditch in question. For the further reason that this Court has no original jurisdiction of a bill in equity to reject or control proceedings of the Board of County Commissioners of Minnehaha County in the construction or reconstruction and repair of this ditch. And that the plaintiffs have a plain adequate and complete remedy at law, by appeal from the equalization arising from the proceedings taken by the Board of County Commissioners. For the further reason, it calls for evidence of a fact, the determination of which is in the exclusive jurisdiction of the Board of County Commissioners, and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action, and with no allegation or proof of fraud or arbitrary action on the part of that tribunal. Is not within the issues of the case and not a proper subject of inquiry in these collateral proceedings, and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these proceedings attacking the question of whether or not they are or are not benefitted by the ditch proceedings?

317 The Court: Yes, the motion is denied. The testimony is received subject to objection.

Mr. Rettinghouse made no statement to me with reference to any other element of benefit to the Great Northern Railroad than the shortening of the north bridge within the city limits; basing my answer upon my knowledge of drainage ditch No. 1 and 2, the spillway, the location and construction of the tracks, bridges and embankments of the Great Northern Railroad Company, and my knowledge of the waters in the Big Sioux River; in my opinion no benefit results to such right of way tracks, bridges, embankments or station grounds from drainage ditch No. 1 and 2, including the spillway; no part of the right of way, tracks or bridges within the area in question to my knowledge have ever been flooded by the waters of the Big Sioux River; we have a plan drawn up for a new steel bridge at bridge 146 which provides for shortening of fifty feet of that bridge and putting in deck girders which are much lower and nearer the water; we considered that owing to the fact that we are lowering the steel we would have to provide practically the same opening we have there now; in planning to shorten the bridge fifty feet we did not take into consideration the existence of the drainage ditch; the present height of the track on this bridge above what I understand to be the high water mark of the Big Sioux River, according to our best record is eleven feet; if I were planning to construct new the bridges in question on the Great Northern, or to rebuild them, in determining the sizes of the openings from an engineering standpoint, I would not take into consideration the existence of drainage ditch No. 1 and 2, because by observation has been that before the spillway went out in 1916, and the water conditions have been just the same; I consider there is great danger as the spillway is constructed now of its going out, and there is danger that they will have to close the ditch and turn the water back into the original channel; I would not take it into consideration even if the ditch and spillway were working at capacity; I don't think it takes enough water out of the river to make any
318 material difference; I would plan new openings without considering the ditch and considering the highest possible water in the river; I would consider it bad engineering to plan otherwise.

I observed the flood waters that entered the ditch coming out of the ditch north of Sioux Falls and re-entering the Big Sioux River; on the Watertown and Sioux Falls we are flooded every year just south of the city pumping plant at the top of the hill; the water comes out of the ditch and goes over our track; it has every year I have been here; we have probably over six inches over the top of our track; the water stands in there, sometimes for probably ten days on the Watertown and Sioux Falls line.

The length of the north bridge is 615 feet; I do not think it would be good engineering or safe for us to shorten that bridge more than fifty feet under any conditions; as I have stated, for some period of time we have contemplated the construction of a new bridge and of a different type, and shortening it fifty feet; as constructed at present the bridges are supported by a truss above, and in contemplating the new construction we had in mind what we called a deck girder, and that support is below the rail which makes a difference; our plan will be to lower it five or six feet due to the use of deck type girders instead of the truss now used; in planning this new bridge we did not take into consideration the possible effect of the drainage ditch.

(Cross-Examination)

When we lower five or six feet, the girders I have mentioned which are in the nature of I beams probably five feet thick, will still be underneath the track; the elevation of the track would remain the same but the bridge work is all underneath the track; from my observation I say that during the last five years the water from the south bridge and north to the termination of our line in the city has remained
319 about the same; during this same time the water has been high enough up around the penitentiary where the Watertown track goes to flood its tracks some inches of water every year; the water that came over the Watertown & Sioux Falls came out of the ditch; I have been told and know approximately the amount of watershed in this drainage project; I couldn't say off hand how much it is; I haven't the figures with me; I do not know how much water really falls in the watershed when we have high water here; I know generally the topography of the country north of Sioux Falls through which this water is collected and conveyed by the river and ditch south; I have been pretty well all over it; I do not know the number of cubic feet of water the river carries per second when it is banked full at flood time, nor the whole capacity of the ditch and spillway; I was up there

when they were building the spillway in 1917 and have been watching it; I didn't like the construction; I saw them repairing the ditch on north and throwing up embankments on either side; I am still of the opinion that the spillway isn't what it should be; I have seen it every year since then; I know of no reason why if the tracks were not upon the right of way and station grounds, those premises could not be used for agricultural purposes, except our station grounds which are right on top of rock; Section 31 and 27 could be used; Tract 11 I don't think has any soil to amount to anything on it; the bridge in town is 615; since I have been on the division there has been no new bridge put in; these bridges have been constructed for some years and before the spillway project was put in; I judge that they were put in to take care of the water that came down the Sioux River at the time; the water has come out of the ditch every year since the spillway was put in; north of the city at level siding
320 the water has come out of the ditch over the tracks of the Watertown & Sioux Falls Company right at the city pumping plant; it comes through the dikes in the ditch.

(Redirect Examination).

Along the right of way south of town we have an embankment about 1800 feet long; bridge 150-7; it is about 16 feet deep; side slopes approximately one and one half to one, approximately fifteen feet high; the toe is protected in some places with rip rap, and it is now overgrown with grass and weeds; that embankment is so constructed as to withstand any possible flood condition in this neighborhood.

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321 THOMAS SIMPSON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination)

My name is Thomas Simpson; I have lived in Sioux Falls twenty-seven years; I am general agent of the Great Northern Railway Company at Sioux Falls, and have been its agent for twenty-seven years; I am familiar with the line of the Great Northern included within the area in question here in Section 16, 27 and 31; during such twenty-seven year period no part of the tracks, bridges or right of way of the Great Northern Railway within that area has been flooded; we have had no trouble during that period of time from high water; the station of the Great Northern is east of the river; I have lived on the west side of the river twenty-seven years; the depot has been located where it is now approximately fifteen years;

during that time I have crossed the Big Sioux River several times a day and I have not observed any appreciable difference in the flow of the Big Sioux River before and after the construction of the spillway.

(Cross-Examination).

During the time referred to in my testimony the height of the river has fluctuated, but there has been no floods; the height during flood periods has been at about the same level; I do not know how much water the spillway takes care of or how much the river banks carry; I heard about it when they put in the spillway.

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322 ANDREW NELSON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination).

I am section foreman for the Chicago, Milwaukee & St. Paul Railway between Baltic and Renner. Renner is six miles and Baltic fourteen miles north of Sioux Falls. I have been section foreman there twenty-seven years and was foreman in 1916. There is a place on my section where the drainage ditch is just outside of the right of way. I think they diked it there four feet just outside of the right of way. From a point about four miles south of Baltic the ditch is on the west side of the railway, and from that point down to Renner it runs close to the track. The Ditch runs between the railroad and the river and the ditch and the river are both on the west side of the track. In 1916 at a point four miles south of Baltic the dam went out of the river and the river let the water in the ditch. The ditch couldn't carry the water and it went over the bank and washed the dike out, and a few miles further south it washed the track and let all the water out over the farms around. It flooded the farms around there and washed back on the track. This water came from the ditch. The ditch is constructed with a dike and the water broke through that dike. Before the water came out of the ditch there was no water east of the track. The water came into the ditch and went out of the ditch and washed all the track out and flooded the ground. The water in the ditch came from the river. I did not have any trouble with the water in 1919 and 1920. It came out of the ditch at several places, but not enough in those two years to hurt the track. In 1919 and 1920 the water came out and went up to the track and the
323 ditch was full of water. It came to the bottom of the railroad track but didn't cut in much or wash. At the

time the water came through and flowed up to the top of the bridge there was no water east of the railroad track. There was no flood water between the ditch and the river until the water ran out of the ditch. It ran out of the ditch and filled up between the river and the ditch too. It went over the dike on the west side of the ditch. The origin of that water was the river. In 1916 the water remained on the [—] that were overflowed about ten days or two weeks. In 1919 and 1920 it stayed over two weeks. It stayed a little longer in 1920 than in 1916. The point at which the ditch protects the track is about a half mile south of the Thompson bridge. The ditch comes to the right of way at the Thompson bridge and runs nearly four miles down the track. The water comes in the ditch where that bridge is built. There has always been a bridge there. They built a cement bridge there a year ago. It is a highway bridge. At the point where I said it washed out we had to put in [riff raff]. We had to build a bridge there temporarily and afterwards we filled it with [riff raff] and it is [riff raff] now.

(Cross-Examination).

The water will wash the track out the way the bridge is put in there. The water in 1916 washed out part of the track but not at the place where the bridge is. That was the year the old spillway went out and there was high water that year. I have no idea of the amount of rain or water that was carried by the river or ditch in 1916-1919 or 1920, in 1897 the track was washed out south of Renner. In 1916 the water did not cover the abutting lands before it went through the track, but it did not cover half as much ground as it did in 1897. Then it covered all over the East side after it got through the track. If the dikes were raised a foot or two they would keep more water in than they do now; our track was not injured in 1920.

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324 NELS OLESON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am section foreman for the Chicago, Milwaukee & St. Paul Railway Company. I started in 1887 as a laborer. The most of the time I have been employed as section foreman I worked in the yard five miles south of Sioux Falls. I have been continuously living here and working for the railroad company since 1887; I have not noticed any injury to railroad property or to railroad property covered by waters from the

Sioux River south of here during that time, and none in Sioux Falls. I do not know of any water doing any damage on J. L. Phillips' Addition and on the Millspaugh's Addition near the roundhouse, or east of the roundhouse, or north of the ice house. I do not know of any flood waters doing any damage to railroad property since I have been here. There are five tracks in the new yard in what they call Daniel's Addition and Millspaugh's Addition in the vicinity of the ice house east of the depot. I do not know of any damage being done there. There has been no interference with any of these tracks by the waters of the Sioux River since I have been here. There has never been any difficulty or damage on account of the flood waters at the roundhouse property.

(Cross-Examination).

The ice generally comes down in the spring and goes over on the east side and over the rocks there. There is a current through the east side of the channel of the river and it lifts the ice right around the roundhouse. The water comes close to the roundhouse but never does any harm. It does not come out to the banks by the ice house very much. I never saw water standing in the ditch alongside the track on the ice house side.

"Q. You don't know, Mr. Oleson, whether or not the amount of water that has been gathered into the Sioux
325 River and the ditch above Sioux Falls in the past five or ten years has increased or not, do you?

A. I couldn't tell you about that.

Q. And so if there is twice as much water coming down this valley as previously came down, you couldn't say that was true or not?

A. If the water raised five or ten feet I could tell.

Q. You don't know the actual amount of water?

A. No, I don't know nothing about that."

William Shea Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am general road master of the Chicago, Milwaukee & St. Paul Railway Company, and have been such about four years. Prior to that time I was district general road master and division road master. I have been in these divisions for the railroad since 1890. Prior to that time I was track laborer and section foreman and construction foreman. We have

many miles of railroad built across river bottoms and creek bottoms where we have to maintain grades that will guaranty us that we can operate our railroad during high water. The Chicago, Milwaukee & St. Paul have many lines upon which heavy traffic is carried upon which they have tracks to maintain under such a situation. I have been over the line between here and Baltic and have noticed the material of which the grade is constructed. From what has been my experience and observation I would state that adjacent water standing alongside of and extending against the grades has no effect upon the maintenance of the grades or the stability of the track upon it, for the reason that we used our track embankment in many cases as the bulkhead to our reservoirs of water for engine supply. We do not hesitate to use our track bank for that purpose. We have many of them on our railroad and we do not notice that we have any bad results from it.
326 No additional expense of up-keep is occasioned by that situation on embankments twenty years old or over. We prepare our property for the purpose we are going to use it for by building up a track bank. In this particular instance, it would cost from $800 to $1,000 an acre for us to build up the track bank and make the line serviceable for our purpose, which in this case is about what that cost up there. I do not believe the farmers ever went to any expense worth mentioning in that community to prepare their properties that way. I didn't notice anything of the kind. The overflow upon this embankment or alongside the embankment would have no effect whatever upon the railroad bridge. If
327 the flood remained two or three, or five days, upon the adjoining agricultural land I think it would ruin their crops.

(Cross-Examination)

It would cost $800 to $1,000 per acre to prepare our right of way for railroad purposes, and if the embankments would wash out it would cost something like that to replace it. It has not been our experience in washouts that the damage to the right of way of the railroad would be greater than it would be to the farm land. When the water goes over it generally breaks through the embankment and cuts out a short piece, or whatever is necessary to carry the overflow of water from one side of the track to the other. After the water would get over our track it would not take our entire roadbed out, just break through and make openings similar to the kind we have in other places known as arches. It would not necessarily take out our entire embankment. Yes, when this embankment is taken out and is washed away it does hold up our

traffic and cuts off our income during that time just the same as the farmers. It costs about twenty-five dollars a cubic yard to put the dirt back in the washout.

I am familiar with this branch of the railroad running north and going through the drainage district. I pass over it and inspect it in different ways three or four times a year. We have had no washouts for the last four years, other than that the water got up on the track in 1919 and 1920. This [—] didn't come over the track but it got very close to it. We possibly delayed our traffic. I came over on this line in 1918.

WILLIAM E. WOODS Called and Sworn on Behalf of the Plaintiff Testified as Follows:

328 (Direct Examination)

I am assistant district engineer of the Chicago, Milwaukee & St. Paul Railway and have been in the employ of that company about thirty years in the engineering department. I am familiar with the lines of the Chicago, Milwaukee & St. Paul Railway described in the notice of assessment published in the Daily Argus Leader dated July 13, 1921. None of the land of the railway company is used for agricultural purposes. The width of the right of way is usually one hundred feet, being 50 feet on each side of the center line of the main track. We have a little piece of right of way in Sioux Falls 50 feet wide, being 25 feet on each side of center line. There is approximately 198 acres of right of way in the drainage district, none of which is agricultural land. I am acquainted with the lands described as Lots 13, 14 and 15, of Block 28 of Millspaugh's Addition to Sioux Falls. That property is near the ice house property south and east of the town. It is used for new yard tracks. The main line lies between the trackage of this yard and the river. These tracks are lower than the main tracks. The main track was built in 1879. It has never been disturbed by high water. It remains in the same position as when originally constructed. Block 9 of Daniel's Addition to Sioux Falls is just east of Millspaugh's Addition and is used in the same manner. Lots 5, 6, 7, 8 and 9 in Block 25 of J. L. Phillips' Addition to Sioux Falls is used for roundhouse and ice tracks and turning table. This property is situated on the west bank of the Sioux River about 18 or 20 feet above the surface of the water.

329 (Cross-Examination)

The Chicago, Milwaukee & St. Paul Railway Company have 198 acres altogether in the drainage district. That in-

cludes what is known as the right of way of the north branch and also includes same going south. A very small portion of that 198 acres is taken up by the roundhouse grounds and the yard out near the ice house. The most of it is right of way. If there were no railroad through the most of it it could I presume be used for agricultural purposes.

A. G. HOLT, called and sworn on behalf of the plaintiff testified as follows:

(Direct Examination)

I am assistant chief engineer of the Chicago, Milwaukee & St. Paul Railway Company and have held that position about eight years. I am a civil engineer by profession and have been connected with the railroad company in a professional capacity about thirty years. I am familiar with and have made a study of the matter of locating lines of road. In turning the line of road from one point to another the character of the country generally determines or controls the location of the line. In locating a line of road through the Sioux Valley an engineer would necessarily have in mind as one of the elements the cost of construction. He would have in mind the height of embankment to be constructed and maintained on account of flood waters. That would be an important feature. In making a location it is a part of the duty of the locating engineer to find out the height of the flood waters of the various streams he crosses. The grade line is usually established with reference to the high water. The engineer gets as much information as he can in regard to the elevation that the high water reaches in the valley. He gets the information partially from the people who live there and partly from his observation of high water marks as they are shown on trees and washes in the sides of the valley. He then deter-
330 mines largely the height of the grade from past experience as indicated by the information he has received. In determining the openings and bridges the engineer makes what is called a ravine section. That is a chart showing the elevation of the valley. Then on this chart he shows the elevation of the high water and from that he computes the size of the bridges and the openings, that will be required to carry that water. There are certain rules adopted by railway companies upon which these computations are made, and they are made as an engineering proposition. I have recently examined the territory put into the drainage district. In locating a new line of railroad through the Sioux Valley occupying the place where the Milwaukee railroad now has its

track you would have to take into consideration the fact that the drainage ditch was there. You would have to provide a bridge to span it. In providing the openings in bridges and other provisions in the line for overflow of water I would not make any deductions on account of that ditch, because I would figure that at the time of the flood the entire valley would be covered with water and this ditch would be simply a wrinkle in the valley. When the flood waters were the highest they would cover the ditch up.

(Cross-Examination)

I do not know the amount of cubic feet of water the river carries per second. I do not know the cubic feet per second the ditch carries, yet I think the ditch is a wrinkle. In computing the spaces I have testified about which I would make for a bridge, I do not think the speed of the water in passing a given point would make any difference if you had a high water mark that was dependable. If subsequent to the time I had that high water mark something was done to increase the speed of the water in passing a certain point I would have to take that into consideration.

It is stipulated that the mileage of the Great Northern within the drainage district in question, to-wit: Sec-
331 tions 27, 16 and 31, is 3.04 miles.

It is stipulated that the mileage of the Rock Island Railroad within Minnehaha County is 4.3 miles and within the district sought to be assessed 3.5 miles.

THOMAS HARDOMON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination)

I have lived in the City of Sioux Falls since April, 1879. I am a member of the City Commission and am in charge of the roads, streets and highways of the City. I have been a City Commissioner of the City of Sioux Falls for nine years last October. Since 1879 my occupation has been constructing and road work a great deal of the time. Some of the time I have done bridge work on railroads. I was in Sioux Falls in 1881 at the time of the big flood. There was an ice gorge out on the south side right over where the bridge runs on the Coats farm. When it came through the City it took all the bridges but one and swept up the mills and lumber yard on the east

side. The only thing left on the east side was the Omaha railroad bridge. With the exception of that flood which was caused by the ice gorge there has never been any high water since I have been here that has done any damage to the property of the City. The Coats farm is about two miles southeast of here. I think the west line of the farm is in the neighborhood of Eleventh or Twelfth Avenue. It is probably eighteen miles from the spillway following the course of the river around. I am familiar with the topography of the channel of the river from Sherman Park down through the City. As you leave Sherman Park the most of the shore line is fairly level on one side. On the other side it is higher and goes up further from the river. For several miles there is a high plain on the right hand side as you go down the river. The banks on the left side are fairly high too in places.
332 From the time you leave Sherman Park until you get down below where the ice gorge formed in 1881 you have a very decided embankment on each side of the river. The river through the territory I have mentioned is much narrower than it is up above Sherman Park. The ice gorge at the Coats farm held all of the water that collected there, except what ran in the channel until the ice gave way. It gorged different places there. It kept creeping along there for probably two or three days before it came down here. The waters did not spread out on either bank of the river. There was no gorge close to the neighborhood where the Milwaukee roundhouse is now in 1881.

I was here when the Great Northern bridge was built that crosses the river about Seventh Avenue and worked on that bridge. During the past nine years my duties in regard to city property have been overseeing it and attending to it, and also attending to the bridges across the river through the City and matters of that kind. From the experiences which I have had during a residence of over forty years here I should say the results would be very unsafe of narrowing the bridges and lowering them in case of extra high water. This would be on account of the volume of water, and in case of ice gorges would leave it too narrow underneath. If a flood took one it would probably take all of them and form a gorge.

The east side of Sioux Falls is thickly built up with business places, wholesale places and residences, lumber yards, and institutions of that kind. The City pumping station and the City electric light station are situated half or three quarters of a mile north of First Street. The pumping station is south and west of the spillway. The electric light and water

plant is south and west of the pumping station. The spillway runs to the north and east of our property. The water
333 plant and the electric light plant are a little north and west of the Penitentiary. I observed conditions of the water around the electric light and water stations during the years 1919 and 1920. I was up there on different occasions when there was any danger or any prospect of water. My official duties required me to be there and investigate those things from time to time. The water around the City electric light plant and pumping station was greater in 1920 than it was any year prior to that excepting 1881. I do not remember so much about it in 1919. We were up there quite a number of times in 1920. When we went in there the water was over the tracks of the two railroads there and there was also a flood down almost to Russell Street and from there down to Covell's Lake. The high water subsequent to 1881 has done no damage to speak of that I know to the City property in the City of Sioux Falls. The water went over Minnesota Avenue in 1920 but not enough to amount to anything. It took a few loads of cinders to patch it up. I never saw the water on the West Sioux Falls road, with the exception of 1881, any higher than it was in 1920. Each street there is two and one-half or three feet above natural ground. In 1920 it went up to just about where it could go over. Then the bridge there carried it down to Covell's Street bridge and it flowed away. Phillip's Park runs along the east bank of Covell's Lake and goes up very abruptly to the east, all except a little piece down at the First Street bridge. There is a little corner there that is a little low, but the balance of it runs up to the east and slopes quite sharply. It has some fruit trees and some other trees on it and has been terraced up in the shape of a park. It is quite broken and is not agricultural land and is not used for agricultural purposes.

334 Sherman Park is very low and all timber and is in where the river bends around considerable. The west side runs quite flat but the east side goes up very abruptly. No part of Sherman Park is agricultural land. Sherman Park overflows pretty nearly every year. The bed of the stream forms a circle in the Park for probably three quarters of a mile. I do not know that the spillway and these ditches have ever been of any benefit to city property. It is pretty hard to state whether or not the spillway materially [effects] the flow of the water through the City, because when the water is high it overflows a lot which comes down in the spillway and almost directly east of the pumping station. Then it
335 comes out through a little ravine and into Covell's Lake and finally into the river.

The City has a park known as Lien's Park near where the spillway empties into the river. It has practically put the park out of commission. The water practically keeps it covered and washed out considerable. There has been an attempt to rip rap or dam it up, but it has been of no avail. That condition did not exist prior to the establishing of the spillway.

In the City pumping station and electric light plant there are five wells, four of them are 25 to 50 feet in diameter. The last one is U shaped and is 16 feet. The furtherest one west is close to a mile west of the station. The City has a piece of ground that surrounds the well directly north of the pumping station. As I remember, there are about twelve acres in it. It is planted to young willow trees. Well No. 1 is located on this tract and well No. 2 is right close to it and directly west. Then follow each well after that up to No. 5. It is probably 30 or 40 rods running east and west at right angles west of the road. The tract is enough as the population of the City increases from year to year for the establishment of
336 additional wells as the needs of the people require.

All of the property other than I have described, that is the three parks, the City pumping station and the electric light station, that is included in the assessment is the streets.

(Cross Examination)

There was high water in 1920.

"Q. Did you not testify in the case of Gilseth vs. County Commissioners, that if this ditch had not been reconstructed and the river had been permitted to take its then course over the bluff it would have destroyed the waterworks of the City?
A. It might."

The water was high twice that year; in the first place when the spring rains came and the snow went off, and then along about the first of June there was a heavy rain in the neighborhood of Flandreau that reached us a few days afterwards.

"Q. And the water was so high that year that it contaminated the city wells and it was necessary for your department to place certain notices in the city papers, in which you informed the patrons of the water company that they should boil all water before using it?
A. The commissioner of water might have done that. Never anything of that kind came before the Board that I know anything about.

Q. As a matter of fact the water did come into the wells in 1920, surface water?

A. I don't know. I would not want to say one way or the other."

The city owns a plat of land known as Sherman Park within the drainage area, it is owned and kept by the city for park purposes; it is practically overflowed every spring; I do not recall whether it was overflowed in the spring of 1921; I was not there that spring; the water does not need to get up but a little ways because the land is very low; the river forms the letter S just around it. Pos-
337 sibly anything that tends to divert a portion of the water that comes down the Sioux Valley and keeps it out of the river as it goes through Sherman Park would be a benefit to that park; there is none of the Covell's Lake Park, excepting a little piece of ground just by First Street Bridge, that would be overflowed; I do not think the water would cover one whole lot; we have 125 miles of street, and some of them cost more for up-keep and some of them cost less; I think the up-keep would be somewhere in the neighborhood of $100 per mile; in 1920 during the high water, the water came up on the [wides] of the West Sioux Falls road, but didn't cross it; the roadway is much higher than the surrounding ground;

"Q. That is true when Sherman Park floods, isn't it. The refuse from the river [funs] up on the banks and is left there, and a very healthy crop of mosquitos is produced?

A. There is a very good reason for that. Sherman Park is filled with little ravines and is very much shaded. It is much better now than it was because many of the trees have been cut out.

Q. Directing your attention to the Park again, those conditions are true every time that it floods, that it causes an unsanitary condition there?

A. I presume it does to a certain extent."

We have abandoned Lien's Park on account of the water, which has practically cut out the park; it has been kept open, and there are some picnics held there, but it is practically abandoned; it is a little north and east of the Penitentiary, and just a little west of the spillway.

338 In my judgment it would be unsafe to change the lengths of the railroad bridges and other bridges across the Sioux River in town. The Omaha bridge is some wider than the Eighth Street bridge, I think. They have filled some

of the trestles of the Omaha. It is not so wide as it was before. As the Eighth Street bridge now stands, I think it has always served its purpose of letting all of the water of the river pass underneath it. I do not know the amount of water that comes down the Sioux Valley. I know that the elevation of the land north of the spillway is about two and one-half to three feet to the mile from Thompson's bridge down to where it enters the present spillway. The amount of water shed varies very much. It would be pretty hard to tell the amount thereof.

(Redirect Examination)

The channel of the Big Sioux River that passes through the city has been infringed on very much in the past twenty-five years; Since I came here in 1879—the river covered much more territory then than it does now and was very flat. When we got a heavy rain the stream flowed out and later would narrow down to a smaller stream again. During the years 1919 and 1920 the water in the river has been the highest that I can recall, and especially up around the city water plant and electric light plant, than at any time prior to that, since 1881; there has been no damage by high water to the city property since 1881; the Cascade Mill dam was built I think in 1878; they were fiinishing it in the spring I came here.

F. E. SPELLERBERG, called and sworn as a witness testified as follows:

(Direct Examination.)

I am and have been since March 1916, superintendent of parks of the city of Sioux Falls; only a very small part of one end of Covell or Phillips park and about half of Sherman Park and about half of Lien Park are affected by
339 high water; Lien Park is situated a little east of the spillway; since the spillway was put in, the Board has taken out practically all the improvements at Lien Park that could be used at other parks and merely cut the grass and keep it available for use at such times as people can go in there when it is dry enough; we took out the improvements because we could use them at other places and they were practically abandoned and of no use at Lien Park on account of flooded conditions from the river overflow from the spillway; the city has practically abandoned Lien Park as a park since the spillway was built; prior to the building of the spillway the city had started in to improve it; the spillway empties into the river above Lien Park and then flows down past it.

The high water does not affect Phillips Park to amount to anything; it overflows a small area at one end where the ditch overflows and comes down to Covell Lake; Phillips Park is practically all high ground bordering on Covell Lake with the exception of a small flat area at one end; it is rough land and cannot be used for agricultural purposes.

The lands of Sherman Park cannot be used for agricultural purposes; that park has overflowed every year except one since I have been here; it did not overflow in 1921; with the exception of that year it has overflowed every year for five years; in 1919 the overflowed condition started in the latter part of May and continued for two weeks into June and then dried up for a short time; the park was [seeable] on the 20th of June and then overflowed once more in the middle of July; in 1920, we had practically no use of the lower part practically all season, the lower part of the park is on
340 the west side of the river; in the years 1919 and 1920 the river came up the highest it has been to my knowledge and the overflowed conditions continued longer those years than in any prior year.

(Cross-Examination).

"Q. The length of those periods would indicate to your mind that there was more water came down the Sioux Valley those years, would it not?

A. I am not sure I am competent to judge.

Q. You would naturally arrive at that conclusion?

A. I might.

Q. Anything that would tend to divert that water would be to the advantage—If a certain amount of water came down the Sioux Valley and you could keep part of it or divert it from Sherman Park, it would shorten the period that Sherman Park would be covered with water would it not?

A. I would sooner not answer that. I don't know that I am competent.

Q. Say yes or no.

The Court: I don't think he can."

There are 52 or 53 acres in Sherman Park; only about 20 or 25 acres are on the lower level; if the land was not occupied for park purposes, it would not make a good pasture as there is not enough grass there; the land around there is used for pasture, but it is higher; the land north of the park is used somewhat for cultivated crops and they are taking their

chances on it; the acre and a half or two acres at Phillips Park could be tilled or turned into pasture or produce hay after a fashion; they would have to wait until after the
341 flood had come down; it makes a late crop proposition.

O. S. THOMPSON, called and sworn as witness testified as follows:

(Direct Examination)

I reside in Sverdrup Township and was born there in 1875 and have resided there ever since; about 10 miles north of Sioux Falls; I own 503 acres in the Big Sioux River Valley where I live; within the drainage district there is close to 300 acres; I have farmed my land since 1897 and was residing there when ditch No. 2 and also ditch No. 1 was constructed; I think ditch No. 1 was constructed in 1909 and ditch No. 2 was constructed the following year; ditch No. 2 starts about 1 mile northwest of Baltic; it starts right in the river at a point about 15 miles north of the spillway near the penitentiary; from the point where ditch No. 2 starts to where it joins ditch No. 1 is about 11 1/2 miles; the length of ditch No. 1 is 3 1/2 miles; the width of ditch No. 1 at the top is about 90 feet; the top width of ditch No. 2 is 45 to 50 feet; it is possible that at the very north end it is down to forty feet; the average depth of ditch No. 2 is about 6 feet and of ditch No. 1 about 6 feet; the present spillway was finished in 1918; the old spillway was washed out in 1916; the present spillway is a little less than 12 feet in diameter; the intake of the spillway is the lower end of ditch No. 1 and is rip rapped, then there are two gates leading into a hole that goes down through the ground about 40 feet; the shaft is perpendicular for about 40 feet; at the lower end of it a channel is run out towards the river towards the east sloping downwards so that it comes out just above the river level on the lower end; there was nothing that prevented all of the water that was gathered by these ditches No. 1 and No. 2 at the outlet or spillway to prevent all of the water going over the hill; since the new spillway was put in, I have lost more crops than I did before it was put in and after the
342 construction of ditches No. 1 and No. 2 my losses have been considerably more since the new spillway was put in than they were before it was put in and after the ditches were constructed.

Defendants were thereupon given permission by the Court to make the witness their witness for the purpose of identify-

ing certain exhibits and he thereupon testified in behalf of defendants as follows:

Defendants' Exhibit 2 is a petition to the County Board asking for the establishment of what is known as Covell Lake cut-off. The first signature attached thereto is mine. I signed that, and I had that presented to the County Board for the purposes set forth in the petition. I own land in the vicinity of Drainage Ditch No. 1 & 2 that is affected by that ditch. I evidently furnished the bond designated as Defendant's Exhibit 3.

Defendants' Exhibits 2 and 3 were offered and received in evidence as part of defendants' case.

FRED H. REED, Called on Behalf of the Plaintiffs and Sworn Testified as follows:

(Direct Examination.)

(It is stipulated that Northern States Power Company is the successor in interest of the Sioux Falls Light & Power Company in and to the property involved in this action.)

343 My name is Fred H. Reed; I have lived in Sioux Falls since 1899; my occupation before coming to Sioux Falls was farming; since coming to Sioux Falls I have been looking after farms, real estate and other properties; I was the Secretary of the Sioux Falls Light & Power Co., and of the Sioux Falls Improvement and Development Co's interest in certain properties in the vicinity of the Queen Bee Mill at one time; I had charge for Mr. E. W. Coughran and various of his associates of properties in the vicinity of the present hydro-electric plant of the Northern States Power Co. for a long period of years and since about 1900; my office is in the Lacotah Building between 8th and 9th streets and between Phillips Avenue and the Big Sioux River on the east side of Phillips Avenue and the west bank of the river in Sioux Falls; it is in the rear of the building facing the river; at the time I came to Sioux Falls there were three dams across the river in the vicinity of the present power plant; the Cascade or upper dam, the Queen Bee dam, and what was known as the Bennett dam; the Cascade dam is the dam below 8th Street and is still in existence; the Sioux Falls Light and Power Co. was organized in 1907 and constructed the present hydro-electric plant of the Northern States Power Co., completing it in 1908; prior to the construction of that plant the Sioux Falls Light & Power Co.,

acquired in the spring of 1907 and operated the Cascade mill property; I first became associated with the property which is now the property of the Northern States Power Co. and the Queen Bee Mill property and the other ground in that immediate vicinity in 1900; I am familiar with the nature and character of the present real property interests of the
344 Northern States Power Co. including tracts 6 and 7 of the County Auditors subdivision of the Northeast of Section 16, township 101, Range 49, Lots B and C of Sioux Falls Light & Power Co's subdivision, tract 2 of the County Auditor's subdivision of the Northwest Quarter of said section 16, and also the property upon which the hydro-electric plant is now located; I don't know that there is any soil on that real property; it is rock, granite, come to the surface; that is true with reference to all of that tract of land in there; in my opinion it would not be possible for any part of that land to be used for agricultural purposes; the hydro-electric plant of the Sioux Falls Light & Power Co. now the Northern States Power Co., was operated partially under my supervision as one of its officers; I was familiar with its construction at that time; at the time of its construction the question of constructing it in such manner as to withstand all flood conditions of the Big Sioux River and prevent any damage to the property or its water power from flood conditions was discussed and taken into consideration; the hydro-electric plant was so designed under the instruction of our company as to guard against such flood conditions and was so constructed; at that time our engineers had data with reference to the flood waters of the Big Sioux River; no part of that property down there now owned by the Northern States Power Co. has been flooded since 1900; I have observed it every year since then; the largest flood that I recall, I think, was prior to the year of 1907, the time the ditch was first constructed; at the time no part of this property was
345 flooded; the hydro-electric plant of the Northern States Power Co. is east and some south of the spillway if ditch No. 1 and 2 and north of the Cascade dam and the city of Dell Rapids is north of the spillway; I think the hydro-electric plant is about ½ mile from the mouth of the spillway; the foundation or lower part of the hyro-electric plant is made right in the solid rock; the rock was blasted out for a distance of something over 30 feet deep; that part would be solid ground and the part from the granite on up with cement, concrete; for the first story it is in granite; the dam was so constructed as to take care of the flood waters; I have observed from my office window the condition of the

river at various times during all these years; I have not observed any appreciable difference in the volume of water flowing down the Big Sioux River since the construction of the spillway; the Lacotah building property is never flooded and the water never got into the basement.

(Cross Examination)

At the time I was connected with the company I was familiar with all the Northern States Power Co. equipment and machinery and with the three dams; the dam which the Northern States Power Co. now has is the same dam the original company put in; that was Queen Bee property at one time; the Bennett dam was below the Queen Bee property; it is not there now; it was about 16 feet in height and I think has all been blasted out; when the dam was taken out I think the tail race of the Northern States Power Co. was lowered; I suppose on a level with the river below the dam, probably 16 feet; that would help the water get away
346 from the wheels of the plant and produce more power; I think the Sioux Falls Light & Power Co. had a seven foot flume; I don't know whether the Northern States Power Co. has changed the flume or not; the property north from the dam to the present hydro-electric plant of the Northern States Power Co. is mostly granite.

O. A. ROFELTY Called on Behalf of the Plaintiff and Sworn testified as follows:

(Direct Examination)

My name is O. A. Rofelty; I live in Sioux Falls, South Dakota; I am Manager of the Northern States Power Co. and have general charge of its business and the operation of its property including this district; I have been in that position since November 27, 1918; the plant consists of Hydro and steam plants for the generation of electric power; that is essential; it is quite necessary for us to have the steam plant to supply the demands for electricity in the city of Sioux Falls; the water plant has not sufficient capacity; in the past, during the year 1921, there has never been a day but when we kept the steam plant going all the time, not even an hour, day or night; it was necessary to do that in order to serve our customers; we operate the two plants together as one unit for generating and selling electricity when we have any water; it does not make a particle of difference in the operating expense of this plant such as labor and help whether the

steam plant is required to produce a larger or smaller part of the load; I am familiar with all the ground or land owned by the Northern States Power Co. down there; I would describe it as a large pile of stone; it is not level; it is
347 piles of stone here and there, a topsy turvy condition; the stone is what they call a red granite; there is not any soil on any of the Power Company's property there sufficient to be used for cultivation of crops of any kind..

(Cross Examination)

The capacity of our steam plant is about 5000 kilowatts; the rated capacity of our water plant, I believe, is 1400 to 1500 kilowatts; if the water is low or for any other reason we can't put the water over our turbines and have to produce this current with steam, it costs more money; what current we make by steam costs more than what we would make by water; there are times in the year when the water is not sufficient to produce any current; I have been manager down there since November 27, 1918; the company has not lowered the tail race since I have been there; we only cleaned it out; we never intended to lower it; I understand that our company succeeded to all the rights of the Sioux Falls Light & Power Co; Defendant's Exhibit "6" looks to me like a fair representation of the river and the location of our plant upon the river; I am unable to say positively whether the drop of our water from the top of our flash boards at our dam down the tail race was substantially as represented by this map or about 55 to 60 feet, but I think so; I think the size of our flume is about 7 feet; Exhibit "7" looks like a fairly good picture of our hydro-electric plant where the water enters the same by our flume, going through the turbines and discharging it into the tail race; I do not know of the lowering of the bottom of the driving tube or the tube carrying the water from the turbines into the tail race; the only thing we did was to clean out the loose dirt and stone that had fallen into it; we concreted that block of stone on the east side of the river in 1920; we did that for the purpose
348 of keeping the flood waters from carrying down the loose rocks that had gathered up there; the gorge you have mentioned north of our power house was full of water in 1919 and 1920; at the time of high water our tail race was up more than when the water is low; that is natural; the water outside was not as high as our lower power room; the water to the north of our building was not higher than the openings into our tail race; the water at that time did not get high enough to cover the solid granite wall on top of which

our company has thrown its loose stone; it was still out of the water; I do not know how deep the water was in the tail race, that is pretty hard to say because it is just a matter of guess; I imagine we have about 25 feet of cement in there; that runs down to almost the level of the falls between those two walls; I do not think the tail race extends over fourteen feet below the concrete; in 1919 the water went about 3 or 4 feet on the rocks which are now covered by cement; during that time our hydro-electric plant could and did run at full blast.

"Q. Do you know the height of the gorge of your tail race?

A. No, I could not answer that.

Q. About forty feet?

A. That is a pretty good guess I should say.

(Redirect Examination)

I should say the difference in cost per kilowatt an hour between generating electric current by steam and water power is possibly 2 mills per kilowatt.

J. WILLIAM LINK, called as a witness on behalf of plaintiff and sworn testified as follows:

349 (Direct Examination)

My name is J. William Link; I reside in Chicago; I am a hydro-electric engineer employed at the present time by the Byllsby Engineering & Managing Corporation; next February I will have been in its employ 12 years; my first experience in hydro-electric work was with the Missouri River Commission; I was with them for five years on the Missouri River Work; subsequent to that I was for five years on the Metropolitan Water Works in Boston; following that I was with the Niagara Falls Power Company for 4 years, I think it was; and then with the former resident engineer of that company, who opened an office for himself and I took charge of his office for him for a year or 18 months; I then was
350 with the City of Columbus, Ohio, for two years; following that I was with the Long Soo Development Company of the St. Lawrence River for two years, and with the Passaic Valley Sewage Disposal Commission for three months; I then came with Byllsby & Co., and I have been with them ever since; I should say the experience I have outlined covers pretty well the field of hydro-electric engineering; I have had a good deal of experience in the designing

and construction or superintendence of construction of hydro-electric plants and water plants, particularly plants for the generation of electric current; I have had experience in the installation and inspection of water wheels and water machinery; I have not had experience in the designing of water wheels; that is a specialty; I have installed that kind of work and written specifications for them and designed what kind of wheels should be installed, etc; since I have been with Byllsby interests I have had complete charge of their hydro-electric plants in the different parts of the country; these plants are scattered pretty well over the country; we have 5 plants in Minnesota in the vicinity of the twin cities and southwest of there; we have two plants in Wisconsin; we have two plants in California; a plant in Oregon and a plant in Montana, and the plant here in Sioux Falls; I think that covers the water power plants pretty well; I have examined the drainage ditch and its course; I have made a study of the hydro-electric plant in this city operated by the Northern States Power Co.; that was constructed before my connection with the Byllsby interests; the Byllsby interests constructed that plant before they acquired it, for other parties, the plant referred to being the hydro-electric plant in question here; I would call the construction of the plant very massive; I have investigated the stability of the dam, its capacity to withstand flood waters, and after examining
351 the whole plant, I should say that it is particularly well designed and constructed to withstand floods or anything of that nature; the massive walls I speak of are of concrete material; I have made a study of the flood conditions in the valley of the Big Sioux River; my sources of information have been government reports and the information I have gleaned from newspaper accounts and talks with various parties who have been on the ground and know the floods; the nearest I can judge, according to the information I have obtained, the greatest flood that there is any record of in that valley was the flood of 1881; I think the design and construction of the plant down here would be sufficient to withstand the flood stages of 1881; I think it would do that if there were no spillway or drainage ditch because the plant was constructed before the spillway was, and so far as I can find out no account was taken of the spillway at all; independently of that, the nearest estimate that I could make of the probable volume of the flood of 1881, the dam would discharge that without even raising the water any higher than we carry it ordinarily; in my judgment, the company operating this plant would absolutely not be justified

in the expenditure of any money for the construction of the drainage ditch and spillway that has been talked about here on the basis of benefits to the plant in any way; it is my opinion that there is no appreciable benefit to the plant of the construction of the improvement out there.

(Cross Examination)

"Q. Mr. Link, you made for the County Commissioners of this county a hydro survey at one time, of this territory, did you not?

A. I don't think I made a survey.

Q. You made a report to the Board? A. Yes.

Q. And the data you testified about? Your attorney asked you on what data you based your opinion and you said upon government reports.

A. And some survey data taken by the Board's engineer.

Q. And you made a report as to the feasibility of this drainage project did you not?

A. The feasibility? In what way do you mean? I don't quite get your idea.

Q. That it was feasible from an engineering as well as a financial standpoint?

352 A. It was feasible to build it, yes."

In that report I stated that the maximum flood liable to occur in the reaches of the Big Sioux River under consideration which has this ditch construction, will probably not exceed ten thousand second feet. This condition was probably approximately as it existed in 1881; and that the floods which occurred in the spring of the year 1916—the amount of water that came down the river and the ditch at that time did not exceed six thousand or six thousand five hundred second feet; it seems to me the amount of water that went through the old spillway in 1916 was 1400 feet per second; I am not sure; I recommended to the Board that the spillway be constructed to take care of approximately 2500 cubic feet per second; in my judgment the amount of water that was carried down the Sioux Valley during the freshet of 1916 was approximately 6000 feet per second; that was the spring that the spillway washed out; I do not know that you call the 1916 flood an ordinary flood; I have not been able to find any record of flood stages in the river and I am not sufficiently familiar with the floods from year to year to know whether that flood would be considered an

353 ordinary flood or not; I would rather say that it was larger than the ordinary flood; that is if by the ordinary flood you mean the intensity of flood that occurs most fre-

quently; the amount of water that came down the Sioux Valley in the year of 1881 is probably the maximum; I do not remember whether in that report I recommended to the Board that the opening which had occurred at what we have been calling Schotz, about 3 miles north of town, a dam be placed in there to keep the river in its old channel and to keep it from coming down through the ditch; I would recommend it; at the time I made this report I was employed by the Byllsby Co., Byllsby & Co. manage the Northern States Power Co., but it isn't the same company by any means, we do the managing for the Northern States Power Co.; I am familiar with the plant of the Northern States Power Co. and the improvements made since 1910; I was familiar with the construction of the old plant through the drawings and inspecting of the plant, etc.; defendant's Exhibit "7" was prepared before my time; in a general way I should say it substantially represents the plant here; it looks to me more like a picture plan than it does like a working plan; it was signed by the chief engineer, so I presume probably it was one of the construction plans; I do not remember the distance between the bottom of our turbine and the outlet in our draft tube; but I would say in the vicinity of 18 or 20 feet; the Northern States Power Co. had to lower their tail race to take advantage of the head at the Bennett dam; we destroyed the Bennett dam and lowered our tail race to take in that head; that lowering gave us more head; the lowering of the tail race does not give us more power; the head we had before was sufficient to run the generators full capacity with the wheels flooded; the lowering of the tail race enables us to pull a larger load with less water; we got no more power out of the units than we got before; they have a certain fixed output; the increasing of that head only conserved water; it didn't increase the output of the plant at all; the higher the head the less water you use, but

354 if you have a machine in there with a fixed output, it doesn't make any difference how much head you put on it, you can't get any more power out of it; it will burn up if you do; what I mean is that the lowering of our tail race, we could only turn out 6000 kilowatts from each unit, but we could get that 6000 from a smaller supply of water and consequently when the river is low we are able to get current longer than we could before; the capacity of the plant is fixed by the units in there; they could be run approximately 6000 kilowatts each; there are three units; the result of piled up water on our tail race is to lower the head but with those units not to produce less power; the head is the total fall; I don't think I have any positive information as to the length of time that the floods last here, but the general impression I have

gotten from the data is that the maximum conditions only last for two or three days; the flood itself; the river in flood stage I imagine for a considerable longer period of time; I think I am familiar in a general way with the general topography near our plant; Exhibit "5" fairly represents the condition from the northwest corner of the plant toward the old falls for a short distance; Exhibit "4" I am unable to identify; defendants' Exhibits "8" and "9" fairly represent the condition at our tail race; if a dam were put in at Schotz up here which was outside of the drainage ditch project, which kept the river in its banks, permitting the water to flow around the city to our water plant instead of going through and coming into the spillway, it would benefit the Northern States Power Co. to the extent that it would not deprive them of what they had a right to; I would not call it a benefit because we
355 have a right to that water; the benefit would be to give us the water that we have a right to here and which was taken away by the ditch; if there were controlling works placed in this ditch at Thompson's bridge some 12 miles up the river which maintained the level of the water in the river and will not permit the river water to go into the ditch until it reaches a certain height, which is flood condition, that would benefit the Northern States Power Co. in just the same way.

(Redirect Examination)

Q. From your examination of that region up there at the time you made the report as representative of H. M. Bylls-by, I wish you would tell the court what that ditch and improvement is with regard to lands down here in the city and particularly in regard to the region down about the Northern States Power Co. property; what is the proper term for it?

A. It acts as a flood water bypass; there is no drainage; by flood water bypass I mean that it takes flood waters out of the river and passes them around and back in again; it relieves flood water conditions a certain small extent in certain stages of the river; I would say that that ditch is not a drainage at all in this section down here; in my judgment the power plant of the Northern States Power Co. as now constructed would be sufficient to withstand a flood equal to the flood of 1881; as I stated before I would think it would pass such a flood without raising the water higher in the dam than we ordinarily carry by means of flash boards; those flash boards should be removed at times of floods; the Bennett

dam was destroyed under my supervision; it was de-
356 stroyed to get advantage of more head water or unite that head with ours in one plant.

Q. Something was said here by another witness about the cleaning out of that tail race or some part of the same. I wish you would tell just what was done in that regard and why.

A. The construction superintendent without asking permission or without my knowledge, built the spoil right on top of the excavation, which was contrary to my intentions, and built it with practically a vertical face, and without very much arrangements of the stones; consequently the first flood that came down washed out some of the stone at the bottom of the piles and started the disintegration of the spoil, and subsequent floods I presume did more, and the elements helped it along, frost action, and a great deal of this spoil had fallen back into the tail race until it raised the level about 4 feet; this work that was done in 1920 was simply to clean that out, and in order to put it so it would not fall back again we moved it back on the west side about 10 feet from the edge of the ledge; on the east side we put a concrete facing on it because there we had used the top of the spoil bank which had been leveled off for an outdoor sub-station, and this was so close to the edge of the spoil bank that we had to make it sloping to hold the substation and some transmission line poles there, and we felt that without a concrete face it might slip in again so we put a concrete face on that side in order to prevent it; that was the reason for that work; the proposition was to restore the tail race.

357 (Recross Examination)

This bypassing of the water I have mentioned would tend to relieve the Sioux River from the point where it took the water from the river to where it deposited it back in the river; it would relieve the river of the amount it carried.

Q. Doesn't that ditch up through there also drain agricultural lands?

A. As I saw it when I inspected it, I should say to very small extent as I understand drainage; there were only 3 or 4 inlets I could see where the farmers could take advantage of the drainage.

(Redirect Examination)

If I were designing a hydro-electric plant on the present site of the plant here today, knowing that the ditch and spillway had been constructed and are there as they are, as I

know the ditch and its history, I would not take the ditch and spillway into consideration at all in the designing that plant, particularly with a view to resistance to floods or possible floods.

A. G. RISTY, recalled and examined by the Court, testified as follows:

The northern end of this ditch No. 1 and 2 was one mile north of Baltic; the end of the ditch opens into the Sioux River; there are no artificial laterals; if there are heavy rains on the lands adjoining this ditch which runs north and south in a general direction that flood the lands on either side of it, it is the intent and purpose that the ditch shall take care of such flood waters.

358 Q. How will it get into the ditch?

A. It slightly slopes into the ditch?

Q. How could it get over the embankment without laterals?

A. There are pipes at certain places to let the water in through the embankment into the ditch, and that you can adjust running out into the farm lands; there are pipes here and there along the ditch to let waters in when the bottom lands overflow, and it has also been proven that these ditches drain the bottom lands, because there are farms all along and it has lowered the water in their wells to a very considerable extent since the ditch was dug, so it shows it drains the lands; they propose to have gates in the embankment so that when the pressure was from the inside it would close the gates and if the pressure came from the outside it would open them within this service pipe.

Q. Then the real purpose of this ditch as I understand it is to take the water from the Sioux River in flood times and conduct it down to the spillway and into the river at the mouth of the spillway.

A. And preventing the overflow to a great degree from spreading over the farm lands.

Q. And the purpose of the ditch, the effects that
359 the ditch is to perform, the thing that you intended when you were contracting was that it should be an [auxilary] to the river and relieve it of the surplus flood waters?

A. If the Court please, I was not on the Board when the ditch was constructed; only when we repaired the spillway, it has been my understanding always that it was to help carry off the flood waters.

Q. It is rather to take the water from the river at its maximum capacity and thus relieve the river of that water rather than to drain the lands along the sides; in other words, it is to keep them from being overflowed with this water?

A. That has always been my understanding.

Plaintiff rests.

Motion to Dismiss

At this time, Your Honor, at the close of the plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these actions and set aside the restraining order heretofore issued, for all the reasons and upon all the grounds urged in the motion made at the opening of these cases.

And for the further reason that the record now shows that notice of an opportunity to be heard upon the amount or proportion of benefits these plaintiffs have received and the amount or proportion of assessment that will be made against their property for such benefits, has been given to them and the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessments to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases, based upon their judgment of values and benefits con-
360 ferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred, by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason the record now shows the Board of County Commissioners of Minnehaha County, charged by the law of this State with the execution of the provisions of the drainage ditch law, has jurisdiction to proceed in respect to the property within said drainage area including the property of the plaintiffs in these actions, and if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs or otherwise, and the record does not indicate upon its face any gross departure from the require-

ments of the statute, therefore this Court cannot inquire into these collateral proceedings, and the same are not questions presenting a federal question.

The Court: The motion is denied pro forma.

The defendants, to maintain the issues on their part, called as a witness F. L. BLACKMAN, who being duly sworn testified in substance as follows: My name is F. L. Blackman. I resided in the city of Sioux Falls on July 15, 1916, and at that time had property within the drainage area of Drainage Ditch No. 1 & 2. Defendants' Exhibit 10 being a petition dated July 15, 1916, addressed to the Board of County Commissioners of Minnehaha County, South Dakota, signed by the City and others, the name of F. L. Blackman appearing thereon, was signed by me.

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361 GEORGE W. BURNSIDE, being called as a witness in behalf of the defendants, testified in substance as follows:

My name is George W. Burnside. I am the Mayor of the City of Sioux Falls, and was such in 1916. I signed defendants' Exhibit 10, for the City of Sioux Falls, being a petition addressed to the Board of County Commissioners of Minnehaha County, dated July 15, 1916, as Mayor of the City of Sioux Falls. My authority for so doing was the action of the City Commission at a special meeting at which it was decided to ask the County Commissioners to protect the destruction of the drainage ditch in order to protect the City's water plant, which consists of something over twenty acres of ground adjacent to the ditch, and within the drainage area, where the City water supply is obtained, upon which the City water and electric light plants are situated. The City also has a piece of ground there with some trees growing on it, and Parks adjacent to the river, particularly Sherman Park. the City has invested in the water works on the land just adjoining the City on the North, approximately Two Hundred Thousand Dollars ($200,000.00). This is just South of the drainage ditch. I attended one or two meetings of the Board of County Commissioners of Minnehaha County when these proceedings were instituted. I knew of the building of the spillway.

Cross-Examination

The wells are open at the bottom, and the ground all around through that section is sand and gravel. The water has to

[perculate] through the sand and gravel before it could
362 get in. I don't know as a matter of fact, whether or not water becomes purified by reason of [perculating] through sand and gravel.

WALTER C. LEYSE, being called as a witness on behalf of the defendants, testified in substance as follows:

My name is Walter C. Leyse. I am City Auditor of the City of Sioux Falls, which position I occupied during the month of June, 1916, and at all times since. The defendants' Exhibit 10, being a petition addressed to the Board of County Commissioners of Minnehaha County, South Dakota, dated July 15, 1916, was signed by me as City Auditor of the City of Sioux Falls, South Dakota, to which I affixed the seal of the City at that time. "City Record City of Sioux Falls 11", is one of the records of my office. It constituted the records of the action of the Board of Commissioners of the City of Sioux Falls. There was offered and received in evidence that part of page 313, of Book 11, City Records, of the City of Sioux Falls, as follows:

"Special Meeting July 15th, 1916. A Petition signed by all the members of the Board of Commissioners of the City of Sioux Falls, calling for a special meeting of the Board of Commissioners to be held in the Commissioners rooms in the City Auditorium at the hour of 9:30 A. M., on July 15th, 1916, for the purpose of taking action in regard to the drainage ditch and spillway. The Board of City Commissioners of the City of Sioux Falls met in special session on Sat-
363 urday, July 15, 1916, at 9:30 o'clock A. M., the following members present on roll call: Hardimon, Mundt and May Burnside. All members present. The motion was made and seconded that the Mayor and City Auditor be authorized and instructed to sign a petition prepared by the property owners to be presented to the Board of Commissioners, Minnehaha County, asking that steps be taken to repair and improve Drainage Ditch No. 1 and 2, and to repair the present spillway of the drainage ditch, or make and construct a new spillway in lieu of the present damaged spillway. The motion carried by the following vote on roll call: Yeas, Hardimon, Mundt and the Mayor, 3. Noes, None. On motion the Board adjourned. Signed Walter C. Leyse, City Auditor."

It was pursuant to that authority that I signed this petition, and sealed it with the seal of the City. This action of the Com-

missioners was never published as a resolution or ordinance of the City of Sioux Falls.

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364 F. E. WARD, being recalled as a witness on behalf of the defendants, testified in substance as follows:

Defendants' Exhibits 10 to 32, inclusive, are records and files in my office as County Auditor of Minnehaha County, with reference to the establishment of Drainage Ditch No. 1 and 2. Defendants' Exhibit 10 is the petition of the City of Sioux Falls, F. L. Blackman, et al, for the establishment and construction of Drainage Ditch No. 1 and 2. Defendants' Exhibit 11 is the bond accompanying and filed with the petition. The material portion of said Bond, being defendant's exhibit 11 is as follows:

"Bond on Petition for Drainage.

Whereas, the parties whose names are signed hereto have prepared and executed and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition to reconstruct and improve drainage ditches Number 1 and 2, in Minnehaha County, South Dakota, and to construct a new spillway or outlet to the said drainage ditches numbered 1 and 2, and to pay therefor by an assessment upon the property, persons and corporations benefited thereby, a copy of which petition is hereto attached marked Exhibit "A" and made a part hereof.

365 Now, Therefore, we F. L. Blackman, E. D. Clark, W. Brady, Dan Donahoe, Den Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, as principals, and Inter State Surety Company as surety, do hereby undertake, promise and agree to and with the County of Minnehaha, of the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or in case the said petition is denied on appeal.

F. L. Blackman, E. D. Clark, W. Braley, Den Donahoe, Dan Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary C. Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, Inter State Surety Company, by A. B. Fairbanks, Its Attorney in Fact.

This bond approved August 1, 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 12 is the order of the Board of County Commissioners for filing said petition and bond. Defendants' Exhibit 13 is a letter of transmittal of said petition with reference to Drainage Ditch No. 1 and 2, to the State Engineer at Pierre, the material portions of which are as follows:

"August 4, 1916.

Homer M. Derr, State Engineer,
Pierre, South Dakota.

Dear Sir:

I enclose herewith new drainage petition with reference to Drainage Ditches Numbers 1 and 2 and the spillway thereof, which have been ordered filed and transmitted to you. It is the especial wish of the County Commissioners that you view this drainage proposition with them at your earliest
366 convenience, as it is necessary that this improvement be made soon, so as to avoid further damage. The parties have agreed to abandon the Covell's Lake extension terminus, in case the drainage proposition is established in accordance with this petition, or a modification thereof.*****

Please give this matter your immediate attention, and advise as to when you can view this drainage proposition with the Commissioners.

Yours truly,

EOJ:M County Auditor."
Enc.

Defendants' Exhibit No. 14 are the minutes of the Board of County Commissioners of August 3, 1916, of adjournment from that date to August 14, 1916. Defendants' Exhibit 15 are the proceedings of the Board of County Commissioners, under date of August 14, 1916. Defendants' Exhibit 16 is the resolution of Board of County Commissioners for a survey of the territory to be drained by Drainage Ditch No. 1 and 2. Defendants' Exhibit 17 is the Surveyor's Report, the material portions of which are as follows:

"Report of Preliminary Survey of Said Proposed Drainage Ditch for the Territory now Partially Covered by Drainage Ditches Numbers 1 and 2, Sioux Falls, South Dakota.

To the Honorable Board of County Commissioners, Minnehaha County, South Dakota:

In accordance with the resolution of your Honorable Board dated August 14th, 1916, authorizing and directing a survey

of the proposed drainage of the territory covered by drainage ditches numbers 1 and 2, as now established, and directing that the exact line or lines of said proposed drainage be established under the supervision of the State Engineer, I took up the work, and, as per your request, file here-
367 with a limited report of the survey of such territory showing the exact line of the proposed drainage ditch as follows, to-wit:

Section One

Commencing at a point 58 feet West and 1035 feet North of the Southeast Corner of Section 29, Township 102, Range 49, West of the 5th P. M., running thence South *****, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number one as now established and constructed.

Section Two.

Commencing at a point 1035 feet North and 58 feet West of the Southeast Corner of Section 29, Township 102, Range 49, the same being the commencement point of Section 1, hereinbefore described, running thence North *****.

Section Three.

Commencing at a point 1640 feet East of the center of Section 18, Township 103, Range 49, running thence North ******, the said line being the center line of said proposed drainage.

That in addition thereto, the Big Sioux River is to be straightened in Sections 17, 18 and 20, Township 103, North of Range 40, in order to afford better means of communication between the lower end of Section 3 of said ditch, and the upper end of Section 2 thereof, the same being intended to cover the exact location of drainage ditch number 2, as now established and constructed.

I further recommend that the Big Sioux River be straightened *****.

All of the above cut offs to have a bottom width of 60 feet, and side slopes of one and one-half to one. A right-of-way 100 feet in width and one-half each side of the above described center lines will be required. The plans and specifications for the proposed spillway on Section 9, of
368 Township 101, Range 49, will be furnished later.

Dated this 13 day of September, A. D. 1916.

Respectfully submitted, L. E. Stevens, Deputy State Surveyor. Filed in the office of the Auditor of Minnehaha Coun-

ty, S. D. this 13 day of September, 1916, Harry H. Howe, County Auditor, by E. H. Shenkle, Deputy.

Defendants' Exhibits 18 and 19 are the proceedings of the Board and the resolution of the Board fixing the exact line and width of Drainage Ditch No. 1 and 2, of September 13, 1916. Defendants' Exhibit 20 is the drainage ditch notice for Drainage Ditch No. 1 and 2. Defendant's Exhibit 21
369 is the affidavit of publication of drainage ditch notice, the material portion of which is as follows:

"Affidavit of Publication

C. L. Dotson, being first duly sworn, deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a Daily Newspaper of general circulation, printed and published in the City of Sioux Falls, in said County and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper and in charge of the advertising department thereof, and has personal knowledge of all facts stated in this affidavit, and that the notice and advertisement headed Drainage Ditch, a printed copy of which is hereunto attached, and made a part hereof, was printed and published in the said newspaper for ..... issues.

That the first publication of said notice in said newspaper aforesaid was on Saturday, the 16th day of September, A. D. 1916, and that the succeeding publications were
370 severally on Saturday, the 23rd day of September, A. D., on Saturday, the 30th day of September, A. D. 1916; that the fees charged for the printing and publication of said notice and advertisement in said newspaper, as aforesaid, were ..... dollars and ..... cents, and for this affidavit, Twenty-five cents, and that the said fees for the printing and publishing of said notice and advertisement and for this affidavit, as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper, as provided in Ses-

sion Laws of 1903, and amendments thereto. * * * * * Filed in the office of the Auditor of Minnehaha County, S. D., this 30th day of Sept. 1916. Harry H. Howe County Auditor.

Defendants' Exhibit 22 is a Certificate of posting said Drainage Ditch Notice The material portion of which certificate of posting Drainage Ditch Notice, is as follows:

'I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby certify that on the 21 day of September, A. D. 1916, I posted three copies of the annexed Notice in three public places near the route of the proposed drainage mentioned therein, as follows, to-wit: One on the bridge on North Minnesota Avenue crossing Drainage Ditch Number One, in the City of Sioux Falls; one on the bridge in Berwick's Addition to the City of Sioux Falls, crossing Drainage Ditch Number One near Fifth Avenue; and one on the bridge crossing Drainage Ditch Number One on Section 29 of Mapleton Township; that I also posted one of said copies at the South Front Door of the Court House in the City of Sioux Falls, all in Minnehaha County. * * * * * *

371 Filed in the office of the Auditor of Minnehaha County, S. D. this 23 day of Sept., 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 23 are the minutes of the Board of County Commissioners in relation to Drainage Ditch No. 1 and 2, of October 2 and 3, 1916, the material portions of which are as follows:

"October 2, 1916.

At the meeting in the County Court room, the Commissioners listened to arguments presented by those in favor of the drainage ditch, and the straightening of the Big Sioux River, and also to arguments against the straightening of said Big Sioux River, there being no objection to the establishment and construction of the main ditch project. The State Engineer, Homer Derr, recommended that the main drainage ditch, as petitioned for, be established and constructed with proper controlling gates and a sufficient spillway.

Claims for damages were filed as follows:

Kittery Realty Company	$2000.00
Margaret Finnegan	1000.00
James L. Finnegan	8000.00

The whole afternoon was taken up in the discussion of the drainage project, and the suggested straightening of the Big Sioux River. At the hour of five o'clock P. M. an adjournment was taken until ten o'clock A. M. on Tuesday, October 3, 1916."

"October 3, 1916.

Pursuant to adjournment, the Board convened at ten o'clock A. M., and in company with the State Engineer, Homer Derr, visited the site of the proposed spillway and control gate, at the head thereof. The Board then returned to the Commissioners' Room, and held a conference with the State Engineer with reference to said proposed drainage. Mr. C. T.
372 Charnock then moved the adoption of the resolution establishing said drainage, and that the vote be taken by districts. Mr. J. E. Johnson seconded the motion. Upon roll call

A. G. Risty, District No. 1 voted yes.

J. E. Johnson, District No. 2 voted yes.

J. L. Fritz, District No. 3, voted yes.

C. T. Charnock, District No. 4, voted yes.

J. A. Jensen, District No. 5, voted yes.

The Chairman then declared the resolution adopted. The State Engineer was then requested to prepare and submit plans and specifications for the necessary spillway and control, or headgates, at his earliest convenience. * * * **

Mr. C. T. Charnock moved that the hearing on damages occasioned by the establishment of Drainage Ditch No. 1 and 2, be adjourned until Friday, October 6, 1916, at ten o'clock A. M., and be made a special order for that date. Motion seconded by J. A. Jensen, and carried unanimously."

Defendants' Exhibit 24 is the resolution of the Board of County Commissioners establishing Drainage Ditch No. 1 and 2 upon the petition of the City of Sioux Falls, F. L. Blackman, et al. Defendants' Exhibit 26 are the minutes of the Board of County Commissioners for October 6, 1916. Defendants' Exhibit 27 is a resolution of the Board of County Commissioners of October 6, 1916, assessing damages as compensation for lands taken in the construction of Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch No. 1 and 2.

Resolution Assessing Damages.

Whereas, the matter of assessment of damages caused by the establishment and construction of Drainage Ditches No. 1 and 2, was, on Tuesday, October 3, 1916, at a regularly adjourned meeting of the Board, deferred to and made a special order for Friday, October 6, 1916, at ten o'clock A. M., and the Board having met on said last named date,
373 and having heard and considered the claims for damages, and having taken into consideration the fact that the principal portion of said drainage ditch has already been constructed, and assessments for damages therefor having already been made and paid in the original construction of said Drainage Ditches No. 1 and 2, and that the principal part of the work to be done consists of building a proper spillway, flood or control gates, cleaning, deepening and widening the channel of the said drainage ditches as now constructed, building levees and dikes where deemed advisable, and other improvements to said drainage system;

Now, Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the damages arising from the establishment of Drainage Ditch No. 1 and 2, including compensation for the lands to be taken for said drainage, be and they are assessed and awarded as follows, the same being in accordance with
374 plats thereof, filed in connection with the original construction of Drainage Ditches No. 1 and 2:

To the Kittery Realty Company, for damages to Tract One (1), etc. * * * * *

Be It Further Resolved, that it is the judgment and determination of this Board that in consideration of the fact that damages were assessed and paid in the original construction of Drainage Ditch No. 1 and Drainage Ditch No. 2, for all damages sustained by each tract of land, or other property, through which the said drainage ditches and the present drainage ditch pass, as damages and compensation for the land taken by the route of such drainage, that no damages will accrue, or should be paid, by reason of the establishment and construction of said Drainage Ditch No. 1 and 2, except as hereinbefore provided, and that the claims of Margaret Finnegan and James L. Finnegan for damages by rea-
375 son of the recommended straightening of the Big Sioux River, which straightening has not been considered and determined, be and the same are hereby disallowed, without passing upon the merits of said claims, in case

it is determined to straighten said Big Sioux River, and said claims are refiled, and that no other damages will accrue to any person or property by reason of the establishment and construction of said Drainage Ditch, except as herein awarded.

Be It Further Resolved that a fund to be known as "Drainage Ditch No. 1 and 2 Fund", be and it is hereby established, and that the proceeds of any assessment, or assessments, hereafter to be made in this proceeding be and they are hereby pledged to such fund, and when such assessments are collected, it is ordered and directed that they be deposited to the credit of such fund, to be applied in the payment of the warrants to be issued on such fund, in the order of the registry of such warrants with the County Treasurer. It is ordered that the warrants to be issued on such fund draw six per cent., interest from date of issue. It is further ordered that, if any of the persons entitled to damages under this resolution will accept a warrant or warrants on such fund in lieu of money, then that warrants on such fund for the proper amounts be issued therefor to the persons entitled thereto, to be signed by the Chairman and countersigned by the Auditor, but if any person or persons will not accept a warrant upon such fund in payment of the damages herein awarded, then the Chairman of this Board, and the Auditor, are authorized to issue warrants on such fund, in such sums as may be found advisable, and to sell the same at not less than par. and out of the proceeds thereof, to pay the damages herein awarded, taking the receipts of the persons entitled thereto therefor. It is further ordered that all expenses in connection with said Drainage Ditch No. 1 and 2, hereafter to be incurred up to the time of the letting of the contract for the construction of said ditch, be paid by warrant upon such fund.

376 Be It Further Resolved that in case any person herein awarded damages will not accept the same, the Chairman of this Board is directed to tender him the amount thereof, and in case of his non-acceptance thereof, to deposit the same in the Sioux Falls, South Dakota, to the credit of such person, and to give such person notice of such deposit.

Approved this 6 day of October, A. D. 1916, by the Board of County Commissioners of Minnehaha County, South Dakota.

By A. G. Risty, Chairman."

Attest:

County Auditor.

Defendants' Exhibit 28 are minutes of the Board of County Commissioners of December 16, 1916, relative to Drainage Ditch No. 1 and 2, passing a resolution fixing the exact line and width of drainage ditches straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, and fixing the time and place for hearing thereon, and defendants' Exhibit 29 is said resolution, the material portions of which are as follows:

"Resolution.

Whereas, on September 3, 1916, this Board, by resolution duly adopted, established Drainage Ditch No. 1 and 2, but expressly reserved for further 'consideration and determination the question of the straightening of the Big Sioux River at the several points recommended in said Engineer's report, without passing upon the merits thereof, for some later date when the straightening of the Big Sioux River will be given more complete consideration covering the points recommended and other points requested at the hearing': and

Whereas, the Engineer, L. E. Stevens, has filed his supplemental report with reference to the straightening of the Big Sioux River, recommending narrower ditches than previously recommended, and also recommending the ex-
377 tension of the straightening of said Big Sioux River, and thereby varying the route of said drainage, together with maps and profiles; and

Whereas, the Board has personally inspected the route of said proposed drainage, as described in said petition for Drainage Ditch No. 1 and 2, and as described in said Engineer's reports;

Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of the ditch straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, be and the same is hereby fixed as described in said Engineer's original report, as amended by his supplemental report, and that the requisite right-of-way of said drainage ditch and dump space, be and the same is hereby fixed as described in said Engineer's report; and

Be It Further Resolved that it is deemed practicable and necessary to vary the route of said drainage occasioned by the proposed straightening of the said Big Sioux River, so that it will pass through other lands than those described in the original notice of hearing; and

Be It Further Resolved that the further consideration and hearing of said matter be adjourned to Saturday, the 30 day of December, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of said County, in the City of Sioux Falls, South Dakota, and the same is hereby fixed as the time and place for the hearing of the said petition with reference to the straightening of the said Big Sioux River, as recommended in the said Engineer's original and supplemental reports, and that notice thereof be given in accordance with the provisions of Section 4, 5, and 28, of Chapter 138 of the Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota. * * * * *".

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378 Defendants' Exhibit 30 is a notice of hearing on the Sioux River cut-offs on Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch Notice.

Sioux River Cut-offs on Drainage Ditch 1 and 2.

Notice is hereby given that Saturday, December 30, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, filed August 3, 1916, for the establishment and construction of a drainage ditch pursuant to the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909, insofar as said petition refers to the straightening of the Big Sioux River, as prayed for in said petition, and as recommended by the Engineer's original and supplemental reports. The consideration whereof having been deferred for further consideration, when Drainage Ditch No. 1 and 2 was established, and said meeting having been adjourned for that purpose. The exact line and width of said ditch was determined by the action of said Board on December 16, 1916, and in general terms is as follows: * * * * *

The tract of country likely to be affected by the establishment and construction of said proposed cut offs in the Big Sioux River is in general terms described as all of the lands and property affected by the construction of Drainage Ditch No. 1 and 2, as established by resolution in these proceedings

under date of October 3, 1916, and of record in the office of the County Auditor of Minnehaha County, South Dakota.

379 The separate tracts of land through which said proposed drainage will pass, and part of which will be required therefor, and for dump space, and the names of the owners of said tracts, as appears from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, on August 3, 1916, that being the time of filing said petition, are as follows: • • • • •

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have, why the said drainage should not be established and constructed, and all persons deeming themselves damaged by said proposed drainage, or claiming compensation for the lands proposed to be taken for said drainage, are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceed-
380 ings for further particulars.

Dated this 16 day of December, A. D., 1916.

BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY, SOUTH DAKOTA,
By A. G. Risty, Chairman."

Attest:
Harry H. Howe,
County Auditor.
(Seal)

Defendants' Exhibit 31 is the certificate of posting the aforesaid notice, the material portion of which is as follows:

"I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby specify that on the 20 day of December, A. D. 1916, I posted three copies of the annexed notice in three places near the route of the proposed drainage mentioned therein, as follows, to-wit:

One on the bridge over the Sioux River between Sections 29 and 32, in Mapleton Township; One on the bridge over the Sioux River on the North Half of Section 8, in Mapleton Township, and one on the bridge over the Sioux River between Sections 29 and 32, in Sverdrup Township; that I also

posted one of said copies at the South Front Door of
381 the Court House in the City of Sioux Falls, South Dakota, all in Minnehaha County, South Dakota. * * * *".

Defendants' Exhibit 32-A is the affidavit of publication of the aforesaid notice, the material portion of which is as follows:

"C. L. Dotson, being first duly sworn deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a daily newspaper of general circulation; printed and published in the City of Sioux Falls, in said County, and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper, and in charge of the advertising department thereof, and has personal knowledge of all the facts stated in this affidavit, and that the notice and advertisements headed Drainage Ditch Notice No. 1 and 2, a printed copy of which is hereunto attached and made a part hereof, was printed and published in said newspaper for ..... issues. That the first publication of said notice in said newspaper aforesaid, was on Wednesday the 20th day of December, A. D. 1916, and the succeeding publications were severally, on Wednesday, the 27 day of December, A. D. 1916. That the fees charged for the printing and publication of said notice and advertisement in said newspaper as aforesaid, were Ten Dollars and ....cents, and for this affidavit, Twenty-five Cents, and that the said fees for the printing and publishing of said notice and advertisement, and for this affidavit as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement, inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or
understanding for the division thereof has been made
382 with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper as provided in Session Laws of 1903, and amendments thereto. * * * *".

The defendants' Exhibit 32 is the minutes of the Board of County Commissioners of August 10, 1917, adjourning said hearing until August 11, 1917, at which time the Board passed a resolution establishing said river cut-offs, a material portion of which resolution is as follows:

"Commissioners' Proceedings.

August 10, 1917.

Pursuant to resolution of July 27, 1917, adjourning and fixing the time of hearing upon the straightening of the Big Sioux River, under the petition upon which Drainage Ditch No. 1 and No. 2 was established, all members of the Board being present, and a delegation of farmers and property owners interested, Engineer L. E. Stephens having made and filed his report of the exact line and location of the several cut offs suggested and recommended, and the Board having heard the protests of those objecting thereto, and the petitioners in like manner having been heard, and the Board having heard the argument of counsel thereon, the further consideration thereof was adjourned to August 11, A. D. 1917, at two o'clock P. M."

"Commissioners' Proceedings.

August 11, 1917.

Pursuant to adjournment, The Board of County Commissioners convened at two o'clock P. M. All members of the Board being present, and after taking up and considering the project of straightening the Big Sioux River upon the petition for the establishment of Drainage Ditch No. 1 and 2, heretofore established, and the Board being fully advised
383 with reference thereto, it was moved by C. T. Charnock, and seconded by J. A. Jensen, that the following resolution be adopted:

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, pursuant to the resolution of this Board of October 3, 1916, establishing Drainage Ditch No. 1 and 2, and reserving the consideration and determination of the question of the straightening of the Big Sioux River at several points recommended in the Engineer's report, that it is the determination of this Board that it will be conducive to the public health, convenience and welfare, and that it is necessary and practicable for the drainage of agricultural lands within the drainage area of said drainage ditch No. 1 and 2; that the hereinafter described ditches straightening the Big Sioux River be established and constructed as a part of the drainage system hereinbefore established, and designated as Drainage Ditch No. 1 and 2.

Be It Further Resolved that the said ditches straightening the said Big Sioux River be, and the same are hereby established, with a bottom width of 20 feet; and a depth of not to

exceed the depth of the main channel of said Big Sioux River, with a right-of-way for ditch and dump space of 100 feet, one-half on each side of the center line along the lines hereinafter and particularly described as follows: * * * * *

All of the foregoing Exhibits were offered and received in evidence.

Mr. Ward, as County Auditor of Minnehaha County, identified Defendants' Exhibits 2 and 3, and 33 to 42, both inclusive, as records and files of his office in relation to this drainage ditch proceeding, all of which were offered and received in evidence.

Defendants' Exhibit 2, being a petition signed by O. S. Thompson et al, to abandon the outlet of old Drainage Ditch No. 1 and for the establishment of a new outlet thereto, the material portion of which is as follows:

384 "To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

The undersigned petitioners respectfully represent that they are all residents of the County of Minnehaha, South Dakota, and that each of them is the owner of certain lands situated in said County, in the Valley of the Big Sioux River, all of which lands will be affected by the drainage herein mentioned and proposed.

Your petitioners further represent that it is necessary for the drainage of agricultural lands in the said Big Sioux River Valley, including all of the lands affected by Drainage Ditches No. 1 and 2, as the same have been established and constructed, that said ditches be repaired and put in proper condition and that the same be cleaned, deepened and widened, and that the Levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary in order for said ditches to carry off the surplus water and properly drain the lands affected thereby;

That it is also necessary to permanently close said Ditch No. 1 above the present spillway, or outlet, thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, in Township 101, of Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a Southeasterly direction, and to extend said ditch from such point, running thence in a Southwesterly direction, through Covell's Lake in the City of Sioux Falls, across the South-

east quarter of Section 5, the East Half of the Southwest Quarter of Section 8, the West Half of Section 17, the East Half of the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, about 40 rods
385 north of the bridge across said river commonly known as the "12th Street Bridge", situated on the section line between said Section 18 and Section 19.

Your petitioners further represent that the proposed maintenance and repair of said drainage ditches No. 1 and 2, and the extension of said Ditch No. 1, are necessary for the reasons that the present spillway and outlet of said Ditch No. 1, as now constructed and used, is impracticable for the purpose for which it was intended, and if allowed to remain in its present condition, will probably cause large damage to the owners of property adjacent thereto and affected thereby; that it is impossible to put said spillway or outlet in a condition to carry off the surplus water and properly drain the lands affected by said drainage ditches, without causing great damage to the owners of property as aforesaid; that for these reasons it is necessary to establish and construct a new outlet for said drainage ditches, which can be done by establishing and constructing the extension herein proposed.

Your petitioners further represent that the proposed repair and maintenance of said Drainage Ditches No. 1 and 2, and the establishment and construction of said proposed extension of or outlet to Drainage Ditch No. 1 will be conducive to the general health, convenience and welfare of the City of Sioux Falls, and of the inhabitants of the Big Sioux River Valley between the Cities of Sioux Falls, and Dell Rapids, and will prevent the annual loss of many thousand acres of crops in said valley, and will prevent great damage to the lands in said territory, and to the buildings, bridges, highways and other improvements thereon.

Your petitioners further represent that the territory likely to be affected by the proposed repairs to and maintenance of said drainage ditches, and the establishment and construction of the proposed extension to or outlet of said
386 drainage ditch No. 1 includes all of the lands in said Big Sioux River Valley that are affected by said Drainage Ditches No. 1 and 2, as the same have been established and constructed, and all of the lands in said valley between the cities of Sioux Falls and Dell Rapids that are subject to overflow by the Big Sioux River.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold."

Defendants' Exhibit 3, being the bond accompanying the petition of O. S. Thompson, the material portion of which is as follows:

"Whereas, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold have prepared and executed, and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a pe-
387 tition for drainage, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof;

Now, therefore, We, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold, as principals, and R. J. Huston and Iver R. Peterson, as sureties, do hereby undertake, promise and agree to and with the County of Minnehaha, in the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or the same is denied on appeal.

Dated at Sioux Falls, South Dakota, April 8th, 1916.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold, R. J. Huston, Iver R. Peterson.

I hereby approve the foregoing bond and the sureties thereto.

HARRY H. HOWE, County Auditor."

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388 Defendants' Exhibit 33, being the order for filing the petition of O. S. Thompson, et al, the material portions of which are as follows:

"Order for Filing Petition for Drainage.

Whereas, O. S. Thompson, and others, of the County of Minnehaha, South Dakota, have this day presented to this Board a petition for the drainage of lands in the Big Sioux River Valley, which lands have heretofore been drained by drainage ditches Nos. 1 and 2, as hereinbefore established and constructed, in which said petition is represented that it is necessary to permanently close said drainage ditch No. 1, above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast Quarter of Section 5, in Township 101, Range 49, where the course of said ditch as

now constructed turns from a Southerly direction to a Southeasterly direction, and to extend said ditch from such point running thence in a Southwesterly direction through Covell's Lake in the City of Sioux Falls, and across the Southeast Quarter of Section 5, the East Half and the Southwest Quarter of Section 8, the West Half of Section 17, the East Half and the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of said Section 18, about forty rods North of the bridge across said river, known as the Twelfth Street Bridge, situated on the Section line between Sections 18 and 19, all in said Township and Range, and said petition having been by this Board examined, and being found sufficient in form, and being accompanied by a proper bond, with sureties approved by the County Auditor;

Now, Therefore, It Is Ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that said petition be forthwith filed with the County Auditor, and a copy thereof be transmitted by said County Auditor
389 to the State Engineer."

Thereafter, on April 12, 1916, a copy of said petition was transmitted to the State Engineer at Pierre, South Dakota, and on May 3, 1916, a resolution was passed by the Board ordering a survey to be made for this proposed extension, and ordering the surveyor to report to the Board upon the length, size, width and depth of the ditch required for this proposed outlet. On May 24, 1916, the surveyor reported his survey, the exact line and width of the ditch, and the amount of right-of-way, together with the estimated cost of the same, and on June 9, 1916, the Board of County Commissioners, by resolution, fixed the exact line and width of the proposed outlet of Drainage Ditch No. 1 and designated the time and place for hearing the same, and designated June 29, 1916, as the time of hearing thereon, and ordered notice to be given. On June 10, 1916, notice dated on that day was published and posted as required by law.

Defendants' Exhibit 42 is the resolution of the Board establishing a drainage ditch as an outlet of Drainage Ditch No. 1 and the abandonment of the old outlet of Drainage Ditch No. 1, and the repair of Drainage Ditch No. 1 and Drainage Ditch No. 2, the material portions of which are as follows:

"The matter of the petition of O. S. Thompson, and others, representing that it is necessary that drainage Ditch No. 1 be

permanently closed above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, Township 101, Range 49, and that such ditch be extended from such point running thence in a Southwesterly direction through Covell's Lake, and terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in said Township, and that it is also necessary that drainage ditches No. 1 and 2 be repaired and put in proper condition, coming on to be heard by the Board
390 of County Commissioners at a meeting of said Board on Thursday, June 29, 1916, pursuant to notice heretofore given, and written objections thereto having been filed by the City of Sioux Falls, the South Dakota Central Railway Company and Catherine W. Peck, and others, and such objections having been presented orally by counsel for the various objectors, and the said petitioners having appeared personally and by counsel in support of said petitions, and various parties having filed claims for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet, and said hearing having been adjourned to this 8th day of July, 1916, and this Board having fully heard and considered said petition and all matters, evidence and arguments presented in opposition to and in support of the same;

Now, Therefore, Be It Resolved that the repair and maintenance of said drainage ditches 1 and 2, and the establishment and construction of said proposed extension to or outlet of drainage Ditch No. 1 will be conducive to the public health, convenience and welfare, and it is necessary and practicable for draining agricultural lands, and it is so found.

Be It Further Resolved that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point on the West bank of Drainage Ditch No. 1, 1610 feet North and 58 feet West of the Southeast Corner of Section 5, Township 101, Range 49, where said drainage ditch swings Southeasterly from a Southerly direction, and that a new extension to or outlet of said drainage ditch, commencing at said point and running thence in a Southerly direction through Covell's Lake in the City of Sioux Falls, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in Township 101, Range 49, as described in the resolution adopted by the Board June 10, 1916, be constructed, and that such extension or outlet be and the same hereby is established.

391 Be It Further Resolved that drainage ditches No. 1 and 2 be repaired and put in proper condition, and

that the same be cleaned, deepened and widened, and that the levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary, in order that said ditches may carry off the surplus water and properly drain the lands affected thereby, the amount and extent of such repairs to be determined by this Board after an inspection, and, if deemed necessary, a survey of said drainage ditches.

Be It Further Resolved that this Board proceed to consider the claims presented and filed by various persons for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet; that before the assessment of damages this Board personally inspected each tract of land or other property through which said extension or outlet will pass, and that the damages sustained by each tract of land or other property through which said extension will pass, and damages as compensation for the land taken for the route of such drainage be assessed by this Board at a regularly adjourned meeting.

Dated this 8th day of July, 1916."

* * * * * * * *

The material portion of the judgment in the case of Oluf O. Gilseth vs. A. G. Risty, and others, as County Commissioners of Minnehaha County, South Dakota, et al, Defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, Intervening Defendants, rendered by the Circuit Court of Minnehaha County, South Dakota, upon the 19th day of July, 1921, offered and received in evidence, is as follows:

"The Court having heard and considered the evidence introduced on behalf of the parties, and having heard the argument of counsel, and being fully advised in the premises, and having made and entered its decision in writing, con-
392 sisting of Findings of Fact and Conclusions of Law;

Now, Therefore, on motion of Messrs. E. O. Jones, R. H. Warren, and Porter & Bartlett, representing the defendants and interveners,

It is hereby Ordered, Adjudged and Decreed that the plaintiff's complaint herein be, and the same is hereby dismissed on its merits."

LEONARD BOYCE, being called as a witness in behalf of the defendants, testified in substance as follows:

My name is Leonard Boyce. I have lived in Sioux Falls for about fifteen years. In 1917 and 1918 I was connected with the Sioux Falls Construction Company, as Superintendent of the construction of the spillway on drainage Ditch No. 1 & 2, constructed by the County Board. As such Superintendent, I made arrangements with the Water Department of the City of Sioux Falls, by which it furnished water to be used in
393 the construction of the spillway on Drainage Ditch No. 1 & 2. The City put in a meter in front of the Penitentiary in a manhole where the main runs into the Penitentiary. We ran a line from there down to the spillway. They knew at the time they put the meter in, the purpose the water was to be used for. We used the water from that connection upon which they furnished the meter in the construction of the spillway. The City rendered bills from month to month, or from time to time for the water so used. These bills were presented to the County Board, and allowed, and warrants were drawn in favor of the City of Sioux Falls, or its water works department, for the amount of these bills, which warrants were delivered by me to the City.

As Superintendent of this work, I had certain steel reinforcing material delivered for that work. Some of it came in on the Milwaukee Railroad, and some on the Great Northern Railroad. There is a spur or sidetrack that extends to near the spillway North of the Penitentiary. I made arrangements with the officers or agents of the Chicago, Milwaukee & St. Paul Railway Company and the Great Northern Railway Company, in the City of Sioux Falls, to have this freight spotted or delivered to us out near the end of this spur near the spillway, and such freight, several car loads, was in fact delivered to us on this spur near the spillway.

During the construction of this spillway in 1917 and 1918, electrical power was used in the work of construction. The Northern States Power Company furnished power or electricity used for power in such construction work. They had a power line that ran by or near the work of construction
394 of this spillway. The agents of the Northern States Power Company made the connections for us so that we used this electrical power which they furnished. They rendered us statements from time to time of the electricity which we used, which statements were presented to the Board of County Commissioners and by them audited and allowed. I think the warrants were drawn direct to these parties.

During the time that I was Superintendent of construction on the spillway on Ditch No. 1 & 2 I saw the City Commission up there looking over the work as it progressed. The whole Commission was together.

Cross-Examination.

My recollection is that they were up there in the Fall of 1917 when we were working on the West side of the bridge on the highway. Possibly October or November, 1917.

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395 W. R. LARSON, being called as a witness in behalf of the defendants, testified in substance as follows:

My name is W. R. Larson. I had the contract with the Board of County Commissioners to deepen and widen these drainage ditches in controversy. The work was done in 1918 and 1919. We started in May, 1918, at the Minnesota road bridge, about one thousand feet from the water works, right across the Sioux Falls & Watertown Railroad, with a trenching machine shipped from Chicago over the Great Northern Railroad into Sioux Falls. It was shipped to their freight depot, and then I made arrangements with their agent here to have it spotted to the side-track over by the waterworks. From the bridge we worked North towards Renner, up until about September. In the process we widened and deepened it, and threw up an embankment on one side. There was a dike on the other side. The following year we did work on this ditch with another machine brought from Sioux City over the Chicago, Milwaukee & St. Paul Railway, and delivered at Renner. There being no agent at Renner, I arranged therefor, and paid the freight through the Sioux Falls Agent. Those machines extend up in the air about thirty feet, and this ditch is about 1000 or 1500 feet from the Chicago, Milwaukee & St. Paul right-of-way, or line of railroad. (p. 253.)

Stipulation.

At this time make the record show that it is stipulated between the respective parties to these actions, that the interventing defendants are the owners of ditch warrants drawn on Drainage Ditch No. 1 & 2 to the amount alleged in their answers, which have been issued and are now unpaid. (Tr. p. 253)

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396 C. T. CHARNOCK, being called as a witness on behalf of the defendants testified in substance as follows:

My name is C. T. Charnock, I am one of the defendant County Commissioners in these actions; have lived in Sioux Falls about twenty-five years, and am familiar with the value of farm land in the vicinity of Sioux Falls. I have been over and am familiar with all the lands within the area of Drainage Ditch No. 1 & 2. Prior to fixing the apportionment of benefits thereon on June 10, 1921, I accompanied the Board of County Commissioners in making a personal inspection of all of the lands within the drainage area. The Board selected and determined the benefit to the unit adopted, which unit is situated about three and one-half miles North of Sioux Falls. We placed a value upon this land without the ditch, and a value upon it with the ditch. The difference between these values was the sum of $25.00 which, in our judgment, was the real beneficial value to this unit produced by the construction of this drainage ditch. The Board applied that unit to all the lands within the drainage area, and used the same method of determining the number of units of benefit to all of the lands affected. In applying this unit towards fixing the proportion of benefits to the Chicago, Milwaukee & St. Paul Railway Company, we first took into consideration the land belonging to the railroad company, the acreage, and we assessed that practically the same as abutting lands, and then we took into consideration the benefits to the grades and the culverts that could be done away with, and to tracks and bridges, etc. That was figured out by our Engineer. The amount or number of units was arrived at by figuring it out in dollars and cents, and then dividing the total amount by the benefit to the unit or twenty-five, thereby obtaining the number of units of benefit which was, in our judgment, received by this railroad company.

397 We pursued the same course in fixing the number of units of benefit to the Chicago, St. Paul, Minneapolis & Omaha Railroad Company; also to the Chicago, Rock Island & Pacific Railroad Company; also to the Great Northern Railroad Company. We used the same method in arriving at the proportion of benefits which, in our judgment, the Northern States Power Company received from the drainage ditch. In fixing the proportion of benefits to the Northern States Power Company there were a number of different elements taken into consideration. First, was the dam at Schjodt's. We put that in to control the water there in the river, and also controlling gates or wiers at Thompson's, and

the cut-offs of the river. We also took into consideration the property here in Sioux Falls known as the hydro-electric plant. These benefits, were arrived at by the same process of figuring the total benefit and dividing the same by the value of the benefit to the unit. The number of units which were fixed against these various plaintiffs in these actions represented the judgment of the Board in fixing the proportion of benefits upon the showing that was made, and the computation of our Engineer. We adopted the same process in arriving at the number of units which were fixed against the City of Sioux Falls for benefits. We used the same process all the way through on all the property that was taken under the ditch here.

Cross-Examination.

The unit we used was one acre of agricultural land. In determining the benefit to the Northern States Power Company, the Board took into consideration the dam at Schjodt's, the purpose of which was to prevent the water from the Big Sioux River, where the River had broken through into the ditch, from being diverted into the ditch. The Power Company was objecting to the ditch taking its power. The same con-
398 dition is true with reference to the controlling gates at Thompson's. The agricultural land had a value placed upon it, and was computed by the acre. I don't mean to say that all the land was assessed at one price. They vary in price according to benefit. Referring to the property of these plaintiffs, the method pursued was to figure the benefit in dollars and cents. The property now before the Court was not computed on the acreage plan. When we were making this assessment, we placed for everyone the same value on it.

We did not make any difference whether the property belonged to the City or individuals. In assessing the railroads, we took the land that the railroad companies owned into consideration first, then the railroad itself, and then the culverts and bridges. The acreage that the railroad companies owned was only one element taken into consideration, and it was all assessed upon the unit plan. We took in the mileage but mileage was not the only element taken into consideration. We did not use the valuation of the railroads, but we used the valuation of the benefits that we thought the railroads would receive from it. The Board went over the proposition with the Engineer, and he figured out the method to use and it was approved by the Board. We accepted his figures, excepting there will be some changes when this comes up for hearing. The Engineer figured the proportion of bridges that could be

saved by diverting the water through the spillawy, and that was computed in dollars and cents, and divided by twenty-five, which made so many units. The whole system was figured on that plan. All of the different elements of benefit were figured up and added together. The Engineer showed us what benefits this would be, what it would amount to, and that is the way we handled it, by the $25.00 unit, the same as we did the farms.

It was all figured out for us on paper. Then we took
399 the map and travelled over to the entire system. The Engineer figured the savings to the bridges, the benefit to the road-bed, and the culverts and the land owned by the railroad. That was all taken in. Those are all the elements I remember.

Q. Now, Mr. Charnock, what was the basis upon which the streets of the City of Sioux Falls were figured on. What were the elements that entered into that?

A. If I remember right they were taken in about the same value as the property abutting.

Q. You mean that all of the streets within the drain-
400 age district were figured by the acreage and also other benefits? A. We didn't figure the lots by the acre.

Q. I am not talking about lots, I am talking about streets?

A. When you get to the streets they are in where lots are laid out.

Q. I am asking about the city property or streets?

The Court: As I understand the witness, they did not consider that upon the acreage basis at all. Am I right?

The Witness: Yes sir.

Q. Upon what basis was the benefits figured?

A. It was figured on the valuation.

Q. Valuation? A. Yes.

Q. Upon the acreage valuation?

A. We figured if you kept the water off this lot you had benefitted it so many dollars.

Q. I am asking about the city streets.

A. I am telling you that we took the streets by the same value.

Q. And figured them in acre valuation?

A. No, not in acre valuation, lot valuation.

Q. Upon what basis?

401 A. I don't know as I can explain it so you can understand it.

Q. What benefits did you figure out that the city would derive to their streets from this spillway and ditch?

A. The drainage. Keeping the water off of them would be certainly a benefit to the streets as well as abutting property.

Q. Upon what basis, what theory?

A. I cannot tell you just how much.

Q. Upon what basis did you figure, for instance, Sherman Park?

A. I believe Sherman Park was run in by the acre.

Q. As agricultural land?

A. Somewhere near that.

Q. Was the streets that you just referred to also figured upon the basis of agricultural land?

A. Whenever they were on that, they were assessed along about the same as the property where the street was located.

Q. As agricultural land?

A. You couldn't call city lots agricultural land?

Q. I am asking you what you done?

A. I am telling you we assessed the street along with the property where it laid.

Q. As agricultural land?

A. No, not as agricultural land.

Q. What about Phillips Park, how did you assess that?

A. There is only a portion of Phillips Park, I think, taken in. That is the north end.

Q. Upon what basis did you put that?

A. That was the same way.

Q. In fact, you assessed the city property, all of it, the same way you have described it here?

A. I think so.

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402 HERMAN RETTINGHOUSE, being called as a witness on behalf of the defendants, testified in substance as follows:

My name is Herman Rettinghouse. I am a civil engineer and reside in Sioux Falls. I graduated in 1881 and came to the United States in 1882, and in the following year engaged in engineering work; was employed by the Milwaukee, Mitchell and Western Railway, which is now a part of the Chicago & Northwestern system, as an assistant and gradually advanced into higher positions until 1893, at which time I engaged in private work in Ashland, Wisconsin, where I was city engineer for three years. Also was engineer for two railroads and in the fall of 1897 again engaged with the Chicago & Northwestern Railway as assistant engineer and was promoted to superintendent of bridges and building on the same road in 1900, in which capacity I served for five years;

and from 1905 to 1907 was employed by the Wisconsin Central Railway Company as division engineer; had charge of the engineering construction work and maintenance of the entire road, and on January 1, 1907, again engaged with the Chicago and Northwestern as division engineer of the Northern Iowa and Sioux City Divisions, which position I held until the spring of 1913, when I was made division superintendent of the Iowa and Minnesota division of the Chicago & Northwestern. I remained there until November, 1913, and was then promoted to chief engineer of the Chicago, St. Paul, Minneapolis and Omaha, a part of the Chicago & Northwestern system. I retired from that service on March 1, 1920, at which time I was placed on the pension roll because of my impaired health. Since April 1, 1920, I have been a resident of Sioux Falls and have engaged in private practice as consulting engineer and senior member of the firm of Chenoweth & Rettinghouse, up to the present time. My first experience in public drainage work was in 1905 in a project which was affect-
403 ing the Wisconsin Central Railway and another similar project in Southern Wisconsin; January 1, 1907, while in the service of the Chicago & Northwestern as division engineer in Iowa, which comprised practically the entire state covered by that railroad, the drainage work was very extensive. It was the principal part of my duties to make myself familiar with and handle the drainage problems which came up constantly. During this time we had from one hundred to one hundred fifty drainage problems of various magnitudes. When I became chief engineer of the Omaha Railway, we had a number of drainage problems in the states of Wisconsin, Minnesota, South Dakota and Nebraska. It was my duty as chief engineer to make myself familiar with them and to cover all the phases of the problems as to benefits, damages and the manner of assessing benefits and damages. In November, 1920, my firm was engaged by the Board of County Commissioners of Minnehaha County, to make a topographical survey of the district covered by Drainage Ditch No. 1 and 2 for the purpose of preparing a correct map and furnishing data to the Board as would enable it to place the proportional benefits on the land and interests affected. Defendant's Exhibit 1 is the map prepared by my firm, which shows the topography of the country adjacent to and affected by Drainage Ditch No. 1 and 2 of Minnehaha County. Drainage Ditch No. 1 and 2 at its initial point is not exactly in the Sioux River. A small creek connects with the Sioux River near the Southwest corner of Section 29, Township 104, Range 49. The initial point of that particular section which we term sec-

tion No. 3 is located at that point, a matter of five or six hundred feet from the river proper. There are controlling works and gates there which enable the ditch to be closed off from the river or from the creek, or opened and at flood time part of the water taken out of the river. Section No. 3 is located along the lowest land west of the Sioux River. The
404 land is naturally down lower than the banks of the river proper, a great deal in some instances. The land west of the ditch gradually rises as you go away from the ditch until you get to the foothills. The surface water on the outside of this ditch can most assuredly get into the ditch. The ditch was constructed for the prime purpose of draining this section of the country and inlets have been made at vari-
405 ous points, at roads and intervening points, to permit this surface water to drain into the ditch.

This third section terminates in connecting with the river on the east and west line of Section 18, Township 103, Range 49, about a thousand feet west of the east line of Section 18. This ditch connects with the river as stated and the river from that point to a point on the southeast quarter of Section 20 has been straightened at various points, being practically canalized. At the point spoken of there is a bayou or an old portion of the river bed, which is partly filled up along the north, due to the fact that the river has been straightened to the west of it, and Section No. 2 connects with this bayou about eight hundred feet east of the river proper. The ditch then extends parallel to the Milwaukee railway to near the junction point of the South Dakota Central line. At that point it diverges to a distance of about sixteen or seventeen hundred feet, running practically that distance parallel and in a southerly direction until it intersects the old bed of Silver Creek. It then follows Silver Creek in a southeasterly direction, cutting out all bends in it until it reaches a point at or near the Section line between Section 28 and 29, and runs in a southerly direction about a thousand feet parallel to the Milwaukee railway again until it reaches a point about a quarter of a mile north of the city limits, from which point it runs in a southeasterly direction to its terminus in the spillway. Throughout Section 2 which is described, the ditch runs in the lowest part of the country east of the river and serves the purpose of a drainage ditch as well as for an overflow
406 from the river. It was put in for the dual purpose of serving as an overflow and as a drainage ditch. You will

notice on the map that Silver Creek runs in a very circuitous route along the ditch and it terminates in this ditch, so that the waters of Silver Creek are more quickly disposed of than before and it therefore assists in draining the land adjacent to the ditch and Silver Creek and the same is true of the lands between the ditch and the river. The ditch assists in draining territory which is tributary to Silver Creek, which has its source north of the initial point of Section 2 of the ditch. The dam at Schjodts is about eight hundred feet from the former end of the lateral ditch constructed there. This dam is about thirteen hundred feet from the present cutoff channel of the Sioux River. There are two controlling works; the one mentioned composed of a gate at the initial point of Section 3. At the initial point of Section 2 there is a concrete bridge with a wier under the same which permits the water to rise to a certain point before it enters into the ditch and thereby is retained in the river proper. This was installed for the purpose of controlling the rise of the water in the river. In making of the survey of which I had charge, I made frequent trips over the territory in order to familiarize myself with all the elements that might come into consideration and particularly as to the relative benefits derived, bearing in mind that it was necessary to arrive at some certain basis so as to be able to make the proper recommendations to the Board. In going over the territory, I came to the conclusion that at the location of this unit, it was about as good an illustration as could be found along the entire district, and I selected this unit for my recommendation to the Board. On Section 2 of this district, which terminates in the Sioux River, there are openings left at all necessary points to drain off the surface water and carry it into the ditch. After we had made our report
407 to the Board and I can best illustrate it by reading the sentence, "We also submit as an aid in your work of equalizing the benefits, a complete list of all the lands with the acreage of each parcel and proportionate benefits. We have made a thorough investigation and have minutely looked over all of the affected lands. In consideration of the proportion of benefits, we have selected a particular tract for a unit, one acre, more particularly described later, in the west half of the northwest quarter of Section 29, Township 102, Range 49". Together with that report we submitted a recommendation as to the proportional benefits and after the board had received this report, we made a trip over the entire district lasting several days. We had one of the maps with us and we viewed all the lands and all of the other points where other benefits were to be proportioned. The particular per-

centages of the different parcels of land came under consideration and were pointed out, and if a dispute arose as to whether or not it was the proper amount of percentage, it was corrected and agreed upon right there by the Board, so that at the conclusion of our inspection the Board was familiar with all of the facts of the situation as I was myself. We used this unit selected as one and compared the other real estate with it. It was decided by the Board that the acre in question was worth one hundred dollars prior to the improvements and that it was worth one hundred twenty-five dollars subsequent to the improvements. Therefore the actual value of benefit to the unit selected was twenty-five dollars. All the agricultural land was assessed in relation to this unit. Many of the lands were only 30 or 40% depending upon the amount of benefit derived, as compared with this unit, being one hundred per cent. There were other lands that were as high as three hundred and three hundred fifty per cent of this unit. I am familiar with the cost of construction and upkeep of highways. In arriving at the benefit to the highways within the drain-
408 age area we estimated the benefit in this way. There is a certain amount [—] necessary [—] under flood conditions. That is to say, a road that is periodically flooded as against a road that never is flooded. The difference in the estimated cost of maintenance was capitalized, or represented the interest on a certain sum of money, and we consider the capitalized portion as a real benefit. We then, after obtaining that result after making a great many calculations, taking into consideration the various locations, some of them benefitted more than others.

We divided the amount arrived at by the value of the unit of $25, thereby obtaining the number of units as a proportional benefit for those roads. The sum we divided by the unit represented the capitalized value to that part of the highway; we applied the same method to the streets and highways of the City of Sioux Falls. We did not apply the acreage basis to the city property, excepting possibly the grounds where the water works are located. In applying the benefit to the unit and what the Board took into consideration as elements of benefit to the Milwaukee Railway Company, we took into consideration the fact that in the first place there were practically three elements. First was the right-of-way on the acreage basis, which was estimated in proportion to the adjacent lands. Second, that it was possible to shorten or abandon certain bridges. In order to determine the benefits derived therefrom is simply a mathematical proposition. It costs a certain amount of money each year in order to maintain a bridge,

whether it is a pile bridge or a steel bridge. We know how long these structures will last. We figure the cost of a bridge and divide it by the number of years in order to get the amount that is necessary to be expended each year for replacement. Taking the amount in dollars and cents multiplied by the length of the bridge and divide that and capitalize that at 7%,
which is the usual rate of interest, and that determines
409 the amount of benefit. This was the second element.
The third element is the fact that by reason of the flooding of the territory in which railroads are located, washouts often occur. We obtained data and from my personal knowledge and experience I have a very good idea of what it costs to repair washouts periodically appearing and we estimated as close as possible how much it would amount to every year and capitalized that amount again.

Again as an additional element, a road-bed is solidified or made stronger by not being subject to floods. A road-bed that is constantly or for great lengths of time subjected to submersion is certainly weakened, and again, so far as humanly possible, we figured the amount of benefits in dollars and cents and after getting all of these results or capitalized amounts, we divided that by twenty-five as our measure and determined the number of units of benefit. That system and general method and plan was used to determine the amount of benefits that each railroad received from these separate elements. There were three elements of benefit so far as the Northern States Power Company is concerned. One of them was the fact that through the construction of the wier at the initial point of section 2 and through the construction of the dam commonly known as Schjodt's dam and I believe some dike work done at other points, the power company was assured of a constant flow of water or a normal stage of water. The second element, that through the diversion of a part of the water of the Sioux River through this drainage ditch, which has been estimated at from twenty-six hundred to three thousand second feet, as against a total flood condition of six thousand feet, and all the way from 6000 to 10000 second feet, a benefit was created in that much water being taken away
from the tail race and lowering the available head at
410 the power company's plant. In determining what
proportion that would be, I was largely guided by the report made by Mr. Link, in which the results of his investigation were given and the amount of second feet of water in flood stages of the river at certain periods mentioned. I was also dependent upon the information and investigation made by Mr. Shenehon, who designed the spillway, and I came to the

conclusion as a fair proportion of the waters diverted, we could assume one-third of the entire river from the end of section 2 in lowering the head of the hydro electric plant, through the flood waters; also the lay of the land opposite the hydro electric plant is such that all of the flood waters, after passing over the dam, must pass through the tail race. All these elements were considered in the determination of the benefits accruing to the Northern States Power Company.

Q. Just a moment, let me call your attention to certain cut-offs in the river. What if any?

A. I said there were three elements and I only mentioned two. The other is the straightening of the river which has been done to a large extent between the upper end of Section No. 2, at this point clear down to this point near the Watertown & Sioux Falls Railway. The velocity of the water was greatly increased of the waters flowing through the river, and it thereby shortened the flood period, in that the water passed through the river much quicker than it did before. The total amount of water that is collected in the initial point of these cutoffs is hastened down the river past the Northern States Power Company's Plant. The ditch takes one third out of the river. I have estimated it as closely as humanly possible at third. It might be more. These were the element we considered in apportioning the benefits to the hydro electric plant. Using these elements, we estimated the amount that would be saved by the power company through the fact
411 that the head was lowered to that extent and capitalized that amount. The power company, by by-passing these flood waters, would have a constant aggregate output of hydro electric power and in season other than flood seasons the controlling works and dams keep all the water in the river that should be there and pass it around over the power company's turbines, insuring to them a constant flow even at a low stage of water in the river. (Tr. p. 285) The Great Northern had 2.4 acres of right-of-way which the Board considered benefited by reason of this ditch. They have one-fifth of a mile of track, two bridges protected, and 315 feet approximately of bridge that might be abandoned. The Chicago, Rock Island and Pacific has 12-1/8 acres of right-of-way that is benefited, one mile of track and two bridges benefited to be shortened, together approximately 230 feet. The Chicago, Milwaukee and St. Paul Railway has 172 acres of right-of-way, 14.2 miles of track, two bridges protected, one bridge shortened one hundred feet and one bridge of 176 feet abandoned, all benefited thereby. The Chicago, St. Paul, Minneapolis and Omaha has two and one-fourth miles of track, 27

acres of right-of-way, 405 lineal feet of bridges abandoned and two bridges protected.

412 These items I have mentioned, in my opinion, were benefitted by the construction of this ditch and the diverting of the water as I have testified." There were three elements in regard to the assessment of the city of Sioux Falls. First, the streets, estimated at about 14 miles of streets within the drainage district. They are benefited in the same manner as I have explained in regard to the county and town roads, although the benefits were more varied on account of the streets being built of different character. The second item was the parks. We figured that from the diversion of the flood, the annual maintenance of the parks was reduced, that is to say there was less work to maintain the grounds as compared with the ground that was flooded. Another item was the benefit to the water works. It seems to be a fact that through the placing of the spillway the life of the water works was saved, insofar as productiveness of the wells is concerned. Another item is that during flood conditions, the water works were unproductive. We have estimated a certain number of days each year that the water works were out of commission. These wells were flooded by surface water and made them unsanitary and unfit for drinking purposes. We figured the amount that that would bring and capitalized the amount same as the capitalization of the streets and parks and divided that amount by twenty-five in order to arrive at a certain number of units. From my experience and the facts and data that I have been able to gather, the benefits that I have mentioned are direct benefits to the railroad companies and their properties by reason of the construction and maintenance of this ditch; and the benefits which I have outlined to the city and Northern States Power Company were direct benefits to them. After determining the amount of the units and actual amount of money necessary to be raised, that amount is divided by the number of actual units to produce the value of a unit; and by that process we reduce the actual value of the unit down proportionately to each party affected.

413 Q. You reduced the valuation down proportionately to each property affected whether it was railroad or ranch property? A. All treated alike.

Q. And that, in the final analysis will be the assessed benefit after being equalized? A. It will.

Q. Calling your attention to the fact that the river continues around the city for some miles beyond the outlet of the

spillway, what is the effect of by-passing this water upon adjacent lands, starting at the city limits on the north around this city until the ditch dumps the water back into the river. Is that a benefit or not?

A. It constitutes a direct benefit. The same benefit as to lands farther up the river.

414 Cross-Examination,

By Mr. Campbell:

When I speak of the ditch diverting something like three thousand feet of water, I have reference to the discharge capacity of the ditch at its lower end; I couldn't tell what proportion of the water came out of the river during the flood stage; I should think a majority of the water came out of the river; I don't know the capacity of the ditch at its upper end; we haven't figured that; the ditch does not divert water from the river at any other point than that; I do not know what the amount is that is diverted there; the wier that I speak of down here that controls the flood of the river is constructed to keep the water from going into the ditch at normal stage; if the ditch were not there, the waters would go down the river just the same. The second element that I said I took into consideration, that is, the diversion of the flood of the water would lower the tail race of the Northern States Power Company at flood times to the extent of the water that was diverted; I couldn't tell you how much that would be; I couldn't tell you how many kilowatt hours of output the plant would gain by reason of that diversion; that is a matter in hydro-electric engineering that I have not attempted to qualify; the value of that increased head would be measured by the value of the increased output from the hydro-electric plant; this answer is based upon the assumption that it is cheaper to produce electric current from a hydro-electric plant than from a steam plant.

By Mr. Parliman for the City of Sioux Falls:

The land portion not needed for water works purposes, I presume, was assessed by the acre. I cannot tell exactly. I know the general construction of the wells and that they are curbed with concrete but the water might not have to
415 go over the top of the wells. The water could penetrate into your water supply, which it does. I know that the water in the wells was affected at times. The water was very poor. I recollect that notice was sent out at one time that the water should be boiled, that it was not suitable.

I don't remember any other notice being given by the health officer that the water was perfectly sanitary and healthy.

By Mr. Grantham:

I didn't know I determined the capacity of the stream; we have several cross sections taken at various points of the ditch and the river as well; I couldn't tell you whether I have a cross-section of the ditch at about the point where the ditch that runs to the spillway is fed by the river; we have taken cross sections of every half mile; the ditch is not uniform all the way; I have no idea at all of the size of the stream; in testifying here that the ditch carries one-third of the water, I was basing my conclusion upon the investigations made; I determined on my survey the high water mark; the [heighth] above the banks of the stream of the high water varies at various points; the dotted line here on the map shows the high water line; at an elevation of 1438, the [heighth] of the high water line is about ten feet above the banks of the river; the water at that point would be about 8000 feet wide on the surface; it is impossible for anyone to tell you off-hand just what the average depth of water would be there without showing cross sections at every point. I have no idea.

Q. How did you determine the capacity or amount of
416 water carried if you didn't know the amount of water in the stream? A. I was not engaged for that purpose.

Q. You don't know as a matter of fact the amount of water that is carried down the stream in flood time?

A. I do not.

Defendant rests.

Endorsed: Filed in the District Court on Jan. 10, 1923.

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417 (Approval of statement of evidence by District Judge.)

The above named appellants having presented and filed in this Court their statement of the evidence in the above entitled cause, and the above named respondents having filed their objections thereto and asking that part of said statement be stricken and said respondents' statement of said evidence be substituted in lieu thereof, and the appellants having filed their objections to said substituted statement of said respondents, and said differences having been submitted to the above named court, and said statement having been made up and completed in conformity with the directions of said
418 Court,

Now Therefore, It Is Ordered that said statement so made in conformity with the order of this Court and hereto

attached be and the same is hereby approved as a true and complete statement of the evidence in this cause.

By the Court:

JAS. D. ELLIOTT, Judge.

Attest:

(Seal of Court) Jerry Carleton, Clerk.

Endorsed: Filed in the District Court on Jan. 10, 1923, at 2. P. M.

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419 (Clerk's Certificate to Transcript.)

United States of America,
Southern Division,
District of South Dakota—ss.

I, Jerry Carleton, Clerk of the District Court of the United States of America, in and for the District of South Dakota, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Eighth Circuit, that the foregoing, consisting of 418 pages, numbered consecutively from 1 to 418, inclusive, is a true and complete transcript of all of the record, process, pleadings, orders and final decree as enumerated in the Praecipe of the parties appellant and the Praecipe of the party appellee to this cause filed herein, directing the Clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original Citation, together with the affidavit of service thereof, and in addition thereto a copy of said Praecipes and all written opinions of the Court filed in said cause.

Seal
U. S. Dist. Court,
Dist. of South Dakota.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, in the said District, this 15th day of March, A. D. 1923.

JERRY CARLETON.

Filed Mar. 20, 1923. E. E. Koch, Clerk.

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282 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

United States Circuit Court of Appeals, Eighth Circuit.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6316. vs.
City of Sioux Falls.

Appeal from the District Court of the United States for the District of South Dakota.

(Excerpt from Brief for Appellee filed on December 7, 1923, as called for in the Praecipe of Appellants.)

It is alleged by the defendants and Appellants in their answer, and Appellee admits it to be a fact, that Drainage Ditch No. 1 and 2 was a new and independent proposition and not a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and cannot be considered as a proposition for the repair of the original ditches. It is a project which must stand or fall upon its own footing.

(Order of Submission.)

Memorandum of Clerk:

On the 17th day of December, 1923, this cause, together with causes Nos. 6312, 6313, 6314, 6315 and 6317, was subto the United States Circuit Court of Appeals for the Eighth Circuit and a full copy of the order of submission having been included in the transcript taken for the Supreme
283 Court of the United States on appeal and an application for writ of certiorari in cause No. 6312, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee, the same is omitted from the transcript in this cause, No. 6316.

(Opinion.)

Memorandum of Clerk:

On the 18th day of March, 1924, an opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in causes Nos. 6312 to 6317, inclusive, and a full copy of the opinion having been included in the transcript taken for the Supreme Court of the United States on appeal and an ap-

plication for writ of certiorari in cause No. 6312, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee, the same is omitted from the transcript in this cause, No. 6316.

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284 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1923,
Tuesday, March 18, 1924.

A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., intervening defendants, Appellants,
No. 6316. vs.
City of Sioux Falls.

Appeal from the District Court of the United States for the District of South Dakota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the City of Sioux Falls have and recover against A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., intervening defendants, the sum of Twenty Dollars for its costs herein and have execution therefor.

March 18, 1924.

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285 (Petition for Appeal to Supreme Court, U. S. Assignment of Errors and Allowance of Appeal.)

(Petition for Appeal and Allowance thereof.)

To the Honorable Presiding Justice, or any of the Judges of the Circuit Court of Appeals of the United States, for the Eighth Circuit:

Now comes the above named appellants, by their solicitors, and complain that in the record and proceedings, as also in the rendition of the Decree of the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Louis, in the State of Missouri, in the above styled and numbered cause, on the 18th day of March, A. D., 1924, affirming the Decree of the United States District Court, for the District of South Dakota, Southern Division, in said cause, manifest error has intervened, to the great damage of the petitioners. In substance, said errors are these:

1. Appellee was given said relief by collateral attack, by means of a Bill of Equity, when it had an adequate remedy at law which it could pursue, at its election, either in the Courts of the State of South Dakota, or in the Federal Court.

2. It was given the relief aforesaid, despite the fact that the record shows without dispute that the appellants, the Board of County Commissioners, in establishing the said new project, and in attempting to obtain said contribution from appellee, acted strictly in accord with the statutes of the State of South Dakota governing the establishment of such new project.

3. Appellee got said relief, though, in addition to the fact that the said Board had in fact thus complied with said statutes of the State of South Dakota, it was the settled law of said State at the time the Circuit Court of Appeals acted as aforesaid, that the doings of said Board with reference
286 to the aforesaid project were in compliance with the statutes of South Dakota as construed by the highest court of that State. It was further settled at said time by the highest court of the State of South Dakota, that the very project at bar was the formation of a new drainage district, or ditch. And the Circuit Court of Appeals erred in disregarding the interpretation of the applicable statutes of the State of South Dakota as formulated by the highest court of that State, and substituting in its own interpretation for that of said highest court of that State.

4. The Circuit Court of Appeals erred in granting the relief which it did grant and affirm, because neither the pleadings nor the evidence warranted such relief, or any relief, and because its finding that appellee was entitled to the relief which it obtained, is contrary to the pleadings and to the evidence, and contrary to and unwarranted by the law.

5. Said Circuit Court of Appeals erred also for the reasons set out in the assignments of error filed herewith.

Both the appellee and the appellants are citizens of the State of South Dakota, and appellee invoked the jurisdiction of said United States District Court by claiming in its Bill of Complaint that appellants were not proceeding in accordance with the requirements of the applicable statutes of the State of South Dakota; that if it were assumed they were acting in compliance with said statutes, such statutes themselves were unconstitutional and void, and violative of the Constitution of the United States, and amendments thereto; and that the action of appellants was depriving appellee of its property without due process of law, in violation of said Constitution and amendments thereto.

Therefore, your appellants and petitioners say that this cause and matter is not one in which the decision of the said Circuit Court of Appeals of the United States is made
287 final, and say further that the controversy between appellants and appellee involves an actual controversy over more than One Thousand Dollars, besides costs.

Wherefore, petitioners pray for an allowance of the appeal, to the end that the cause may be carried to the Supreme Court of the United States, and petitioners pray for a supersedeas of said judgment, and such other process as is required to perfect the appeal prayed for, to the end that the errors therein may be corrected.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Solicitors for Appellants.

Appeal and supersedeas allowed, and bond fixed at the sum of One Thousand and no/100 Dollars ($1000.00), conditioned as the law provides, this 31 day of May, A. D., 1924.

WM. S. KENYON,
Judge of the Circuit Court of Appeals of the United States, for the Eighth Circuit.

Assignments of Error.

Now on this 31 day of May, 1924, comes A. G. Risty et al. as County Commissioners, etc. et al., Appellants by their solicitors, Benj. I. Salinger, Elbert O. Jones and Norman B. Bartlett, and in connection with their petition for appeal to the Supreme Court of the United States say that in the findings, judgment and decree entered in the above cause on the 18th day of March, 1924, manifest error has intervened, to the injury, wrong and prejudice of this appellant, and that the same is erroneous and unjust to appellant;

1. Because the Circuit Court of Appeals failed to
288 follow the construction of the South Dakota Constitution and statutes as pronounced by the highest court of the state and did its own construing of said state law and based its affirmance of the decree of the District Court on a construction on its own part, which is in conflict with the construction of the highest court of the state.

2. Because it was based on the reasoning that appellant Board had no authority to make an assessment except in aid of a drainage project to drain agricultural lands and that said Board had no authority in law to establish a drain except for the drainage of agricultural lands.

This is erroneous and the interpretation of the Constitution and statutes by the Circuit Court of Appeals is erroneous because it is and for a long time has been the settled law of South Dakota as declared by the highest court of the state in construing its said Constitution and statutes that a Board such as appellant Board is, is by such Constitution and statutes authorized to establish and construct a drain for a public purpose and that such public purpose included but was not limited to the drainage of agricultural lands, and that such authority existed as to such drainage as the very one at bar is, and it is undisputed in the evidence that one object of this project was to drain agricultural lands.

3. Because it is not only a fact that the highest court of the state has ruled in construing the Constitution and statutes of the State of South Dakota that the drainage ditch at bar was lawfully established and that the acts of appellant Board were lawful, but the record shows both facts without dispute; and the Circuit Court of Appeals' affirmance is despite such ruling and despite said state of the evidence.

4. Because there is no evidence in the record to show any fraud or subterfuge on behalf of the appellant Board or any-

one at all in the establishment of this new drainage ditch; and there is absolutely no evidence in the record that
289 appellee was prevented from making a full and fair defense to such establishment in the proceedings had upon notice given by the appellant Board by which this new drainage ditch was established. Unless appellee was by some subterfuge prevented from making a full defense to the establishment of this project at the time of its establishment, the mere statement now that it was established by subterfuge is of no avail to it in this collateral attack.

5. Because the affirmance was based on an interpretation of the statutes of South Dakota by the Circuit Court of Appeals that such statutes did not permit or authorize appellant Board of County Commissioners to establish and construct a new drainage ditch over the line of two older ditches, which new project contained a materially larger area than the combined areas of such old ditches and called for cleaning out, widening, deepening and diking of the older ditches to double their former capacity—the construction of river cut-offs to accelerate the flow of water therein, and the installation of a new and larger spillway, all at a cost of more than double the cost of the original ditches; which interpretation was contrary to the interpretation given to such statutes by the highest court of the state of South Dakota in this very drainage project.

6. Because the statutes of South Dakota, as interpreted by the highest court of the state, permit and authorize the appellant Board to establish over the line of one or more old drainage ditches a new drainage project containing a materially larger drainage area than the combined area of such old ditches—with additional river cut-offs—new and larger spillway, and a cleaning out and deepening, widening and diking of the old ditches to double their former capacity, at an expense of more than double the cost of the original ditches; and the undisputed evidence in this case shows the proceedings of the appellant Board sufficient under such statutes to establish and construct such new drainage project and
290 make an apportionment of benefits for the payment of the cost thereof, and did not warrant the finding and conclusion of said Circuit Court of Appeals that said proceedings were in fact for repair and maintenance only.

7. Because it is based on the holding and reasoning that appellant Board had acted without authority from and had not complied with the provisions of the statutes of South Da-

kota regulating the maintenance and repair of ditches already established. The appellees, City of Sioux Falls, C. Milwaukee & St. P. Ry. Co., and the C. St. P. & Omaha Ry. Co., conceded that the project at bar was the creation of a new ditch and a new project. That fact is established by the undisputed evidence as against all of the appellees. It is undisputed in the evidence that there was a full compliance with every statute dealing with the establishment of a new ditch. Therefore, the affirmance was given because there had been a failure to comply with statutes that had nothing whatever to do with the establishment of a new ditch or assessing for the cost of its construction. The court disregarded that the relevant statutes had been complied with and based its action wholly on the fact that statutes that had no application had not been complied with.

8. Because the appellant Board to whom had been delegated by the statutes of South Dakota the authority to determine the purpose and character of this drainage project had, after notice and hearing, determined that this drainage project, among other things, was for the benefit of the public health, welfare and convenience and was necessary and practicable for draining agricultural lands, from which determination no appeal was ever taken; and the highest court of the state of South Dakota has held in interpreting such statutes that such determination is final, no appeal from the same ever having been taken.

9. Because the notice dated September 15, 1916 and the hearing held pursuant thereto on October 2, 1916 was
291 a notice to and an opportunity to be heard by appellee on the formation of this new drainage project with an enlarged area subject to benefits and that appellee's property was included therein, and gave to it its day in court and its opportunity to contest the establishment of said drainage project, the legality thereof, the necessity therefor, the character and purpose thereof, and it having waived the same and defaulted therein and not having appealed from said determination, is bound thereby.

10. Because what was in effect done was to restrain legislative action on the part of the appellant Board acting in a legislative capacity under delegation from the legislature of the state. The legislature itself could have by enactment of a statute done everything the Board did or was proposing to do, and it should be conceded that the legislature could not have been enjoined from enacting such a statute. The only difference is, that the Board was bound to give certain

notices and hearings before any assessment could become a lien, and the Board did what it was bound to do.

11. Because notwithstanding the allegations contained in appellee's bill, it admitted in court and in its brief and argument that this "Drainage Ditch No. 1 and 2" was a new and independent project and not a continuation of or a proposition for the repair of old Drainage Ditch No. 1 and old Drainage Ditch No. 2, and the highest court of the state, in interpreting the statutes of said state, has determined that such statutes gave authority to the appellant Board to construct this very ditch and authority to construct a ditch for a public use or purpose and that corporate drainage districts therefor were not necessary.

12. Because the proceedings at bar were proceedings in rem, for the purposes of taxation, and dealing in this matter or any review of the same involves property rules, over
292 which the courts of the state are the final authority, and both resident and non-resident property owners must, at least in the first instance, resort to and exhaust the remedies provided by the statute in the state tribunals for reviewing such controversies before they may enter either the state or the federal courts at all.

13. Because the appellee City should not have had its suit entertained at all in the federal courts for the reason that it is not a non-resident of the state and could and did enter the federal courts only, assuming it could enter at all, upon the assertion of a federal question; and it had no right to have that question entertained because under the rules in the case of Bank of Greeley vs. Weld Co. Commissioners, 44 Sup. Ct. Rep. 385, it had no right to enter the federal court at all without first resorting to such tribunals as the law of South Dakota had provided for the review of the controversy like the one at bar; and it never resorted to those tribunals.

14. Because although where a resident of a state may enter the courts of a state, one who has diversity and a controversy involving more than $3,000.00 need not submit himself to those state courts but may at his election enter the federal courts, yet in a proceeding in rem like a drainage project the resident of the state must first submit to administrative review and may not enter the courts of his state without first exhausting such administrative review, and the non-resident cannot disregard such administrative review, and have his proceedings in rem reviewed in the first instance in the federal courts. The non-resident can enter the federal

court only when the resident of the state can enter the state court.

15. Because the injunction was granted on the reasoning that one should not be compelled to appear at the hearing to equalize apportionments for the reason that it would be had before said Board and said Board had no authority whatever to act—that one should not be compelled to submit to a hearing before a mere trespasser. This disregards, first,
293 that the mere assertion that the Board was without authority did not justify the failure to appear at said hearing, and, second, it disregards the decisions of the highest court of the state that the Board was acting on full authority, and, third, it appears by the undisputed evidence that they had full authority.

16. Because the hearing enjoined was one to be had for the purpose of equalizing a tentative estimate only which had been made by the appellant Board. This estimate was not final and additional acts by the Board were necessary after such hearing was held before any tax, assessment or servitude could become operative. Manifestly the holding of such hearing could not give rise to a multiplicity of suits as against this appellee, no matter how many suits might arise as to other parties. Manifestly the proposal to hold such hearing cast no cloud on title, because other acts by the Board were necessary before any amount that was finally fixed could become a tax, assessment or servitude upon its property, and there was no evidence at all that there would result irreparable injury to appellee. This is especially applicable to the appellee City of Sioux Falls and to the four railway company appellees, because even if an assessment had been made and a tax levied, it would have created no lien upon their property.

17. Because appellee made no case under any acknowledged head of equity jurisdiction and in the essence, based its claim for relief upon the assertion that it was threatened with exaction of an illegal tax. At any rate there could be no right to have equitable relief until such time, if ever, as the threatened tax was about to be collected by taking from appellee the title to the lands affected by the assessment. Up to that time nothing could happen more than to exact a sum of money for taxes which were illegal taxes, and for that wrong or threatened wrong the law provides an adequate remedy either in the state or federal courts.

18. Because if, as is contended by the Circuit Court
294 of Appeals, the appellants acted utterly without authority of law and were therefore naked trespassers, that fact gave appellee an adequate remedy at law in either the federal or state courts at their election, to-wit, to sue in trespass—hence appellee's bill in chancery should not have been entertained. If, on the other hand, the acts of the appellants were in all respects lawful, the appellee was not entitled to any remedy either at law or in equity.

19. Because appellee had at all times a plain, adequate and complete remedy at law in the premises in the courts of the state by appealing from the establishment of the ditch to the circuit court of the state where a trial de novo could be had, and if dissatisfied there, an appeal to the Supreme Court of the state where, if it had been a federal question, the same could have been taken to the Supreme Court of the United States upon a writ of error.

And while it may be true appellee has waived its right to this appeal from the establishment of the ditch, that does not alter the fact that it had no right to enter a court of equity on the ground that, though it had at one time the right to thus appeal and to have review in the courts and a trial de novo there on the law side, by its default and waiver it voluntarily lost that right.

The right to enter chancery cannot be created by waiving or failing to exercise an adequate remedy at law.

Passing that, the appellee City had the right to appeal from the action of the appellant Board as to the apportionment of benefits directly to the circuit court of the state and there have a trial de novo, and if dissatisfied, to then appeal to the Supreme Court of the state and then a right, upon a writ of error, to go to the Supreme Court of the United States, upon any federal question saved and presented.

Or if, after appealing from the action of appellant
295 Board to the circuit court of the state, it had the right to enter the federal court, it could do so by a removal and there have a trial de novo the same as all other appellees in these actions.

20. Because, assuming for the sake of argument that the District Court and the Circuit Court of Appeals had authority to pass upon the merits, both of them erred in finding for the appellee in that there is absolutely no evidence to support the contention of the appellee on the merits; that is to say,

there is no evidence whatever that the appellant Board ever did anything whatsoever in the premises other than what it was authorized to do by the Constitution and statutes of the state of South Dakota. And in addition to this being the state of the evidence, the highest court of the state, construing said Constitution and statutes of the state, has ruled in a way that is binding upon said federal courts that in truth and in fact appellants acted on full authority and in every way in compliance with the requirements of said Constitution and statutes of the state of South Dakota.

21. Because the City of Sioux Falls was entitled to no relief, for the reason that it was one of the signers on the petition that initiated the establishment of this ditch and the subsequent action of the appellant Board. It was, therefore, estopped to object to being assessed to contribute its portion towards the cost of the construction; also estopped by reason of the premises to challenge the said ditch project on the ground of unconstitutionality; or to assert that the laws of South Dakota had not been complied with either in the establishment, construction or in proceedings to make an apportionment to obtain contribution to pay for its costs—for the City asked all to be done that was done.

22. Because the federal District Court reserved from its decree such property as to the appellees C. Milwaukee and St. P. Ry. Co. and the C. St. P. M. & Omaha Ry. Co. had within the assessment area of the old ditches. But it
296 failed to make the like reservation as to property which the City of Sioux Falls had in the same area; and the Circuit Court of Appeals erred in affirming without modification, curing this omission as to the City of Sioux Falls.

Wherefore Appellants pray that the said findings, judgment and decree of the said Circuit Court of Appeals be reversed and that such further orders and proceedings be had as law and justice may require and that this case may be remanded and such relief given to appellants as may be their due.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 31, 1924.

(Bond on Appeal to Supreme Court, U. S.)

Know All Men By These Presents:

That we, A. G. Risty, et al, as County Commissioners, etc., et al., Appellants, as principals, and the Southern Surety Company, of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the City of Sioux Falls, (a corporation) Appellee, in the above cause, in the sum of One Thousand Dollars ($1,000.00);

Conditioned that, whereas, on the 18th day of March, A. D., 1924, in the Circuit Court of Appeals of the United States, for the Eighth Judicial Circuit, in a suit pending in that Court upon appeal, wherein the City of Sioux Falls, a corporation, was plaintiff and appellee, and A. G. Risty, et al., as County Commissioners, etc., et al., were defend-
297 ants and appellants, numbered on the Docket as No. 6316, a Decree was rendered against the said A. G. Risty, et al., as County Commissioners, etc, et al., Appellants and the said A. G. Risty, et al., as County Commissioners, etc., et al., having obtained an appeal to the Supreme Court of the United States, and filed a copy thereof in the office of the Clerk of this Court, to reverse the said Decree, and a citation directed to the said appellee, citing and admonishing it to be and appear at a session of the United States Supreme Court, to be held in the City of Washington, D. C.;

Now, if the said A. G. Risty, et al., as County Commissioners, etc., et al., shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

A. G. RISTY,
Signing for All the Appellants,
Principals.

(Seal) SOUTHERN SURETY COMPANY OF DES MOINES, IA.,
By H. B. Charnock,
Attorney-in-Fact.
Surety.

The foregoing bond is hereby approved.

May 31, 1924.

WM. S. KENYON,
Judge of the United States Circuit Court of Appeals, for the Eighth Circuit.

• • • • •

(Certified copy of Power of Attorney issued to Mr. H. B. Charnock by the Southern Surety Company of Des Moines, Iowa, etc., attached to original bond.)

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 31, 1924.

---

298 Citation

United States Circuit Court of Appeals,
Eighth Circuit

A. G. Risty et al. as County Commissioners, et al., Appellants,
No. 6316 vs.
City of Sioux Falls, Appellee.

United States of America to City of Sioux Falls, Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the City of Sioux Falls is complainant and A. G. Risty et al. as County Commissioners et al. are defendants, and in which case the said defendants perfected an appeal to the Circuit Court of Appeals, Eighth Circuit, an appeal has been allowed to the said A. G. Risty et al. to the United States Supreme Court. You are hereby cited and admonished to be and appear in said court at Washington, D. C. sixty days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable William S. Kenyon, Judge of the United States Circuit Court of Appeals, Eighth Circuit, this 31st day of May, A. D. 1924.

WM. S. KENYON,
Judge of the United States Circuit Court of Appeals, Eighth Circuit.

Service of the within Citation this 2nd day of June, A. D., 1924, at Sioux Falls, South Dakota, is hereby acknowledged.

C. O. BAILEY AND
ROY B. MARKER,
Counsel for Appellee.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No. 6316 A. G. Risty, et al., as County Commissioners,

et al., Appellants, vs. City of Sioux Falls. Citation on Appeal to Supreme Court, U. S., and acknowledged of service. Filed Jun. 5, 1924, E. E. Koch, Clerk.

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299 (Praecipe for Transcript on Appeal to Supreme Court, U. S.)

The Clerk of the above named Court is hereby directed to prepare and certify a transcript of record in the above entitled case for the use of the Supreme Court of the United States by including therein the following:

1. The printed transcript of record filed in your court.

2. Appropriate reference to the hearing held at St. Louis in the Circuit Court of Appeals.

3. The opinion of the Circuit Court of Appeals in this cause except the title thereof.

4. The decree of the Circuit Court of Appeals, except the title thereof.

5. Petition for appeal and order allowing the same, except the title thereof.

6. Assignments of error.

7. The bond on appeal and approval, except the title, and the powers of attorney, verification and authentication which may be shown by sufficient memoranda.

8. That portion of appellee's brief and argument appearing on page 28 thereof which reads as follows: "It is alleged by the defendants and appellants in their answer, and appellee admits it to be a fact, that Drainage Ditch No. 1 and 2 was a new and independant proposition and not a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2 and cannot be considered as a proposition for the repair of the original ditches. It is a project which must stand or fall upon its own footing."

9. Citation in appeal and admission of service thereof.

300 10. Memoranda as to the praecipe filed.

11. Clerk's certificate.

Dated at Sioux Falls, South Dakota, this 3 day of June, 1924.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jun. 5, 1924.

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301 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of South Dakota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, except the order of submission and opinion, had and filed in the United States Circuit Court of Appeals, omitting, however, the full captions, titles and endorsements in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the Praecipe of counsel for appellants, in a certain cause in said Circuit Court of Appeals wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and City of Sioux Falls was Appellee, No. 6316, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this tenth day of June, A. D. 1924.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 30,420. U. S. Circuit Court Appeals, 8th Circuit. Term No. 455. A. G. Risty et al., as county commissioners, et al., appellants, vs. City of Sioux Falls. Filed June 16th, 1924. File No. 30,420.

(30,421)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 456

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS, ET AL., APPELLANTS,

vs.

GREAT NORTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1923, of said Court, before the Honorable William S. Kenyon, Circuit Judge, and the Honorable Jacob Trieber and the Honorable David P. Dyer, District Judges.

Attest:
(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twentieth day of March, A. D. 1923, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of South Dakota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Great Northern Railway Company was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (Affidavit of Service of Citation.)

In the District Court of the United States for the District of South Dakota, Southern Division.

Great Northern Railway Company, Plaintiff,
vs.
A. G. Risty, et al., Defendants,
and
Minnehaha National Bank et al, Intervening Defendants.

District Court of the United States
District of South Dakota—ss.

W. C. Welsh, being first duly sworn on oath, deposes and says: That he is a citizen and elector of the State of South Dakota. That he served the hereto attached citation in the above entitled cause upon the above named plaintiff on the 8th day of December, 1922, in the city of Sioux Falls, South Dakota, by then and there handing to and leaving with Harry Judge, its solicitor, a true copy of said citation.

W. C. WELSH.

Subscribed and sworn to before me this 8 day of December, 1922.

(Notarial Seal) DOUGLAS S. ELLIOTT,
Notary Public, South Dakota.

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2 Citation.

In the District Court of the United States, for the District of South Dakota, Southern Division.

Great Northern Railway Company, Plaintiff,
No. 103. vs. In Equity.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J.

O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial & Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter, Intervening Defendants.

United States of America to the above named Plaintiff, Great Northern Railway Company—Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Great Northern Railway Company is complainant and A. G. Risty et al., as County Commissioners of Minnehaha County, South
3 Dakota, are defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., are intervening defendants an appeal has been allowed the above named defendants and intervening defendants therein to the Circuit Court of Appeals, Eighth Judicial Circuit. You are hereby cited and admonished to be and appear at said Court at the City of St. Paul in the State of Minnesota sixty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable James D. Elliott, Judge of the United States District Court for the Southern Division, District of South Dakota, this 25 day of November, 1922.

JAS. D. ELLIOTT, Judge.

Service of the foregoing Citation, by receipt of copy, at Sioux Falls, South Dakota, is hereby admitted this ..... day of ....., A. D., 1922.

. . . . . .

Solicitor for Great Northern Railway Company, Plaintiff.

Endorsed: Filed in the District Court on Dec. 13, 1922 at 2 P. M.

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5 In the District Court of the United States of America, for the District of South Dakota, Southern Division.

Great Northern Railway Company, Plaintiff,
No. 103 S. Div. vs. In Equity.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris, Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants.

Be It Remembered, that on the 1st day of August, A. D. 1921, there was filed in the above entitled court, on behalf of the plaintiff, a Bill in Equity; which said Bill in Equity, excluding the verification and Exhibit A, is in words and figures the following, to-wit:

6 (Bill of Complaint.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Great Northern Railway Company, Plaintiff,
vs.
A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock as County Commissioners of Minnehaha County, South Dakota; Fred E. Ward as Auditor of Minnehaha County, South Dakota; and J. O. Anderson as Treasurer of Minnehaha County, South Dakota, Defendants.

The plaintiff, a corporation of the state of Minnesota and a resident and citizen of said state of Minnesota, brings this its bill of complaint against A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota,

Fred E. Ward, as auditor of Minnehaha County, South Dakota, and J. O. Anderson, as treasurer of Minnehaha County, South Dakota, residents and citizens of the state of South Dakota and of the southern division of the district of South Dakota, and respectfully shows unto the court:

First.

That the plaintiff is and was during all of the times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the state of Minnesota, and a resident and citizen of the said state of Minnesota within the meaning and intent of the laws conferring jurisdiction upon the district court of the United States.

Second.

That the defendants, A. G. Risty, J. A. Jensen, C. W.
7 Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, Fred E. Ward, and J. O. Anderson, are each of them residents and citizens of the state of South Dakota and of the southern division of the district of South Dakota within the meaning and intent of the laws conferring jurisdiction upon the district courts of the United States.

Third.

That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, and C. T. Charnock are the duly elected, qualified and acting county commissioners of the county of Minnehaha, in the State of South Dakota and constitute the board of county commissioners of said county of Minnehaha; that the defendant, G. W. Tyler, is a duly elected and qualified commissioner of said county of Minnehaha, and claims to be the legal commissioner of said county in place of said Chris Olson; that the defendant, Fred E. Ward, is the duly elected, qualified and acting auditor of the said County of Minnehaha, and that the defendant, J. O. Anderson, is the duly elected, qualified and acting treasurer of the said county of Minnehaha.

Fourth.

That the Legislature of the State of South Dakota at the ninth session thereof enacted a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Convenience or Welfare", which purported act was approved by the Governor of the State of South Dakota on March 7, 1905,

and which purported act is commonly known as Chapter 98 of the Session Laws of South Dakota of 1905; that
8 subsequently and at its tenth session the Legislature of the State of South Dakota re-enacted said Chapter 98 of the Session Laws of 1905 by enacting a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Convenience or Welfare or Whenever it Shall be Necessary or Practicable for Drainage of Agricultural Lands", which purported law was approved by the Governor of the State of South Dakota February 21, 1907, and which purported law is commonly known as Chapter 134 of the Session Laws of South Dakota of 1907; that by said Chapter 134 of the Session Laws of 1907 the Legislature of the State of South Dakota attempted to re-enact said purported law known as Chapter 98 of the Session Laws of 1905, together with amendments thereto; that subsequently the Legislature of the State of South Dakota at the Sixteenth Session thereof, re-enacted said Chapter 134 of the Session Laws of 1907 with amendments thereto and that such re-enactment is contained in the South Dakota Revised Code 1919, as Sections 8458 to 8491 inclusive thereof; that at its special session in the year 1920, the Legislature of the State of South Dakota amended sections 8464, 8671, 8472, and 8473 of said Revised Code by Chapter 46 of the laws of the second special session of 1920; that a copy of the purported law of the State of South Dakota known as Chapter 98 of the Session Laws of 1905 as amended and re-enacted as Chapter 134 of the Session Laws of 1907, and as amended and re-enacted as Sections 8458 to 8491 of the South Dakota Revised Code, 1919, and amended at
9 the second special session of 1920 is hereto attached, marked "Exhibit A", and made a part hereof.

Fifth.

That prior to the year 1916 the Board of County Commissioners of the said County of Minnehaha established within said County a drainage ditch known as "Drainage Ditches No. 1 and No. 2", which drainage ditches were designed for the purpose of draining upwards of twenty thousand acres of agricultural land situated in Townships 101, 102, 103 and 104 North, of Range 49, West of the Fifth Principal Meridian, in the said County of Minnehaha; that said drainage ditches were established pursuant to and under the provisions of said purported Law known as Chapter 134 of the Session Laws of South Dakota of 1907, and extended for a dis-

tance of several miles through said townships, and were fully completed prior to the year 1916; that an assessment for the cost of the construction of said drainage ditches No. 1 and No. 2 was made prior to the year 1916; that prior to said assessment the said board of county commissioners equalized the benefits to the lands so assessed and by such equalization of benefits established the area of the drainage district and determined the various properties benefitted by said drainage ditches No. 1 and No. 2; and that all matters connected with the construction of said ditches and with the assessment of the costs thereof were fully completed prior to the year 1916.

That none of the property of plaintiff described in the purported drainage ditch notice hereinafter referred to, of which "Exhibit C" is a copy, and none of its property or rights whatsoever was included in the property assessed as aforesaid for the construction of said drainage ditches No. 1 and No. 2; that in the equalization of benefits made by said Board of County Commissioners of the said County of Minnehaha prior to the making of said assessment no part of said property and none of plaintiff's property or rights whatsoever was included or found to be benefitted; that no property or rights whatsoever of the plaintiff are within the drainage district of said drainage ditches No. 1 and No. 2, and that the said defendants, the county commissioners of the said County of Minnehaha, have no power or jurisdiction to include within said drainage district any property or rights whatsoever of plaintiff or to find and determine that any such property or rights have been benefitted by the construction and maintenance of said drainage ditches No. 1 and No. 2, or to assess said property or rights for any sum or sums whatsoever.

Sixth.

That the land drained by said drainage ditches No. 1 and No. 2 is situated in the valley of the Big Sioux north of the city limits of the city of Sioux Falls, which city is a municipality of upwards of twenty-five thousand inhabitants; that the Big Sioux River flows in a southerly direction through said townships 101, 102 and 103 north of said Range 49, West of the Fifth Principal Meridian, and that the City of Sioux Falls is situated in said Township 101; that after entering said township 101 at the northern boundary line thereof the said Big Sioux River flows in a southerly direction to the vicinity of the southern boundary line of said township and then flows in an easterly direction for a dis-

tance of some miles and then in a northerly direction
11 through the said City of Sioux Falls and towards the north line of said township and then continues in an easterly direction until it passes out of said township over the eastern line thereof; that in its course in a northerly direction through the City of Sioux Falls the said Big Sioux passes over a series of falls aggregating approximately ninety feet; that the city water supply of the said City of Sioux Falls is situated in a graveled bed extending over a considerable area in said townships 101 and 102 north of the city of Sioux Falls; that the South Dakota State Penitentiary is situated north of the said City of Sioux Falls, and that said penitentiary and the lands belonging thereto are situated in said townships 101 and 102.

Seventh.

That the Big Sioux River has its source in Lake Pelican adjoining the City of Watertown in the County of Codington and State of South Dakota, which City of Watertown is situated approximately one hundred miles north of the City of Sioux Falls; that from the said City of Watertown the said Big Sioux River flows in a generally southerly direction but with many crooks and bends through the counties of Codington, Hamlin, Brookings and Moody to the City of Sioux Falls, in the County of Minnehaha, and that the said Big Sioux River during its southward course drains a large area of territory both eastward and westward of its channel.

Eighth.

That none of the property of plaintiff described in said purported drainage notice, of which "Exhibit C" is a copy, is agricultural land; that plaintiff is a corporation engaged in the operation of a line of railroad in the said county of Minnehaha; that all of its property in said county of Minnehaha consists of its right-of-way, station grounds, yards, line of railroad, bridges, culverts, and other property employed in the maintenance and operation of its line of railway; that it is not engaged in any agricultural operations, and that the reconstruction of said spillway and the construction of said retaining gates, dams, ditches and other work done as hereinafter pleaded by the board of county commissioners of the said county of Minnehaha, conferred no benefits upon plaintiff or its property; that no portion of the property of plaintiff upon which an apportionment of benefits is now sought to be made is subject to overflow, or is in danger of damage by overflow, or is situated within or adjacent to any lands sub-

ject to overflow, or is drained to any extent by said
12 spillway, and other improvements or benefitted thereby.

Ninth.

That as originally constructed said drainage ditches No. 1 and No. 2 emptied into the Big Sioux River through a ditch constructed across the land immediately north of the City of Sioux Falls, which ditch was between the City of Sioux Falls and the graveled bed from which said city obtained its water supply, and emptied into the Big Sioux River in the Northeast portion of the City of Sioux Falls and north of the series of falls situated upon said river along its course through the said City of Sioux Falls; that subsequent to the construction of said drainage ditches No. 1 and No. 2 and about the years 1915 and 1916, the volume of water passing through said drainage ditches caused the outlet of said drainage ditches into the Big Sioux River to wash out a channel upon the land through which said outlet was constructed to such an extent that there arose imminent danger that the course of the Big Sioux River would be changed so that all
13 of the water in the channel of said river would be diverted through said drainage ditches and the outlet thereof, and a new channel formed by said ditches which would cause the water in said river to cease flowing through its proper and natural channels and over the series of falls in the City of Sioux Falls, and to flow instead through said drainage ditches and the outlet thereof into the Big Sioux River at a point north of the City of Sioux Falls; that such diversion of the channel of the said Big Sioux River threatened to cause enormous damage to property in the said City of Sioux Falls situated along the channel of said river, and to destroy the water power obtained from said river at the falls thereof, and also to destroy the municipal water supply of the said City of Sioux Falls by draining the water from the gravel bed from which said municipal water supply is obtained.

Tenth.

That the Board of County Commissioners of the said County of Minnehaha, for the purpose of repairing and maintaining said drainage ditches No. 1 and No. 2 in such manner as to avoid the threatened change in the channel of the Big Sioux River and to prevent the drainage of the gravel bed from which the City of Sioux Falls obtains its municipal water supply, and to prevent the injury to the property owners of the City of Sioux Falls and the destruction of the water

power at the falls of the Big Sioux River in the City of Sioux Falls, which would be caused by the threatened change in the channel of the Big Sioux River, caused to be constructed in the summer of the year 1916 various dams and gateways at various places along said drainage ditches No. 1 and No. 2, made changes in the channel of the Big Sioux River along the course of said
14 drainage ditches and caused to be re-constructed the spillway at the outlet of said drainage ditches into the Big Sioux River; that said construction work was done for the purpose of draining lands in addition to the lands theretofore found to be benefitted by and assessed for the cost of the installation and construction of said drainage ditches No. 1 and 2, but for the sole and only purpose of maintaining said drainage ditches No. 1 and No. 2 in such manner as to permit them to attempt to perform the function for which they were originally constructed without danger of damage to the property and rights theretofore threatened as hereinbefore pleaded.

Eleventh.

That there has been expended by the Board of County Commissioners of said Minnehaha County upon the construction of ditches, dams, gate-ways and other work as aforesaid, and upon the reconstruction of said spillway upon the outlet of said Drainage Ditches No. 1 and No. 2 a sum in excess of Two Hundred Fifty-five Thousand ($255,000.00) for which said sum the said Board of County Commissioners has issued drainage warrants, and that there is due for principal and interest upon said warrants a sum, as plaintiff is informed and believes, in excess of three hundred thousand dollars.

Twelfth.

That before the construction of said spillway, dams, retaining gates, and other work, and straightening of the channel of the Big Sioux River, no petition therefor signed by one or more owners of land likely to be affected was ever made or presented to the Board of County Commissioners of the said County of Minnehaha, excepting that on or about the 3rd day of August, 1916, there was filed in the office of the County Auditor of the said County of Minnehaha a purported petition signed by F. L. Blackman and other persons, which said petition purported to be a petition "to reconstruct and
15 improve Drainage Ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway and outlet to said Drainage Ditches No. 1 and No. 2,

and to pay therefor by assessment upon the property, persons and corporations benefitted thereby"; that drainage ditch No. 1 and 2 referred to in said purported drainage notice, of which "Exhibit C" is a copy, is a combination of and is the same drainage Ditches No. 1 and No. 2 hereinbefore referred to; that the owners of some of the property included within the drainage area of drainage ditches No. 1 and No. 2 as theretofore established as aforesaid, objected to the repair of said ditches and to the assessment of their property for the cost of said repairs and of the maintenance of said ditches, and that on account of such objections and as a mere subterfuge and for the sole and only purpose of attempting to lay a foundation authorizing the Board of County Commissioners of said Minnehaha County to change the boundaries of the drainage area or district of said drainage ditches No. 1 and No. 2, and to assess property not included within the area of said drainage ditches and not benefitted by said ditches No. 1 and No. 2, for the cost of the necessary repairs and maintenance of said ditches theretofore established, constructed and accepted, the then Board of County Commissioners of said County of Minnehaha, caused the said purported petition hereinbefore in this paragraph referred to, to be filed, and that said Board of County Commissioners acquired by the filing of said petition no power or jurisdiction under and by virtue of the drainage laws of the State of South Dakota hereinbefore referred to, to proceed in any manner to include any of the property of plaintiff within the drainage area or district of said Ditches No. 1 and No. 2 or of said ditches No. 1 and 2 and that said Board and the said defendants now constituting said Board never acquired and have no power
16 or jurisdiction to determine that any of the property of plaintiff is benefitted by said drainage ditches No. 1 and 2, now attempted to be designated drainage ditch No. 1 and 2, or to assess said property, or any portion thereof, for the cost of the necessary repairs and maintenance of said drainage ditches No. 1 and No. 2; that upon the filing of said purported petition the County Commissioners of said County of Minnehaha did not transmit a copy of the same to the State Engineer of the State of South Dakota; that the said Board of County Commissioners of the said County of Minnehaha did not inspect the proposed route of said drainage ditches and did not cause a survey of said drainage ditches to be made by a surveyor; that no survey of the same was ever made under the general supervision of the State Engineer of the State of South Dakota, or otherwise prior to the construction thereof; that no surveyor's report

in writing was made to the said Board of County Commissioners; that no surveyor's report, or copy of any map or plan made or filed by said surveyor was furnished to the said State Engineer prior to the beginning of said work; that the said Board of County Commissioners of said Minnehaha County did not file with the said purported petition its determination of its costs, length and width of the drainage improvement furnished in said petition; that the said Board of County Commissioners did not fix a time and place for a hearing of said petition and did not give notice thereof in the manner provided by law; that none of the proceedings of the said Board of County Commissioners in the matter of the said drainage petition has been recorded and indexed in any book kept for that purpose in the office of the Auditor of said County of Minnehaha; that no drainage district for the
17 purpose of the construction of said spillway, dams, retaining gates, ditches and other work has ever been established other than the drainage district established as alleged in paragraph "Fifth" hereof.

Thirteenth.

That prior to the reconstruction of said spillway, dams, retaining gates, ditches and other work, the said Board of County Commissioners of Minnehaha County did not prepare plans and specifications therefor, and did not file plans or specifications therefor in the office of the County Auditor of the said County of Minnehaha, and did not let contracts upon competitive bids for the construction of said spillway, dams, retaining gates, ditches and other work; that prior to the reconstruction of said spillway the said Board of County Commissioners did advertise for competitive bids for the construction of the spillway in accordance with certain plans therefor; that bids were received by the said Board of County Commissioners for the construction of a spillway in accordance with such plans, and that the same were rejected by the said Board of County Commissioners, and subsequently the said Board of County Commissioners adopted a new and amended plan for the construction of an entirely different form of spillway, and without advertising for bids for such construction made a contract for the construction of said spillway in accordance with said new and amended plan with the Sioux Falls Construction Company, under which said contract the said Sioux Falls Construction Company constructed such spillway upon the cost plus plan; that under said contract the said Sioux Falls Construction Company was paid the entire cost of the construction of said spillway, together with nine

per cent (9%) of the total cost added; that the cost of the construction of said spillway under said cost plus plan was, as plaintiff is informed and believes, upwards of one hundred fifty thousand dollars ($150,000.00) for which said sum drainage ditch warrants upon said drainage ditches No. 1 and No. 2 were issued by the said Board of County Commissioners of Minnehaha County to the said Sioux Falls Construction Company, and to other persons.

Fourteenth.

That on or about the 20th day of November, 1920, the Board of County Commissioners of said Minnehaha County entered into a certain contract with Albert J. Chenoweth and Herman Rettenhouse, co-partners as Chenoweth & Rettenhouse, whereby the said Board of County Commissioners employed the said Chenoweth & Rettenhouse to make a topographical survey showing the lands benefitted and subject to assessment for the payment of the cost of said spillway, dams, retaining gates, ditches and other work, and that by said contract the said Board of County Commissioners agreed to pay the said Chenoweth & Rettenhouse for said survey the sum of Seven thousand five hundred dollars ($7,500.00) to be paid in drainage ditch warrants drawn on drainage ditches No. 1 and No. 2; that the said Chenoweth & Rettenhouse thereupon proceeded to make the purported survey of the lands purported to be subject to assessment for the construction of said spillway, dams, retaining gates, ditches and other work; that the said Chenoweth & Rettenhouse made and filed a report with the said Board of County Commissioners, in which report they made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereunto annexed, marked "Exhibit B" and made a part hereof.

18

Fifteenth.

That on or about the 10th day of June, 1921, the said board of county commissioners of the said county of Minnehaha adopted a purported notice of the time and place for equalizing the proportion of benefits for the construction of said spillway, dams, retaining gates, ditches, and other work, and caused the same to be published on July 13th, 1921, and on July 20th, 1921, in the Sioux Falls Daily Argus Leader, the official newspaper of the said county of Minnehaha; that a copy of said drainage notice is hereunto annexed, marked "Exhibit C"; that the proportion of benefits assessed against the plaintiff is 616.85 units, out of a proposed total of 32,-

549.62 units, and that upon the basis of such apportionment the assessment against plaintiff and its property will be in excess of five thousand eight hundred dollars ($5,800.00); that the said board of county commissioners of said Minnehaha County are threatening to and will, as plaintiff is informed and believes, unless enjoined by this court, make an apportionment of benefits upon plaintiff of 616.85 [unites], and will make an assessment thereon against plaintiff
19 and its property in the sum in excess of five thousand eight hundred dollars ($5,800.00), and that the defendant, Fred E. Ward, as county auditor of the said county of Minnehaha, will spread such assessment upon the books of his office, and that the defendant, J. O. Anderson, as treasurer of the said county of Minnehaha, will proceed to collect the same pursuant to the provisions of said purported statute, "Exhibit A".

Sixteenth.

That this action is a suit of a civil nature to resist and prevent an assessment upon the property of plaintiff under the pretended authority of a purported act of the Legislature of the state of South Dakota claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000.00) and is the amount of said threatened assessment, to-wit: a sum in excess of five thousand eight hundred dollars ($5,800.00).

Seventeenth.

That the costs of the board of county commissioners of said Minnehaha County in constructing said spillway, dams, retaining gates, and ditches, were unauthorized under the constitution and laws of the state of South Dakota, and that the same have never been approved by the State Engineer
20 of the state of South Dakota; that no benefits have accrued to plaintiff or its property by the construction of said spillway, dams, retaining gates, and ditches, and by the other work done as aforesaid upon the property, in the drainage area of said drainage ditches No. 1 and No. 2, but that the same have been and are a positive damage to the property of plaintiff.

Eighteenth.

That said purported statute of the state of South Dakota, "Exhibit A" hereto, is unconstitutional and void, in that the

same is in violation of Section 2 of Article VI. of the Constitution of the State of South Dakota, and in that the same is in violation of the Fourteenth Amendment of the Constitution of the United States; that said Statute, "Exhibit A", is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area, and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies and other corporations, and upon the property of municipal and quasi-municipal corporations, and upon platted property in cities and villages. Said purported law, "Exhibit A", is further unconstitutional and void in that the same provides for an assessment against property without the right of the property owner to be heard thereon and without notice of any character to the property owner; that if said apportionment of benefits be made as threatened by the said board of county commissioners of said Minnehaha County, and as is provided in said notice, "Exhibit C", the same will constitute the taking of the property of plaintiff and of the
21 other property owners affected by said notice without due process of law, and will deny and deprive plaintiff of the equal protection of the laws; that a cloud will be placed upon the title of the plaintiff to its real property situated within said drainage area affected and attempted to be established by said notice, "Exhibit C"; that there will result a multiplicity of suits; that plaintiff and other property owners affected will suffer immediate and irreparable injury; and that plaintiff has no plain, speedy, and adequate remedy at law.

Wherefore, plaintiff prays judgment that the defendants and each of them, their agents, servants, employes, attorneys, and successors in office, and each and every one of them, be forever restrained and enjoined from proceeding further in the making of an apportionment of benefits upon the property of plaintiff for the construction of said spillway, dams, retaining gates, ditches, and for the other work done, as aforesaid, by the board of county commissioners in the area of said drainage ditches No. 1 and No. 2 and restrained and enjoined from making any assessment upon the property of plaintiff for the cost of the construction of said spillway, dams, retaining gates, ditches, and other work, or any part thereof, and from proceeding in any manner under said purported statute, "Exhibit A" in the construction of any work in the

area of said drainage ditches No. 1 and No. 2 and from doing any act looking toward the apportionment of benefits for any work heretofore done in the area of said drainage ditches No. 1 and No. 2, and from doing any act tending towards the making of an assessment for the cost of any such work heretofore done, and from in any manner proceeding under said purported law, "Exhibit A", in the doing of any work in the area of said drainage ditches No. 1 and No. 2; that the defendant, Fred E. Ward, as auditor of the said county of Minnehaha, be forever restrained and enjoined from making
22 any apportionment of benefits for work done, as aforesaid in the area of said drainage ditches No. 1 and No. 2, and from making any assessment therefor, and from certifying any assessment therefor to the county treasurer of the said county of Minnehaha; that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as county commissioners of the said county of Minnehaha, and their successors in office be forever restrained and enjoined from fixing a proportion of benefits for the construction of said spillway, dams, retaining gates and ditches upon the property of plaintiff and upon the property of the other property owners named in said notice, "Exhibit C", and forever restrained and enjoined from making any assessment against plaintiff, or its property, or against the property of any other property owner in the area of said drainage ditches No. 1 and No. 2 and for the cost of said work; that the defendant, J. O. Anderson, as treasurer of Minnehaha County, South Dakota, and his successors in office, be forever enjoined and restrained from filing any assessment and from collecting any assessment against the property of plaintiff, or of the other property owners named in said notice, "Exhibit C", upon any assessment for the construction of said spillway, dams, retaining gates and ditches; that the said purported statute of the state of South Dakota, "Exhibit A", hereto, be adjudged and decreed to be unconstitutional and void; that all acts of the board of county commissioners of said county of Minnehaha and of the state engineer of the state of South Dakota heretofore done in connection with the construction of said spillway, dams, retaining gates and ditches be adjudged and decreed to be illegal and void; that it be adjudged and decreed that no benefits have resulted to plaintiff from the construction of said spillway, dams, retaining gates, and ditches and that no apportionment of benefits or assess-
23 ment of damages ever be made against plaintiff or its property therefor.

That pending the issuance of a perpetual injunction herein, this Honorable Court grant an interlocutory injunction herein restraining the defendants herein, their agents, servants and employes and each and every of them from doing any of the above mentioned acts until the final hearing herein or until the further order of this court; that before the hearing and determination of plaintiff's application for an interlocutory injunction this Honorable Court grant a temporary restraining order restraining the said defendants, their agents and servants and each and every of them, from doing any of the above mentioned acts until the hearing and determination of plaintiff's application for an interlocutory injunction herein.

The plaintiff further prays that a subpoena of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, individually and as County Commissioners of the County of Minnehaha in the State of South Dakota, and to Fred E. Ward, individually and as auditor of the said county of Minnehaha, and to J. O. Anderson, individually and as Treasurer of the said County of Minnehaha, thereby commanding them and each of them on a day certain therein to be named to be and appear before this Honorable Court, and then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular, the premises and to perform and abide by such order, direction or decree as may be made in the premises, and that on final hearing hereof said order of injunction may be made perpetual. Plaintiff further prays for such other and further relief as shall to Court seem just, proper and equitable, and for its costs and disbursements herein.

H. E. JUDGE,
Solicitor for Plaintiff.

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of Counsel.

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24 Exhibit B.

Proposed Distribution of Proportional Benefits.

District or Division	Acres	Units	Percent of total.	
1. Farm lands north of City Limits and North of South Line of Sec. 12-101-50	13,271.09	10862.30	33.4%	$103,191.85

2.	City Lots and Town of Renner lying north of above line,	81.20	42.52	0.1%	403.94
3.	Farm land and tracts south of above line,	2,065.23	2958.45	9.1%	28,105.28
4.	City lots south of above line,	361.60	1372.52	4.2%	13,038.94
5.	City of Sioux Falls,		3147.95	9.7%	29,905.52
6.	Minnehaha County,		2518.36	7.7%	23,924.42
7.	Township roads,		1573.98	4.8%	14,952.81
8.	Railroads,		4721.91	14.5%	44,858.15
9.	Northern States Power Company,		5351.63	16.5%	50,840.49
	Totals,	15,722.12	32549.62	100.0%	$309,221.40

In the above calculation the Value of One Unit is taken at $9.50.

CHART

TOO

LARGE

FOR

FILMING

26 Endorsed: Filed in the District Court on Aug. 1, 1921, at 11 A. M.

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27 (Order granting leave to Minnehaha National Bank of Sioux Falls et al., to intervene and be made parties defendant.)

The matter of hearing the show cause order heretofore issued out of this Court at the instance of the Minnehaha National Bank of Sioux Falls, South Dakota, et al, to the above named plaintiff and defendants in the above entitled cause, coming on regularly for hearing before this Court, at the court room thereof, in the Federal Building, in the City of Sioux Falls, South Dakota, the said plaintiff appearing by its attorneys of record, and the said petitioning interveners appearing by their attorneys, Porter & Bartlett, and after hearing of said matter, it is hereby

Ordered and Adjudged that the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, said petitioning interveners, petition be granted, and the said Minnehaha Nation Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Hartford, South Da-
28 kota, The Colton State Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, the Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, H. E. Donahoe, and W. G. Porter, be and they are hereby made parties defendant to this cause of action, and they are hereby given until the 25th day of August, 1921, at Ten o'clock A. M. thereof, within which time to file their answer to plaintiff's bill of complaint herein, and to make a return to plaintiff's show cause order herein.

And good cause appearing therefor, it is further likewise Ordered that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock as County Commissioners of Minnehaha County, South Da-

kota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, have and they are hereby granted until August 25th, 1921 at Ten o'clock A. M. to file their answers to plaintiff's bill herein, and to make a return to plaintiff's show cause order herein.

And it is further Ordered that the hearing of said show cause order be and the same is hereby adjourned to August 25th, 1921, at Ten O'clock A. M.

Dated this 11th day of August, A. D. 1921.

By The Court:

(Seal of Court) JAS. D. ELLIOTT,
Judge of the District Court.

Attest:
Jerry Carleton,
Clerk of the District Court.

Endorsed: Filed in the District Court on Aug. 19,
29 1921, at 2 P. M.

And afterwards, to-wit, on the 1st day of September A. D. 1921, there was filed in the office of the clerk of said court, Answer of Defendants; that the Title of the Case, Paragraphs A. B, C, D and F of defendants' Special Answer, Paragraph First to Eighteenth, inclusive, of the defendants' General Answer, Paragraphs I, VII, VIII, IX, XII, XIII, XIV and XV of defendants' Affirmative Defense, the Prayer, Petition of F. L. Blackman and others to reconstruct and improve drainage ditches No. 1 and 2, the Order for filing said Petition, the Resolution for survey under said Petition, the Resolution fixing the exact line and width of the ditch and fixing the time and place for hearing said petition, and the Resolution establishing Drainage Ditch No. 1 and 2, all as contained in said Answer of Defendants, are in words and figures the following, to-wit:

30 (Answer.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Great Northern Railway Company, Plaintiff,

vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as

Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha, County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, W. G. Porter, Intervening Defendants.

Comes now the above name defendants, A. G. Risty, et al., and for their answer to plaintiff's bill of complaint in the above entitled action, admit, deny and allege as follows:

A.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint, allege that said bill does not state any matter of equity entitling plaintiff
31 to the relief prayed for, nor are the facts as stated, sufficient to entitle plaintiff to any relief against the said defendants in that said plaintiff has a plain, adequate and complete remedy at law.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

B.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint and the allegations contained in paragraph eighteen thereof, to-wit: "That there will result a multiplicity of suits and that the owners affected will suffer irreparable injury", are not truly stated or alleged in good faith and are stated with the false and fraudulent purpose of imposing upon the jurisdiction of this court and they are therefore fictitious and fraudulent. And said defendants say there are no other actions at law or in

equity pending or threatened against said plaintiff and that said plaintiff has a plain, adequate and complete remedy at law, all of which these defendants allege to be true and plead the same in bar to said bill.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

C.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint, allege that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this Court in that this suit is wholly based upon the alleged existence of a federal question and diversity of citizenship, and that the amount sued for and the value of the subject matter as alleged in said bill is not truly stated or alleged in good faith. That
32 the allegations of plaintiff's bill show it as being "a suit of a civil nature to resist and prevent an assessment upon the property of this plaintiff under the pretended authority of a purported act of the legislature of the State of South Dakota, claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00) and is the amount of the threatened assessment, to-wit: a sum in excess of Fifty-eight Hundred Dollars ($5800.00)", are false and stated with a false and fraudulent purpose of imposing upon the jurisdiction of this Court and are therefore fictitious and fraudulent. And said defendants say that the amount involved, or value of the subject matter in this suit, does not exceed the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs; that said bill of complaint upon its face shows that under the drainage law referred to in paragraph four thereof the amount of the assessment, or the amount in controversy herein, has not been, and cannot be, determined until after the equalization thereof provided for in such statute and until such equalization, the amount to be hereinafter assessed, if any, by said Board of County Commissioners or by the Courts of the State of South Dakota, to which an appeal is taken, as provided for by said law is purely speculative, is uncertain and undeterminable at this time by said plaintiff, this court, or anyone at all, and is dependent entirely upon the showing made by this plaintiff at such hearings and determinations provided for by said law, as to the amount of benefits re-

ceived by this plaintiff; and that no sum has been or can be assessed and determined against the plaintiff's property until such equalization of the proportion of benefits has
33 been had, and at which hearings this plaintiff is permitted to make his showing therein and the amount of benefits, if any, which plaintiff does receive are thereafter equalized and fixed by said Board or Court and the amount so fixed is then extended and assessed against the property of said plaintiff, and not otherwise, all of which these defendants aver to be true and set up the same in bar of plaintiff's bill of complaint herein.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

D.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint herein, allege that on or about December 4, 1920, an equity suit was instituted in the Circuit Court within and for Minnehaha County, in the State of South Dakota, the same being a Court of general jurisdiction and having jurisdiction over the subject matter there presented by one Oluf O. Gilseth, whose lands are affected by the construction of drainage ditch No. 1 & 2 and against which lands the proportion of benefits for the construction of said ditch has been proportioned upon the same basis and in like manner as the proportion of benefits upon the lands of this plaintiff as hereinafter set forth, which action was brought by the said Oluf O. Gilseth, for himself and as representing an informal organization of farmers and others who are similarly situated, against the defendants herein, the Board of County Commissioners of Minnehaha County, South Dakota, and other persons, which action was instituted with full knowledge, approval, acquiescence and consent of the plaintiff herein, its officers, agents and attorneys, and in which said cause the same facts are alleged and relied on in plaintiff's bill of complaint as herein set forth, and which said bill of complaint prayed that said defendants be
34 forever enjoined and restrained from making or attempting to make any proportion of benefits upon the property of the plaintiffs herein, or the property of other property owners within the drainage area of the drainage ditches No. 1 and No. 2 for the costs and construction of said spillway, dams, retaining gates or other work, and be forever restrained and enjoined from levying any assessment upon the property of the plaintiff or upon the property of

other property owners in said drainage area for the payment of the costs of the construction of said spillway, dams, retaining gates or other work, for the reason and upon the grounds that the law under which said drainage ditch was established and constructed was in controvention of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States, to which said bill of complaint said defendant Board of County Commissioners and these intervening defendants set up and relied upon the same facts and defense as are hereinafter set forth; that said action came on for trial before said Circuit Court of Minnehaha County, South Dakota, with the full knowledge, acquiesence, consent and approval of plaintiff and at which trial plaintiff was entitled to be heard and was represented by its attorneys on the 31st day of January 1921, evidence was introduced upon said hearing on behalf of said plaintiff and these defendants and after the taking of evidence therein was closed and thereafter upon the facts there presented, and in the trial of which the plaintiff could have and did participate, said Court made findings and conclusions and judgment thereon dismissing said action upon its merits. That a duly exemplified copy of said bill of complaint, answer, findings, conclusions and judgments are hereto attached, marked "Exhibit B", and made a part hereof, all of which these defendants allege to be true and plead the same in bar.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

* * * * * * * * * * *

35 F.

Comes now the above named defendants, A. G. Risty, et al, and for answer to plaintiff's bill allege that this suit does not really and substantially involve a controversy within the jurisdiction of this court, in that this suit involves the determination of facts and matters controlled and governed by the drainage statute of South Dakota, mentioned in plaintiff's bill of complaint and which by its provisions creates and provides its own special tribunal with exclusive original jurisdiction to try and determine the questions necessarily involved therein, and which are attempted to be presented for litigation in this action, and that, until such determination by said special tribunal so provided for, this court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, and that said special tribunal has not fully determined the matters and things herein presented for determination.

All of which these defendants allege to be true and plead the same to the jurisdiction of this Court.

Wherefore, defendants pray that plaintiff's bill of complaint be dismissed with costs.

G.

Comes now the above named defendants, A. G. Risty, et al, and for their further answer to the allegations contained in plaintiff's bill of complaint, admit, deny and allege as follows:

First.

That these defendants admit Paragraph I of said bill.

Second.

That these defendants admit Paragraph II of said bill.

Third.

That these defendants admit Paragraph III of said bill.

36 Fourth:

These defendants, answering said bill of complaint, admit that the Legislature of the State of South Dakota, at its Tenth Session enacted a law entitled: "An Act for the Establishment, Construction and Maintenance of Drainage and Levies in Counties, Whenever such Drainage shall be Conducive to the Public Health, Convenience or Welfare, or Whenever it shall be Necessary or Practicable for the Drainage of Agricultural Lands", which law was approved by the Governor of the State of South Dakota on February 21st, 1907, said law being Chapter 134 of the Session Laws of South Dakota of 1907, and that subsequently thereto, the Legislature of the State of South Dakota, in the years 1909, 1911, 1915 and 1917, enacted laws amendatory thereto, and in 1919 re-enacted said law and amendments thereto, as Sections 8458, to 8491, inclusive, of the South Dakota Revised Code for 1919, and thereafter and in the years 1920 and 1921, enacted amendments thereto, which law and amendments now constitute the drainage laws of the State of South Dakota, and specifically deny each and every other allegation of said paragraph.

Fifth.

These defendants answering the Fifth paragraph of complainant's bill, deny that the Board of County Commissioners of Minnehaha County, South Dakota,

established a drainage ditch known as "Drainage Ditch No. 1 and No. 2", as therein alleged, but allege the fact to be that in the year 1907 the Board of County Commissioners of Minnehaha County, upon the petition of William H. Lyon, accompanied by a proper bond, approved by the County Auditor, and after due notice and other procedure pursuant to and under Chapter 134 of the Laws of 1907 of the State of South Dakota, established Drainage Ditch No. 1 commencing at a point named in the Southeast Quarter (SE¼) of Section Twenty-nine (29), Township One Hundred two (102), Range Forty-nine (49), running thence about two (2) miles directly South, thence in a Southeasterly course about a mile, cutting through the rim of the natural ridge or bluff just North and East of the State Penitentiary in the City of Sioux Falls, and descending about one hundred (100) feet following the slope of the hill, and terminating in the Big Sioux River on the Northeast Quarter (NE¼) of Section Nine (9), Township One Hundred One (101), Range Forty-nine (49), which said drainage ditch was constructed so as to have a bottom width of forty (40) feet, except where the same cut through the bluff and descended into the Big Sioux River, where a thinly lined concrete gutter or spillway, with sufficient capacity only to carry the water that was planned to come through the said ditch, was constructed, but the terminal thereof was never safely or securely anchored and established, and that thereafter and before the construction of said Drainage Ditch No. 1 had been completed, one Iver R. Peterson and numerous other persons, filed their petition in regular form, accompanied by a proper bond duly approved by the County Auditor, with said Board of County Commissioners, asking and praying that the said Drainage Ditch No. 1 be extended Northward several miles through the Valley of the Big Sioux River, to drain other agricultural lands therein situated; the said petition was found sufficient in form, and was ordered filed and referred to the State Engineer, and a resolution for survey regularly adopted thereon, and thereafter, and upon the Engineer's written report of said survey, by resolution, the exact line and width of said ditch extension was fixed, and after due notice and hearing, said petition was allowed, and resolution adopted by the Board of County Commissioners establishing said drainage ditch, and designating it as "Drainage Ditch No. 2", extending from the North end of Drainage Ditch No. 1, hereinbefore described, Northward about twelve (12) miles to a point near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, and said drainage ditch was thereafter constructed,

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which ditch so constructed, tapped the Big Sioux River in two places, and the assessment for the costs and expense of the construction thereof was duly spread upon the lands benefited within the territory embraced within the initial point in Dell Rapids Township, and the terminal point in Section Nine (9) of Sioux Falls Township; and further answering said Paragraph V, these defendants admit that prior to the year 1916 assessments were duly spread upon the lands determined to be benefited by the construction thereof, and such assessments collected, but deny each and every other allegation in said paragraph contained.

Sixth.

These defendants answering the sixth paragraph of complainant's bill, admit the allegation contained in said paragraph, but allege the fact to be that in addition to the lands drained lying North of the City of Sioux Falls, the said Drainage Ditches No. 1 and No. 2 also drained, affected and benefited lands lying West and South of said City and also the lands adjacent to said River through and in said City of Sioux Falls were drained, affected and benefited thereby.

Seventh.

These defendants answering the Seventh paragraph of the complainant's bill, allege that they are without knowledge as to the facts therein set out, and therefore deny the same.

Eighth.

These defendants further answering the Eighth paragraph of complainant's bill, admit that the plaintiff is a corporation engaged in the operation of a line of railroad in the
39 said County of Minnehaha, but specifically deny each and every other allegation, matter, and thing in said paragraph contained.

Ninth.

These defendants answering the Ninth paragraph of complainant's bill, admit the statements therein made, but in explanation thereof, allege the further facts to be that after the construction of said spillway, as above described, the capacity of said ditches were increased by the rapidly flowing waters therein, eroding the banks and widening said Ditch No. 1 to nearly twice its original width of forty feet: the natural barrier which originally prevented the waters of the Big Sioux River from flowing into said Ditch No. 1 near its initial point,

except in flood times, eroded and wore away and permitted a large part of the water from the Big Sioux River to flow uncontrolled directly into said ditch and through the same to said spillway, which said spillway did not have the capacity to safely carry all of the flood waters that came to it through said ditch; that by reason of the foregoing facts said ditches became out of repair, and filled with sand bars and mud, and other obstructions, and that, owing to the tortuous course of the Big Sioux River through the district drained by said Ditches No. 1 and No. 2, the said river and said ditches were inadequate to carry away the flood waters and properly drain the lands within the area of said drainage ditches during flood seasons; that on or about the 15th day of March, 1916, during a spring flood, said spillway and outlet for said drainage ditches, as above described, was washed out and destroyed, so that the waters passing through said ditches and outlet, were wholly uncontrolled; that at the place where said spillway had been constructed, the waters descend-
40 ed to the basin of the Big Sioux River over a steep bluff by a drop of approximately of the height of one hundred feet, and that after the washing out and destruction of said spillway and outlet, the waters from said ditches washed out a deep gorge in the bluff, and tore away and destroyed the adjacent land to the extent of several acres; that said outlet and spillway were located in the immediate vicinity of State lands belonging to the State of South Dakota, and in the immediate vicinity of the State Penitentiary, and also of the City Water Works of the City of Sioux Falls, by means of which water works the said City was supplied with water from gravel beds immediately adjacent to said drainage ditches, and that by reason of the washing out of said spillway and of the uncontrolled waters of said ditches, the said lands of the State of South Dakota, the State Penitentiary and the water works and water supply of the said City of Sioux Falls, as well as the properties of private citizens in the vicinity of said outlet and spillway, were greatly imperiled and endangered; that there was imminent danger of the waters of the Big Sioux River being entirely diverted from their natural course into Drainage Ditch No. 1 and through the said spillway and outlet, and the water power of the Big Sioux River immediately above the mouth of said drainage ditches thereby destroyed, to the great and irreparable damage of many private property owners.

Tenth.

These defendants answering the Tenth paragraph of the complainant's bill, hereby specifically deny the same, and each and every allegation thereof, and in explanation of the facts attempted to be therein set out, allege that upon the oc-
41 currence of the destruction of the original spillway as hereinbefore set out in the Ninth paragraph hereof, that thereupon the Board of County Commissioners of said Minnehaha County took immediate steps to control the said waters coming through said drainage ditches, by means of dams across said drainage ditches above said spillway, and by driving piling therein, and were so employed when, on or about the 21st day of March, 1916, one Charles Kaufmann, and other persons owning property within the area of said Drainage Ditch No. 2, brought an action in the Circuit Court of Minnehaha County, South Dakota, to restrain said Board from so proceeding to control the waters of said drainage ditches, and obtained an order against said Board, requiring them to show cause why an injunction should not be granted, which said order came on for hearing before the said Court on the 25th day of March, 1916, and the said Court thereupon denied said application for said temporary injunction, whereupon said action was dismissed, the same being Circuit Court File of Minnehaha County No. 15708, which is hereby referred to and made a part hereof.

That on or about April 1, 1916, and because of the conditions above described, the plaintiff in the last mentioned suit and a large number of his neighbors, similarly situated and affected by said drainage ditches perfected an informal local organization and appointed a committee of eight members to look after their interests with reference to repairing said drainage ditches, and to urge before the Board of County Commissioners, such improvements as seemed advisable.

That thereafter and on or about the 8th day of April, 1916, several persons representing said local organization or committee, including some of the said plaintiffs in said last mentioned suit, filed a petition and bond with the said Board of County Commissioners praying that the outlet and spillway to said drainage ditches as originally established and constructed, be closed up and abandoned, and that a new outlet for said ditches be provided by diverting the waters thereof at a point above said spillway, as originally constructed, in a Westerly direction through Covell's Lake,

and thence back into the Big Sioux River above the said City of Sioux Falls, upon which said petition the said Board caused a survey to be made, with the approval of the State Engineer, and a surveyor's report to be filed, and a hearing had upon said petition, after notice, as required by law upon which hearing numerous property owners within the territory affected thereby, appeared before said Board and filed objections to the said proposed proceedings, and filed numerous large claims for damages by reason of said proposed change of outlet, and that upon said hearing, on July 8th, 1916, said Board made an order allowing the prayer of said petition, and established said Covell's Lake outlet, and abandoned said outlet and spillway as originally established and constructed; that thereupon numerous conferences were had between the petitioners in said proceeding last
42 above referred to, and the said objectors and property owners owning lands within the area of said Drainage Ditches No. 1 and No. 2, and that it was agreed at said conferences that the proceedings upon said petition last above referred to should be abandoned, and the same were abandoned accordingly, and that a new petition should be filed and new proceedings instituted for the re-establishment of said Drainage Ditches No. 1 and No. 2 and the reconstruction and improvement thereof, and the re-establishment and the reconstruction of the outlet to said ditches, and for the establishment and construction of a new spillway to properly control and take care of the waters flowing through said drainage ditches, and for the enlargement of said drainage district so as to embrace all of the property benefited thereby, extending from the Northern end of said territory included in said Drainage Ditches No. 1 and No. 2, following the course of the Big Sioux River around the City of Sioux Falls, and extending as far down said river as the mouth of said spillway and outlet to said drainage ditches, where the waters thereof were discharged into the Big Sioux River, below the said City of Sioux Falls, and that thereafter, and in accordance with said agreement, and with the consent and acquiescence of this plaintiff, a new drainage petition and bond, approved by the County Auditor, were filed with the Board of County Commissioners, by the City of Sioux Falls, F. L. Blackman, and other persons who owned lands within the area of and that was assessed for the cost of construction of said Drainage Ditches No. 1 and No. 2, praying for the establishment and construction of a new drainage ditch in the exact location of said original ditches, and the re-establishment and construction of a substantial spillway and outlet there-

for, together with several cut-offs or ditches, straightening and canalizing the channel of the Big Sioux River ad-
43 jacent thereto, so as to improve and increase its carrying capacity, and praying that the assessment area be increased to cover said new territory benefited, pursuant to said agreement, which said petition being found sufficient in form by said Board of County Commissioners, was, on August 3, 1916, ordered filed and referred to the State Engineer, who, with the said Board of County Commissioners, on August 4, 1916, inspected the route of said drainage, and had several conferences with the said persons interested as aforesaid, including this plaintiff, and authorized and ordered a survey to be made by Engineer L. E. Stevens, under the supervision of the State Engineer, which said survey was accordingly made by said L. E. Stevens, who, on September 13, 1916, filed his written report with said petition, and thereupon the said Board of County Commissioners fixed the exact route and width of said drainage, and the time and place of hearing thereon, and caused notice of hearing to be given according to law and upon the return date fixed in said notice, after due hearing, and upon the approval and advice of the State Engineer, and without objection upon the part of the plaintiff herein, or any other person. upon October 3, 1916 found said proposed drainage, as petitioned for, to be conducive to the public health, convenience and welfare, and necessary and practicable for draining agricultural lands, and thereupon, by resolution duly adopted, re-established said drainage ditch in the exact location of the original ditches, and fixed the damages caused by the construction thereof, and designated it as "Drainage Ditch No. 1 & 2", and no appeal was taken from such order establishing said "Drainage Ditch No. 1 & 2", and said order so establishing said Drainage Ditch No. 1 & 2 is now in full force and effect.

Eleventh.

These defendants answering the Eleventh paragraph of the complainant's bill, admit that the Board of County Commissioners of Minnehaha County have expended ap-
44 proximately Two Hundred and Fifty-five Thousand Dollars ($255,000.00) in, payment for work done and material furnished in the construction of ditches, dams, gateways and the spillway upon said Drainage Ditch No. 1 and 2, for which drainage ditch warrants upon Drainage Ditch No. 1 and 2 Fund have been issued, payable only out of the assessments to be hereafter levied upon the lands and properties benefited by the construction of said ditch, and there

is now due thereon, for principal and interest, about Two Hundred and Ninety Thousand Dollars ($290,000.00) and hereby specifically deny each and every other allegation in said paragraph contained, but further allege that the drainage warrants above referred to were issued, only upon duly verified claims, duly presented, audited and allowed by the County Commissioners, and report of the allowance of the same duly published in said Commissioners' proceedings, as provided by law.

45 Twelfth.

These defendants answering the Twelfth paragraph of complainant's bill, hereby admit that on or about the 3rd day of August, 1916, a petition was filed in the office of the County Auditor of the County of Minnehaha, duly signed by the City of Sioux Falls, by George W. Burnside, its Mayor, and duly attested by Walter C. Leyse, City Auditor, F. L. Blackman, and others, which petition was for the purpose of re-constructing and improving Drainage Ditches No. 1 and No. 2, in Minnehaha County, South Dakota, and to construct a new spillway and outlet to Drainage Ditches No. 1 and No. 2, and to pay therefor by assessments upon the property, persons and corporations benefited thereby, but these defendants specifically deny each and every other allegation, matter and thing contained in said Twelfth paragraph, but allege the facts to be as stated and set forth in the Tenth paragraph of this Answer, and further allege that all acts negatived in said paragraph Twelve, were duly taken, done and performed, upon due notice, as required by the laws of the State of South Dakota.

Thirteenth.

These defendants answering the Thirteenth paragraph of complainant's bill, hereby specifically deny each and every allegation in said paragraph contained, as therein alleged, and allege the facts in relation thereto to be as follows: That immediately after the establishment of "Drainage Ditch No. 1 & 2", as hereinbefore described, the said Board of County Commissioners, acting under said newly established Drainage Ditch No. 1 & 2, proceeded to dike, clean out, enlarge and re-construct original Drainage Ditches No. 1 and No. 2, and the additional river cut-offs were constructed, and the outlet and spillway of said drainage ditches re-built in a more substantial and permanent manner, upon plans approved by

the State Engineer; that in the course of the construction of said spillway, plans were prepared under the supervision of the State Engineer, and approved by him on May 7, 1917, and bids for the construction thereof asked for by legal notice, and upon the opening of said bids and a consideration thereof, it was, by resolution of the Board, determined that the "spillway for which bids have been received for 'Drainage Ditch No. 1 & 2' can be constructed for less money than the amount of any bid submitted therefor", and it was "therefore ordered that the Board of County Commissioners cause such spillway to be constructed, hire the necessary labor, machinery, tools and appliances, and a superintendent to oversee the construction thereof, and purchase all necessary material for such construction, without letting a contract for the entire construction thereof", and the Board thereupon proceeded to construct said spillway in accordance with said determination, ordered the necessary material for the construction thereof, and employed the Sioux Falls
46 Construction Company to furnish the necessary labor, superintendent and supervision of the construction thereof, and to furnish the necessary machinery, tools, etc, to be used in said construction.

From the determination of the Board that it would build said spillway without letting a contract therefor, and by buying the necessary material therefor, and employing the Sioux Falls Construction Company to furnish the necessary labor, machinery, tools, superintendent and supervision thereof, one William H. Lyon, being the original petitioner in the construction of original Drainage Ditch No. 1, appealed to the Circuit Court of Minnehaha County, South Dakota, which appeal came on for hearing before the Court on the 14th day of July, A. D. 1917, and the court, after full hearing and consideration of the evidence introduced on behalf of the appellant and the Board, dismissed said appeal, holding that it appeared that the "decision appealed from is one that rests in the sound judgment of the Board of County Commissioners, and is not a proper subject for review by the Court"; that the proceedings upon said appeal are contained in File No. 16405 of the Circuit Court of Minnehaha County, South Dakota, which file and proceedings are hereby referred to and made a part hereof.

That thereupon the said spillway and outlet to said Drainage Ditch No. 1 & 2 was immediately re-constructed in a more substantial manner in accordance with the determination of said Board of County Commissioners, under the supervision

of the State Engineer of the State of South Dakota, at a cost of more than One Hundred Thousand Dollars ($100,000.00); that the soil at the place where said outlet and spillway are constructed is of peculiar formation; that beneath the
47 surface at said point are found deep quicksands, the extent of which was at said time unknown to said Board of County Commissioners; that by reason of the necessity for immediate action in the construction of said spillway, and on account of the difficulties to be encountered in the construction thereof, it was impossible to prepare fully completed working plans at the time said work was commenced, but that the working plans had to be modified and adapted to the difficulties encountered as the work progressed, and that thereupon and by reason thereof, and with the approval and under the supervision of the State Engineer, the said Board of County Commissioners employed one F. C. Shenehon, a competent civil and [hýdralic] engineer, to prepare working plans and to superintend the construction of said spillway as the work progressed, and that said working plans were so prepared by said Shenehon, and said spillway re-constructed under his immediate supervision and the supervision and approval of the State Engineer, in a substantial and adequate manner, and that the same, as so constructed, has ever since said time been in operation, and for the past three years has safely controlled and cared for the waters flowing through said drainage ditches, and protected the properties adjacent thereto, as aforesaid, from injury and damage by reason of the said waters, and the same is now in successful operation.

These defendants further allege that the records and proceedings in the establishment and construction of Drainage Ditch No. 1 & 2, on the petition of F. L. Blackman, the city of Sioux Falls, and other persons, referred to in Paragraph Fifth hereof, except the lengthy notices, are hereunto annexed, marked Exhibit "A", and made a part hereof, and that all of said proceedings were taken and had after due and legal notice, as required by law, which notice specifically named the plaintiff herein, and cited it to show cause why said drainage ditch should not be constructed as petitioned for.

48 Fourteenth.

These defendants answering the Fourteenth paragraph of complainant's bill, hereby specifically admit the facts therein set out, except the allegations that said "Chenoweth & Rettinghouse were to be paid in Drainage ditch warrants

drawn on Drainage Ditch No. 1 and No. 2", and except the further allegation that they "made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereto annexed, marked Exhibit "B", and made a part hereof", which allegations are hereby specifically denied, and the facts are alleged to be that the said Chenoweth & Rettinghouse were paid in drainage warrants drawn on Drainage Ditch No. 1 & 2 Fund, and that said Exhibit "B" referred to, is merely an analysis or resume or deduction drawn from the facts set out in the report, merely for the purpose of showing the results shown by the proportion of benefits recommended.

49 Fifteenth.

These defendants answering the Fifteenth paragraph of complainant's bill, deny that said Board of County Commissioners, on the 10th day of June, 1921, adopted a purported notice of time and place of equalizing the proportioning of benefits for the construction of said spillway, etc., as therein alleged, but allege the fact to be that for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum of about Two Hundred and Fifty-five Thousand Dollars ($255,000.00), in payment of the labor, material, etc., used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commissioners, did, on the 10th day of June, 1921, by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and indirect benefits that accrue by the construction of said drainage, taking a particular tract as a unit for comparison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty

per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law, to this plaintiff, at which time and place, the apportionment fixed as to the plaintiff's property and other property, will be equalized, and the assessment will be later extended and spread on said equalization, but the defendants have no knowledge of the total number of units or sum in dollars that will finally be equalized and assessed against said plaintiff's property. The defendants further allege that the notice, in addition to being published, as stated, was also posted according to law, and deny the balance of said paragraph.

50 Sixteenth.

These defendants answering the Sixteenth paragraph of complainant's bill, specifically deny the same.

Seventeenth.

These defendants answering the Seventeenth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

Eighteenth.

These defendants answering the Eighteenth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

These defendants further answering complainant's said bill, and by way of affirmative defense, allege:

51 I.

That said proceedings of the said Board of County Commissioners so taken and had in the establishment and construction of said Drainage Ditches No. 1 and No. 2, and in the assessment and equalization of the proportion of benefits, and in the assessment of the cost thereof upon the lands benefitted thereby, were taken and had after due and legal notice as required by law, and that said ditches were so established and constructed in accordance with said proceedings.

* * * * * * * * * * *

52 VII.

These defendants further allege that in the assessment of Drainage Ditch No. 2, hereinbefore referred to, resolutions

were adopted assessing and equalizing the proportion of benefits thereunder upon and including all of the land assessed for the construction of Drainage Ditch No. 1, and other lands, including the lands and property rights of the plaintiff herein, but making due allowance for the assessment already made upon the lands within the area of the original district of Drainage Ditch No. 1 thereby treating and consolidating said two ditches as Drainage Ditch No. 2; that all of the proceedings herein referred to required to be recorded and indexed in a book kept for that purpose in the County Auditor's office, were so recorded and indexed.

VIII.

And the defendants, further answering complainant's bill, admit that they entered into a contract with Chenoweth & Rettinghouse, civil engineers, to make and perfect a topograhical survey of all the lands lying between the City of Dell Rapids and the outlet to said spillway and drainage ditch, lying within the valley of the Big Sioux River, and that said survey was necessary and was made in order that said defendant Board might advisedly make an apportionment of and fix the benefits to the lands and properties affected by reason of the benefits derived by said plaintiff and others like situated, by reason of the diking, cleaning out, reconstruction and improvement made upon said drainage ditch, the river cut-offs and new spillway and outlet to said ditches; and further allege that the original petition for said drainage ditch, river cut-offs and spillway, hereinbefore mentioned, was a compromise between the said petitioners therefor and others affected thereby, as hereinbefore set forth, and that the making and filing of said petition, accompanied by a bond, as provided by law, which was duly approved by the County Auditor of Minnehaha County, South Dakota, transmisssion of a copy thereof to the State Engineer, the inspection of the proposed route of said drainage project, the causing and ordering of a survey thereof to be made by a competent surveyor under the supervision of said State Engineer, the surveyor's report thereon, the filing of the same by the Board with said petition, said Board's determination of the exact length and line and width of said drainage improvement, and the order and resolution of said Board fixing a time and place for hearing said petition, and the giv-
53 ing of notice thereof, the establishment of said drainage district and project by resolution and order of said Board upon said hearing, and the subsequent notice given to all parties interested, of the establishment of the cut-off

ditches, including the plaintiff herein, and the final establishment thereof, and all work done and performed upon said ditches and river cut-offs ditches, and the establishment and construction of said spillway and work done thereon, and the manner of doing the same, and all other work done and performed upon said drainage ditch, cut-offs and spillway, were done and performed by said defendant Board, with the notice, actual knowledge, acquiescence, approval and consent of the plaintiff herein, its officers, agents and servants, and all others like situated, and said plaintiff and all others like situated during all the time said ditch, river cut-offs and spillway were being established, layed out and constructed, had notice and actual knowledge that payment therefor was to be made by special assessments against the lands and properties of said plaintiff affected thereby, and the lands of others like situated, and that there was no other provision of law or method of making such payment, and said plaintiff and none other of said parties took any legal steps to stop or prevent the establishment of, or work performed upon said ditches, river cut-offs or spillway, or the issuance of certificates of indebtedness or drainage warrants therefor, which said parties had notice and actual knowledge of, were to be taken up and paid only by said special assessments as aforesaid; and that said plaintiff and others like situated are now, and since 1918 have been receiving large and continu-
54 ing benefits to their lands and properties affected, by reason of said reconstruction and construction of said drainage ditch, river cut-offs and spillway, under the said re-establishment as Drainage Ditch No. 1 & 2.

IX.

These defendants further allege, as special instances of the notice, knowledge, approval and co-operation of the plaintiff with these defendants, as the Board of County Commissioners, in proceeding with the work of establishing, re-constructing and constructing said Drainage Ditch No. 1 & 2, its dams, dikes, spillway and controlling works, that said plaintiff was specially summoned in the notice dated September 15, 1916, to show cause why said Drainage Ditch should not be re-established and constructed; that its agents and servants knew of the destruction of the old spillway, as originally constructed; that by special arrangement, the plaintiff hauled and delivered all of the cement, crushed rock, sand, re-inforcing iron, etc, used in the construction of the spillway on Drainage Ditch No. 1 & 2, on its spur extending to near the said spillway, just Northeast of the State Penitentiary; that said plain-

tiff hauled, and, by special arrangement, delivered one of the dredges used in cleaning and diking said drainage ditch, on its siding near said ditch and just West of the Penitentiary; that the said Drainage Ditch No. 1 & 2, where some of said cleaning and diking was done, is within plain view from the trains of plaintiff company going North from Sioux
55 Falls, and the officers, and agents of said plaintiff saw and knew of the work being done toward diking, cleaning and repairing said ditch, and the construction of said spillway, dams, gates and controlling works, during several months in the years 1917 and 1918.

* * * * * * *

56 XII.

That by reason of each and all of the foregoing facts, acts and resolutions and orders done, passed and performed as hereinbefore set forth, the said plaintiff and all others like situated are now estopped and forever barred from in any manner claiming or asserting any right or relief herein, or at all.

XIII.

That in pursuance of said resolutions and orders hereinbefore referred to and set forth, and for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum of about Two Hundred and Fifty-five Thousand Dollars ($255,000.00), in payment of the labor, material, etc, used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commissioners, did, on the 10th day of June, 1921 by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and in-
57 direct benefits that accrue by the construction of said drainage, taking a particular tract as a unit for com-

parison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law.

XIV.

The above named defendants, A. G. Risty, et al, further answering plaintiff's bill of complaint allege that heretofore and on and prior to October 3, 1916, due and legal notice was given to the plaintiff herein of the time and place appointed by the Board of County Commissioners of Minnehaha County, South Dakota, for claiming any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2 and that the plaintiff herein wholly failed and neglected to present to said Board of County Commissioners at said time and place, to-wit: October 3, 1916, any claim for damages therein, and that by reason thereof this plaintiff is now estopped and debarred from claiming or asserting herein any right, or claim to any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2.

XV.

The above named defendants, A. G. Risty, et al, for further answer to plaintiff's bill of complaint, allege that the plaintiff is not entitled to the aid of a court of equity herein, for
58 the reason that said plaintiff has failed, neglected and refused to tender or offer to tender herein the amount of the actual benefits received by it by reason of the establishment, construction and reconstruction of Drainage Ditch No. 1 and 2.

Wherefore, the defendants, above named, pray that the plaintiff's bill of complaint in said action be dismissed, with costs.

E. O. JONES,
L. E. WAGNER,
Solicitors for Defendants.

B. C. Matthews,
Of Counsel.

59 **Exhibit "A"**

Petition.

To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefitted Thereby.

To The Honorable Board of County Commissioners of Minnehaha County, South Dakota:

1. The undersigned petitioners respectively represent and show that they are all residents of Minnehaha County, South Dakota, and that each of them is the owner of certain lands and real property situate and lying in said county in the valley of the Big Sioux River and within the territory to be drained, protected and benefitted by the reconstruction and improvement of drainage ditches One and Two in said Minnehaha County, South Dakota, and by the construction of a new spillway or outlet to said drainage ditches numbers One and Two.

2. Your petitioners further represent and show that said drainage ditches Numbers One and Two were established for the purpose of draining agricultural lands in 1907 and 1910 respectively as appears from records of said proceedings in the office of the County Auditor of Minnehaha County, South Dakota, which are hereby referred to and made a part hereof.

3. Your petitioners further represent and show that the said Drainage Ditches Numbers One and Two and the outlet thereto as constructed were and are insufficient to accomplish the purpose for which they were constructed and were
60 and are insufficient to properly drain the agricultural lands within the districts or territory supposed to be drained thereby and insufficient for the drainage of other agricultural lands lying within the valley of the Big Sioux River above the mouth of the outlet to said Drainage Ditches Numbers One and Two and between the mouth of said outlet and the lands heretofore included within the assessment districts upon which the cost of the construction of said drainage ditches One and Two was imposed and insufficient as constructed to improve, promote and conserve the public health and welfare within said territory hereinbefore described above the mouth of the outlet to said ditches Numbers One and Two lying partly within the City of Sioux Falls, South Dakota, all of which said lands and property would be benefitted, drained

and protected by a proper reconstruction and improvement of said Ditches One and Two and by the construction of a new and proper spillway or outlet to the same by means whereof the public health and welfare within the area hereinbefore described and referred to above the mouth of the outlet to said ditches would be conserved and improved.

4. Your petitioners further represent that it is necessary for the drainage of agricultural lands within said drainage districts Numbers One and Two and also agricultural lands lying above the mouth of the spillway or outlet to said ditches and between the mouth thereof and the present boundaries of said drainage Ditches Numbers One and Two to reconstruct, deepen, widen and improve said drainage ditches One and Two and to construct a new outlet or spillway thereto and that the construction of such new outlet or spillway and the reconstruction and improvement of said Ditches One and Two would also be conducive to the public health, convenience and welfare of the
61 City of Sioux Falls, South Dakota, and also of the County of Minnehaha, South Dakota and people resident within the said area hereinbefore described lying between the present boundaries of said drainage districts One and Two and the mouth of the outlet to said ditches and within the valley of the Big Sioux River, partly within the corporate limits of the City of Sioux Falls, and that in the reconstruction of the said ditches One and Two, it will be necessary that the same be cleaned, deepened, widened and that certain levees, dikes, flood gates and barriers thereto be constructed to such extent as may be necessary to carry out the surplus or flood waters and to properly drain and protect the lands within said drainage districts and within the area hereinbefore described and within the city of Sioux Falls and to properly conserve and promote the public health and welfare within the said area as aforesaid.

5. Your petitioners further represent that there should be constructed and installed in the said Drainage Ditches Numbers One and Two and at the head of the said Spillway or outlet of said Drainage Ditches, controlling gates for the purpose of regulating and controlling the amount of water flowing through the said ditches and over the said Spillway, the number and location of said gates and the manner in which they should be installed should be determined by the County Commissioners upon the advice of their engineers.

6. Your petitioners further represent that the present spillway or outlet to said Drainage Ditches Numbers One and Two where the same empties into the Big Sioux River in Section Nine (9) Township One Hundred and one (101) of Range forty-nine (49) is wholly insufficient and has been practically destroyed by the action of the water therein, so that the same has become inefficient as a means of disposing of the waters flowing in said drainage Ditches Numbers One and Two and to such an extent that it has become dangerous to abutting property and to persons living within the vicinity thereof and that it is necessary to entirely abandon said present spillway or outlet and to construct an entirely new outlet or spillway in place thereof in accordance with a new and different plan therefor, the new spillway to be located at or near the present location of the present spillway.

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7. Your petitioners further represent that the said drainage ditch or drainage system should consist of the following ditches: First a ditch having its initial point at the beginning of Section Two (2) of Drainage Ditch Number Two (2) of Minnehaha County as now established at the creek near the Northeast corner of Section thirty-one (31) Township One hundred four (104) of Range Forty-nine (49) and should then run Southwesterly to near the center of said Section thirty-one (31) and then south near the center line through said Section Thirty-one (31) and through Sections Six (6) and Seven (7) of Township one hundred three (103) of Range forty-nine (49) into Section eighteen (18) and then in a Southeasterly direction having its terminal point upon the Big Sioux River Sixteen hundred forty feet (1640) east of the said center of Section Eighteen (18), Township One hundred three (103) of Range forty-nine (49) following the present location of the said Section Two (2) of Drainage Ditch Number Two of Minnehaha County as now located.

Also a ditch having its initial point at the present beginning of Section One of Drainage Ditch Number Two of Minnehaha County, at the high water channel of the Big Sioux River in the Southeast quarter of Section Twenty (20) Township One hundred three (103) of Range forty-nine (49) thence running in a general southerly direction through the Southeast quarter of Section Twenty (20) Township one hundred three (103) of Range forty-nine (49) and the Northeast quarter of Section twenty-nine (29), The Southwest quarter of Section twenty-eight (28) the west half of Section thirty-three (33) all in Township one hundred three (103) of Range forty-nine (49) and the west half of Section four (4)

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the northwest quarter of section nine (9) the Southeast quarter of Section eight (8) the east half of Section seventeen (17), the east half of section twenty (20) and the east half of Section twenty-nine (29) all in Township one hundred and two (102) of Range Forty-nine (49) with its terminal point at the southern end of said Section One of Drainage Ditch Number Two in the Southeast quarter of Section twenty-nine (29), Township One hundred two (102) of Range forty-nine (49) following the line of the said Section One of Drainage Ditch Number Two as now established in Minnehaha County.

Also a ditch having its initial point at the present beginning of Drainage Ditch Number One of Minnehaha County at or near the Northeast quarter of the Southeast quarter of the Southeast quarter of Section twenty-nine (29) Township one hundred and two (102) of Range forty-nine (49) thence running south across the East half of the East half of Section Thirty-two (32) in Township one hundred two (102) of range forty-nine (49) and the East half of the Northeast quarter of Section Five (5) Township one hundred one (101) of Range forty-nine (49) and the Northeast quarter of the Southeast quarter of Section five (5) Township one hundred one (101) of Range forty-nine (49) thence across the West half of the Southwest quarter of Section four (4) in Township one hundred one (101) Range forty-nine (49), thence across
64 the northwest quarter of Section Nine (9) Township One hundred one (101) of Range forty-nine (49) and the Southwest quarter of the Northeast quarter of Section nine (9) township one hundred one (101) of Range forty-nine (49) where it empties into the Big Sioux River having its initial point and terminal point the same as and following the line of Drainage Ditch Number One as now established in Minnehaha County. With also, a branch drain or second part beginning at the point near the center of the Northeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49) running thence in a southeasterly direction across the Southeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49) to where it connects with the main ditch of Drainage Ditch Number One as now established in Minnehaha County.

8. Your petitioners further represent that in order to make the foregoing drainage system complete and adequate for the purposes for which it is designed, that it will be necessary to straighten, clear out and deepen the channel of the Big Sioux

River at a number of places within the said Drainage District and especially to straighten the channel, of the said River upon Section thirty-two (32) Township one hundred three (103) of Range forty-nine (49) by a ditch cutting off the bend in said river on said Section. Also to straighten the said River upon section Eight (8) Seventeen (17), Twenty (20) and Twenty-nine (29) in Township one hundred two (102) of Range forty-nine (49) by cutting off bends of the said Sioux River situated upon those Sections, the exact location of the said ditches for straightening, clearing out and deepening the channel of the said Sioux River to be determined by the County Commissioners upon advice of their engineers.

9. Your petitioners further represent and show that the lands and territory likely to be affected by the construction of such new spillway or outlet and by the reconstruction and improvement of said drainage ditches One and Two and which will be drained, benefitted and protected thereby and within which territory the public health and welfare will be promoted includes all of the lands lying in the valley of the Big Sioux River and included within the present boundaries of said Drainage Districts Numbers One and Two as well as all of the lands in said valley of the Big Sioux River between the mouth of said spillway or outlet to said ditches and the City of Dell Rapids, South Dakota, that are subject to overflow by the waters of the Big Sioux River and that will be subject to overflow and damage by the waters of said River if the said outlet to said Drainage Ditches Numbers One and Two be abandoned and said outlet thereto closed and that the said District should be so extended and enlarged as to include all lands and property benefitted thereby as far down the valley of the Big Sioux River as the mouth of said outlet or spillway and including therein the corporation of the City of Sioux Falls as well as the corporation of the County of Minnehaha, South Dakota, which said corporations your petitioners further represent are and will be largely benefitted by the reconstruction and improvement of said ditches and construction of said new outlet or spillway thereto to their highways, bridges and other corporate properties owned by them respectively.

Dated this 15th day of July, A. D. 1916.

Attest: WALTER G. LEYSE,
City Auditor.

CITY OF SIOUX FALLS
(Seal of the City of Sioux Falls) By Geo. W. Burnside, Mayor.

F. L. BLACKMAN,

W. BRALEY,

DEN DONAHOE

DAN A. DONAHOE,

W. M. DONAHOE

CATHERINE PECK

PORTER P. PECK

MARY C. BRACE

JOHN P. BLEEG

FRANCES G. CARPENTER

M. RUSSELL, By Louis Caille, Agt.

McKINNEY & ALLEN

E. D. CLARK

66 C. C. BRATRUD

L. P. CALDWELL

Filed in the office of the Auditor of Minnehaha County, S. D. this 3 day of Aug. 1916.

HARRY H. HOWE,
County Auditor.

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67 Order for Filing Petition for Drainage

State of South Dakota,
County of Minnehaha—ss.

In re Drainage Ditch Numbers 1 and 2 Minnehaha County, South Dakota.

Whereas F. L. Blackman and others of the County of Minnehaha, State of South Dakota, have this day presented to this Board a petition for the construction of a drainage ditch conducive to public health, convenience and welfare and for the purpose of draining agricultural lands in the Big Sioux

River Valley which lands have heretofore been drained and protected from overflow by ditches Number 1 and 2 of Minnehaha County as heretofore established and constructed, in which petition it is represented that it is necessary to re-construct, improve and extend said drainage ditches Number 1 and 2 and to construct a new spillway or outlet where said drainage ditch number one empties into the Big Sioux River in Section Nine (9), Township One Hundred and One (101), Range Forty-nine (49) by reason of the fact that the spillway or outlet of said drainage ditch number 1 is inadequate for its purpose and has been destroyed by action of the water; also that the drainage ditches number 1 and 2 are not adequate for the purpose of which they are constructed and that they should be cleaned, deepened and widened and levees, dikes, and barriers remodeled, re-constructed and improved in such places and to such extent as may be necessary to carry off the surplus or flood water and properly drain the land to be drained thereby and protect other land subject to overflow; also that there should be constructed and installed in said drainage ditches 1 and 2 necessary flood gates for the purpose of regulating the amount of water flowing
68 through; also that it is necessary in order to make such drainage system complete and adequate for the purpose for which it is designated to straighten, clear out and deepen the channel of the Big Sioux River at different places within the drainage district of said drainage ditches number 1 and 2, and said petition having been by this board examined and found sufficient in form and being accompanied by bond with sureties approved by the County Auditor.

Now Therefore it is hereby ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that the said petition be forthwith filed with the County Auditor of this County and that a copy thereof be transmitted by the said County Auditor to the State Engineer.

A. G. RISTY,
Chairman of County Board.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of Aug. 1916.

HARRY H. HOWE
County Auditor.

69 Resolution for Survey.

Whereas on the 3rd day of August, A. D. 1916, the City of Sioux Falls, F. L. Blackman and others of Sioux Falls, Minnehaha County, South Dakota, presented to this board a petition for the drainage of lands in the Big Sioux River Valley for the establishment of a drain chiefly to carry off the overflow of water of the Big Sioux River, such drain to begin at the beginning of Section two (2) of drainage ditch number 2 of Minnehaha County, as now established at the creek near the northeast corner of Section 31, Township 104, Range 49, and should end at a point on the said river near the center of Section 9, in Township 101, Range 49, where drainage ditch number 1 as now established in Minnehaha County, empties into the Big Sioux River, which petition was accompanied by a proper bond with sureties approved by the County Auditor of said County; and

Whereas said petition was by this board examined and found sufficient in form and was ordered filed with the County Auditor of said County, and was so filed on the 3rd day of August A. D. 1916; and

Whereas this board together with the State Engineer did on the 14th day of August, A. D. 1916, inspect the proposed route of such drainage; and

Whereas this board deems it necessary that a survey of the proposed drainage be made by a competent surveyor.

Now Therefore it is Ordered that a survey be made of the lands in the Big Sioux River Valley between the City of Dell Rapids and the terminus of said proposed drainage for the purpose of determining the exact line of said drainage and the most practicable method of draining the entire sec-
70 tion of the country of which the lands proposed to be drained are a part. Such surveyor shall include in his report to this board a description of the exact line of said drainage ditch or ditches as suggested in said petition, the size and width thereof [of], such survey to be made under the supervision of the State Engineer and report filed with the County Auditor with all convenient speed.

And the chairman of this board is hereby authorized to employ such surveyors and his assistants and purchase such material as may be necessary for such survey.

Approved this 14th day of Aug. 1916.

A. G. RISTY.

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71 Resolution Fixing the Exact Line and Width of Ditch and Fixing the Time and Place for Hearing Petition.

(Commissioners Proceedings, September 13, 1916)

Whereas, on September 13, 1916, Mr. L. E. Stevens, Civil Engineer employed by this Board for the making of a survey for a proposed drainage ditch, in the valley of the Big Sioux River, in Minnehaha County, South Dakota, in the territory previously partially drained by Drainage Ditches Numbered One and Two, as heretofore established, pursuant to the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, did file his report of such survey, together with maps and profiles; and

Whereas, this Board has personally inspected the route of said proposed drainage, as described in said petition and as described in the engineer's said report;

Therefore, be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of said proposed drainage, be and the same is hereby fixed as described in said Engineer's report, and that the requisite right of way for said drainage ditch and dump space be as described in said engineer's report; and

Be it further resolved that Monday, the 2 day of October, 1916, at 2 o'clock, P. M. at the Office of the County Auditor of said County be and it is hereby fixed as the time and place for hearing of said petition and that notice thereof be given in accordance with the provisions of Section Four (4) of Chapter 134, of Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication once in each week
72 for two consecutive weeks in the Sioux Falls Daily Press, and by posting copies of said notice in at least three of the most public places near the route of said proposed drainage ditch, such posting to be made at least ten days prior to the time of said hearing.

Approved:

A. G. RISTY,
Chm. Co. Bd.

73 Resolution Establishing Drainage Ditch No. 1 and 2

The matter of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on August, 3, 1916, coming on to be heard by the Board of County Commissioners of said county at a regularly adjourned meeting, on Monday, the 2 day of October, A. D. 1916, pursuant to notice heretofore given, the said Board having heard and considered said petition and all matters in support of the same, and in opposition thereto, and being fully advised by the state engineer with reference thereto, now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said principal drainage ditch as hereinafter described and set forth, is conducive to the public health, convenience and welfare and it is necessary and practicable for the drainage of agricultural land and it is so found;

Be It Further Resolved that the said drainage ditch as hereinafter described be, and it is hereby named and designated as "Drainage Ditch No. 1 and 2";

Be It Further Resolved that the said Drainage Ditch No. 1 and 2 be and the same is hereby established in accordance with the resolution adopted by this Board on September 13, 1916, in so far as the same is set out and described in Sections One, Two, and Three of the engineer's report of preliminary survey, filed herein on September 13, 1916, and particularly described as follows:

74 Section One.

Commencing at a point Fifty-eight (58) feet west and Ten Hundred and Thirty-five (1035) feet north of the Southeast corner of Section Twenty-nine (29), Township One Hundred and Two (102), Range Forty-nine (49) west of the 5 P. M. running thence South parallel to the adjacent highway Two Thousand and Eighty-five (2085) feet to Station One Hundred and Fourteen (114); also commencing at a point Six Hundred and Seventy-four (674) feet north and about Thirty-five (35) degrees west of said Station number One Hundred and Fourteen (114) thence southeasterly Six Hundred and Seventy-four (674) feet to said Station number One Hundred and Fourteen (114), thence south and parallel to said highway Seventy-seven Hundred (7700) feet to station number Thirty-seven (37) thence south forty-five (45) degrees

east Three Thousand Seven Hundred (3700) feet to station number zero (0) the same being on high water line, thence South Fifty-nine (59) degrees and Thirty-six (36) minutes east, Four Hundred and Fifty (450) feet, thence south Thirty-one (31) degrees east to the Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point Ten Hundred and Thirty-five (1035) feet north and Fifty-eight (58) feet west of the Southeast corner of Section Twenty-nine (29) in Township One Hundred and Two (102) of Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north Five Hundred and Forty-seven (547) feet; thence north Twenty-three (23) degrees west Thirty-three Hundred and Eighteen (3318) feet to a point Fifty-eight (58) feet west of the quarter quarter line in
75 the northeast quarter of Section Twenty-nine (29) in said Township; thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17) and a part of Section Eight (8), Twelve Thousand Nine Hundred and Thirty-five (12,935) feet; thence north Fifty (50) degrees east Twenty-seven Hundred and Thirty-two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way of the Chicago, Milwaukee & St. Paul Railway Company, in the Northwest quarter of Section Nine (9) in said Township; thence Northerly parallel with and Thirty-three (33) feet west, of said right of way line Nineteen Thousand Three Hundred and Sixty-eight (19.368) feet to a connection with a high water channel of the Big Sioux River in the Southeast Quarter of Section Twenty (20) in Township One Hundred and Three (103) North of Range Forty-nine (49).

Section Three.

Commencing at a point Sixteen Hundred and Forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103), Range Forty-nine (49); running thence north Thirty-three (33) degrees west Thirty-one Hundred and Fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line in Sections Seven (7) and Six (6) in said Township and in Section Thirty-one (31)

in Township One Hundred and Four (104) North of Range Forty-nine (49) to the center line running east and west through said Section Thirty-one (31); thence north-
76 easterly to the creek near the Northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River is to be straightened in Sections Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred and Three (103), North of Range Forty-nine (49) in order to afford better means of communication between the lower end of Section Three (3) of said ditch and the upper end of Section Two (2) thereof; the same being intended to cover the exact location of drainage ditch Number Two (2) as now established and constructed.

Be It Further Resolved that the consideration and determination of the question of the straightening of the Big Sioux River at the several points recommended in said engineer's report, be deferred, without passing upon the merits thereof, to some later date, when said straightening of the Big Sioux River may be given more complete consideration, covering the points recommended and other points requested and suggested at the hearing.

Be It Further Resolved that in the construction of the said Drainage Ditch, the rights of flowage of the owner of the mill at or near Baltic, South Dakota, will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch where the same joins with the creek near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, that it will not diminish or interfere with said rights of flowage and that the headgate or other protection now established, be maintained to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

77 Be It Further Resolved that headgates or controlling gates be established in said drainage ditch, on Section Twenty (20) of Sverdrup Township and on Section Twenty-nine (29) or Thirty-two (32) in Mapleton Township at such place and of such size and material as the state engineer may direct;

Be It Further Resolved that a good substantial adequate spillway be constructed, under the supervision of the state engineer, in said ditch on Section Nine (9) of Sioux Falls Town-

ship and that an efficient, substantial controlling gate be constructed at the upper end of said spillway in such manner that the same can be closed and all water be prevented from entering said spillway;

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same may be made a special order for Friday, October 6, A. D. 1916, at ten o'clock A. M.

A. G. RISTY,
Chairman of Board of County Commissioners of Minnehaha County, South Dakota.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of October 1916.

HARRY H. HOWE
County Auditor.

Endorsed: Filed in the District Court on Sept. 1, 1921, at 9:30 A. M.

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78 And afterwards, to-wit, on the 28th day of November, A. D. 1921, there was filed in the office of the clerk of said court, stipulation as to certain Drainage Ditch Notice and that same be considered as a part of the answers and returns of the defendants and intervening defendants; that attached to said Stipulation is a "Drainage Ditch Notice"; which said Drainage Ditch Notice is in words and figures the following, to-wit:

79 Drainage Ditch Notice.

Notice is hereby given that Monday, October 2, 1916, at 2 o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others filed August 3rd, 1916, for the establishment and construction of a drainage ditch, pursuant to the provisions of chapter 134 of the laws of 1907 of the State of South Dakota, as amended by chapter 102 of the laws of 1909, the exact line and width

of said drainage ditch was determined by action of said board on September 13, 1916, to be as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of section twenty-nine (29) township one hundred and two (102) range forty-nine (49) west of the 5th P. M. runnnig thence south parallel to the adjacent highway two thousand eighty-five (2085) feet to station one hundred fourteen (114); also commencing at a point six hundred and seventy-four (674) feet north and about thirty-five (35) degrees west of said station number one hundred fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south 45 degrees east thirty-seven hundred feet (3700) to station number zero (0), the same being on high water line, thence south fifty-nine (59) degrees thirty-six (36) minutes east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to the Big Sioux River, the said line being the
80 center line of said drainage ditch and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five feet (1035) north and fifty-eight (58) feet west of the southeast corner of section twenty-nine (29), in township one hundred and two (102) of range forty-nine (49), the same being the commencement point of section one (1), hereinbefore described running thence north five hundred and forty-seven (547) feet; thence north twenty-three (23) degrees west three thousand three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the northeast quarter of section twenty-nine (29) in said township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through sections twenty-nine (29), twenty (20), seventeen (17) and a part of section eight (8), twelve thousand nine hundred and thirty-five (12,935) feet; thence north fifty (50) degrees east twenty-seven hundred and thirty two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way to the Chicago, Milwaukee & St. Paul Railway Company in the northwest quarter of section (9), in said township; thence northerly

parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the southeast quarter of section twenty (20) in township one hundred and three (103) north of range forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of section eighteen (18) in town-
81 ship one hundred and three (103), range forty-nine (49) running thence north thirty-three (33) degrees west thirty-one hundred and fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between sections seven (7) and eight (8) in said township; thence north parallel with and sixty (60) feet west of the quarter line in sections seven (7) and six (6) in said township and in section thirty-one (31) in township one hundred and four (104) north of range forty-nine (49) to the center line running east and west through said section thirty-one (31); thence northeasterly to the creek near the northeast corner of said section thirty-one (31). The said line being the center line of said proposed drainage ditch.

That in addition thereto the Big Sioux river is to be straightened in sections seventeen (17), eighteen (18) and twenty (20) in township one hundred and three (103) north of range forty-nine (49) in order to afford better means of communication between the lower end of section three (3) of said ditch and the upper end of section two (2) thereof; the same being intended to cover the exact location of drainage ditch number 2 as now established and constructed.

I further recommend that the Big Sioux river be straightened on section thirty-two (32), township one hundred and three (103) north of range forty-nine (49) west by the construction of a cut off beginning at the intersection of the center line of the highway bridge across the Big Sioux river, on the town line between sections thirty-two (32), township one hundred and three (103), range forty-nine (49) and section five (5), township one hundred and two (102), range forty-nine (49) and the center line of said river; thence northerly at right angles to said bridge two hundred (200) feet; thence
82 northwesterly at an angle of twenty (20) degrees to the west, nine hundred and fifty (950) feet; thence northerly at an angle of nineteen (19) degrees to the east twenty-eight hundred and fifty (2850) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8), township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at a point in the center line of the Big Sioux river, twenty-one hundred and seventy (2170) feet easterly and seven hundred and eighty-five (785) feet southerly from the northwest corner of section eight (8) township one hundred and two (102), range forty-nine (49); thence easterly parallel with the north line of said section eight (8) three hundred (300) feet; thence northeasterly at an angle of twenty degrees (20) to the north, four hundred (400) feet, to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8) township one hundred and two (102) range forty-nine by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the east and west quarter line of section eight (8), township one hundred and two (102), range forty-nine (49); thence northerly at an angle of forty-one (41) degrees and thirty (30) minutes to the north eight hundred (800) feet; thence northwesterly at an angle of seventy-five (75) degrees to the west five hundred and fifty (550) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section seventeen (17), township one hundred and two (102), range forty-nine (49) by the construction of a cut off beginning at a point in the center line of the Big Sioux river seven hundred and twenty (720) feet southerly and six hundred and twenty (620) feet easterly from the west quarter post of section seventeen (17) township one hundred and two (102), range forty-nine (49); thence northerly parallel with the westerly line of said section seventeen (17) six hundred (600) feet; thence northwesterly at an angle of twenty-nine (29) degrees to the west fourteen hundred and ten (1410) feet; thence northerly at an angle of twenty-nine (29) dagrees to the east fifteen hundred and sixty (1560) feet; thence northeasterly at an angle of fifty-five degrees (55) to the east eight hundred and seventy (870) feet to the center of said river.

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I further recommend that the Big Sioux river be straightened on section twenty (20), township one hundred and two (102), range forty-nine (49), by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty (20), town-

ship one hundred and two (102), range forty-nine (49), thence southeasterly at an angle of one hundred and thirteen (113) degrees to the east six hundred and ten (610) feet; thence southwesterly at an angle of thirty-one (31) degrees to the west ten hundred and eighty (1080) feet; thence southwesterly at an angle of twenty-one (21) degrees to the west thirteen hundred and eighty (1380) feet to the center of said river.

Also in said section twenty (20) beginning at the intersection of the center line of Big Sioux river and the south line of section twenty (20), township one hundred and two (102) range forty-nine (49); thence northwesterly at an angle of sixty-two and one-half (62½) degrees to the north twenty-one hundred and ten (2110) feet; thence northerly at an angle of twenty-eight (28) degrees to the east five hundred (500)
84 feet to the center of said river.

I further recommend that the Big Sioux River be straightened on section twenty-nine (29) township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty-nine (29) township one hundred and two (102), range forty-nine (49); thence southerly at an angle of 81 degrees to the south twenty-nine hundred and ninety (2990) feet; thence southeasterly at an angle of thirty-five (35) degrees to the east ten hundred and ninety (1090) feet; thence southerly at an angle of thirty-seven and one-half (37½) degrees to the west eleven hundred (1100) feet, to the center of said river.

All of the above cut-offs to have a bottom width of sixty (60) feet and side slopes of one and one-half (1½) to one (1). A right of way one hundred (100) feet in width, one-half each side of the above described center lines will be required.

The tract of country likely to be affected by the establishment and construction of the said proposed drainage is in general terms described as follows: Sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty-two (22), twenty-seven (27), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), in township one hundred and one (101) of range forty-nine (49); sections thirteen (13), twenty-four (24) and twenty-five (25) in township one hundred and one (101), range fifty (50); sections three (3), four (4), five (5), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21),

twenty-eight (28), twenty-nine (29), thirty-one (31), thirty-two (32) and thirty-three (33) in township one hundred
85 and two (102), range forty-nine (49); sections five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), twenty (20), twenty-one (21), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty-two (32), thirty-three (33) and thirty-four (34) in township one hundred and three (103), range forty-nine (49); sections twenty-nine (29), thirty-one (31) and thirty-two (32) in township one hundred and four (104), range forty-nine (49), including also the mill property at or near the town of Baltic and the tracts of country covered by the right of flowage belonging to said mill property. Also the following additions to the City of Sioux Falls, Minnehaha County, South Dakota; North Boulevard addition, Carpentar's addition, Central Park addition, Meredith's First Addition, Meredith's Second addition, Harrison's addition, Lincoln Park addition, Englewood addition, West Lawn addition, Sioux Falls Improvements Company's addition, North Park Addition, North Park Second addition, Brooks' addition, Bunker's addition, Lake View addition, Brookings addition, Berwick addition, Summit addition, McClellan's Second addition, West Park addition, Pettigrew & Tate's Eighth addition, Glendale addition, Scott's Second addition, Morningside addition, Van Eps' addition, Millspaugh's addition, Daniels' addition, Morse's addition, Gale's addition, Gale's Sioux Falls, Phillips' addition, Syndicate addition, Central addition and W. R. Green addition.

The separate tracts of land through which said proposed ditch will pass and parts of which will be required therefore and for dump space, and the names of the owners of said tracts as appears from the records in the office of the
86 register of deeds of said county on August 3rd, 1916, that being the date of filing said petition, are as follows:

Owner	Description		Township	Range
Lars Simonson	NW¼ of NW¼	Sec. 32	104	49
Lars Simonson	NE¼ of NE¼	" 31	104	49
Lars Simonson	SE¼ NE¼	" 31	104	49
Gustava Nelson	SW¼ of NE¼	" 31	104	49
P. G. Thompson	E½ of SW¼	" 31	104	49
Julia L. Moe	NW¼ of SE¼	" 31	104	49
Even O. Fossum	NE¼ of NW¼	" 6	103	49
Gunerius Thompson	All that part of SE¼ of NW¼ Sec. lying south of a certain slough running West of Northwest to end of drain ditch	6	103	49

E. P. Sorkilmo	All that Part of SE¼ of NW¼ Sec. 6 located & lying on the north side of a certain intermittent water-course or slough running through the center of said section in a northwesterly course to ditch on the west line of said "40" except the N½ of N½ of said SE¼,	103	49
Lina Hanson,	N½ N½ SE¼ NW¼ Sec. 6,	103	49
Gunerius Thompson	E½ of SW¼ Sec. 6	103	49
Ole J. Ustrud	E½ of NW¼ Sec. 7	103	49
Magnhild Floren, Olaf Berthum Floren, Mabel Floren & Ovida Mathilda Floren	E½ of SW¼ Sec. 7	103	49
Andrew Swenson Aas	E½ of NW¼ Sec. 18	103	49
John O. Aasen	S½ of NE¼ Section 18	103	49
B. G. Flamoe	NE¼ of NW¼ Sec. 20	103	49
Bernt G. Flame	SE¼ of NW¼ Sec. 20	103	49
Peter Paulson,	E½ of SE¼ Sec. 20	103	49
Olymphious S. Thompson	Tract 3 of County Auditor's Subdivision of the NE¼ of Sec. 29	103	49
Olymphious S. Thompson	SE¼ of NW¼ and W½ of SW¼ of Sec. 28	103	49

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Owner	Description		Township	Range
Bertha Peterson, Alice, Christina Thompson, John Oscar Thompson, William Henry Thompson, Fred Raymond Thompson, Reuben Victor Thompson, Mabel Josephine Thompson, Carl Melvin Thompson	SW¼ of NW¼	Sec. 33	103	49
Andrew J. Aason	NW¼ of NW¼	" 33	103	49
Joseph C. Thompson	NW¼ of SW¼	" 33	103	49
Thomas Hendrickson	SW¼ of SW¼	" 33	103	49
Ole Thompson Aspass	W½ of NW¼	" 4	102	49
Martin H. Oyen and Cleopatra H. Oyen	W½ of SW¼	" 4	102	49
Martin Oien	W½ of NW¼	" 9	102	49
Martin H. Oien	SE¼ of NE¼	" 8	102	49
Ole Gunderson	W½ of SE¼	" 8	102	49
Leonard Renner	E½ of SE¼	" 8	102	49
Ingeberg Peterson Peter R. Peterson Iver R. Peterson				
Gertie R. Peterson,	W½ of NE¼	" 17	102	49
Christian J. Orstad	W½ of SE¼	" 17	102	49
Albert N. Allis	W½ of NE¼	" 20	102	49
Robert J. Huston	W½ of SE¼	" 20	102	49
Charles E. Kaufmann,	NE¼ & NE¼ of SE¼ of Section 29		102	49

State of South Dakota	SE¼ of SE¼	Sec. 29	102	49
State of South Dakota	E½ of NE¼ & NE¼ of SE¼	" 32	102	49
Hans Ruvald	SE¼ of SE¼	" 32	102	49
Hans Ruvald	E½ of NE¼ & NE¼ of SE¼	" 5	101	49
City of Sioux Falls	Starting at Southwest corner of Section 4, running thence east along Sec. line to the center line of County Ditch #1 as shown on Map #3 of the recorded plat of said ditch, thence in a northwesterly direction along the center line of said ditch to the west line of Sec. 4 thence south along said section line to the place of beginning		101	49
State of South Dakota	SW¼ of Sec. 4, except above described tract		101	49

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Name	Description	Township	Range
Southern Minnesota Railway Extension Company (Now Chicago Milwaukee & St. Paul Railway Company.	Right of way across the SW¼ of SW¼ Sec. 4	101	49
Watertown & Sioux Falls Railway Company	Right of Way across the SW¼ of SW¼ Sec. 4	101	49
Watertown & Sioux Falls Railway Company	Right of Way across the East ½ of SE¼ Sec. 5,	101	49
Chicago, Milwaukee & St. Paul Railway Company	Right of Way of Madison Branch, on Sections 8 and 9,	102	49
Mapleton Township	Interest in Highway adjacent to the line of the proposed ditch in Sections 4, 8, 9, 17, 20 and 29	102	49
Sverdrup Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 6, 7, 18, 20, 28, 29 and 33.	103	49
Dell Rapids Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 29, 30, 31 and 32,	104	49
Sioux Falls Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 4 and 5 and 9	101	49

89 Berwick Addition to Sioux Falls

	Lot No.	Block No.
Elwin L. Potter	1, 2 and 3	5

Arthur D. Horton	5, 6, 7, 8, 9, 10 and 11	4
State of South Dakota	1, 2 and 3	13
Grant Lines	5, 6, 10 and 11 lying east of Drainage Ditch	14
State of South Dakota	7, 8, and 9	14
State of South Dakota	1, 2 and 3	19
Sophia Krull,	4	18
Sophia Krull, Emma Buchholz, Mary Toepfer, Charles Krull, William F. Krull and Otto R. Krull	5 and 6	18
Sophia Krull	7, 8, 10, 11	18
George W. Hanson (Fee) Security Savings Bank (Tax title)	9	18
Moses M. Robinson	1	31
Security Savings Bank	2 & 8	31
James Kennedy	3	31
Security Savings Bank	All of Block	32

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The Kittery Realty Company—Tract 2 of NE¼ Section 9, Twp. 101, Rge. 49.

The Kittery Realty Company—Tract 3 of NE¼ Sec. 9 Twp. 101 Rge. 49.

State of South Dakota. Tract 3 of NW¼ Sec. 9, Twp. 101 Rge. 49.

90 The separate tracts of land wherein the Big Sioux River is proposed to be constructed and which will likely be affected thereby and the names of the owners of said tracts as appear from the records of the office of the Register of deeds of said County on August 3rd, 1916, that being the date of the filing of said petition, are as follows:

Name of Owner.	Description	Township	Range
Andrew J. Aasen,	W½ NE¼ Section 32	103	49
Andrew J. Aasen	NE¼ of NE¼ Sec. 32	103	49
Joseph O. Thompson,	S½ of SE¼ of NE¼ Section 32,	103	49
Gus S. Thompson,	N½ of SE¼ of NE¼ Section 32.	103	49
Jonas L. Finnegan,	N½ of SE¼ of Sec. 32,	103	49

Margaret Finnegan,	SE¼ of SE¼ Sec. 32,	103	49
John Finnegan,	SW¼ of SE¼ Sec. 32	103	49
Ole Gunderson,	NW¼ Sec. 8	102	49
Iver Nelson,	NW¼ of SW¼ Sec. 8,	102	49
Jonas Olson,	SW¼ of SW¼ Sec. 8,	102	49
Ole Gunderson,	E½ of SW¼ Sec. 8,	102	49
Iver R. and Palma Peterson,	NW¼ of NW¼ of Sec. 17	102	49
Bernt Mekvold,	SW¼ of NW¼ Sec. 17	102	49
C. C. Fleischer,	NW¼ of SW¼ Sec. 17,	102	49
Iver R. and Palma Peterson,	East 26 acres of NE¼ of NE¼ Sec. 18	102	49
Bernt Mekvold,	SE¼ of NE¼ Sec. 18	102	49
W. O. Quincy,	W½ of NW¼ Sec. 20	102	49
Albert N. Allis,	E½ of NW¼ Sec. 20,	102	49
Robert J. Huston	N½ of SW¼ Sec. 20,	102	49
Charles Kaufmann,	S½ SW¼ Sec. 20,	102	49
Charles Kaufmann,	W½ of NE¼ Sec. 29	102	49
Charles Kaufmann,	NE¼ of NW¼ Sec. 29	102	49
Ole P. and Maria Schjodt	W½ of SE¼ Sec. 29	102	49
Berit Johnson,	NE¼ of SW¼ Sec. 29	102	49

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In addition to the above, notice is also given to Minnehaha County, Townships of Sioux Falls, Mapleton, Sverdrup, and Dell Rapids in said County and the City of Sioux Falls in said County on account of benefits to highways, bridges, parks and city waterworks plant in the said drainage area and notice is also given to the Chicago, Milwaukee & St. Paul Railway Company, also to the Watertown & Sioux Falls Railway Company on account of the benefits to their rights of way within said drainage area;

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have why the said drainage should not be established and constructed;

And all persons deeming themselves damaged by said proposed drainage or claiming compensation for the lands proposed to be taken for said drainage are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 15th day of September A. D. 1916.

THE BOARD OF COUNTY COMMISSIONERS,
By: A. G. Risty, Chairman.

Attest:
(Seal) Harry H. Howe, County Auditor
By E. H. Shenkle Deputy.

Filed in the office of the Auditor of Minnehaha County, S. D., this 15 day of Sept., 1916.

HARRY H. HOWE, County Auditor,
By E. H. Shenkle, Deputy.

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93 (Order directed to defendants to show cause why plaintiff should not be permitted to amend bill of complaint.)

Upon motion of plaintiff in the above entitled action and upon the affidavit of H. E. Judge, Solicitor for plaintiff, duly filed herein, it is Ordered that the defendants and intervening defendants in said action show cause, if any they have, before the court on the 31st day of January, 1922, at 10 o'clock A. M., why plaintiff in said action should not be permitted to amend its bill of complaint to conform to the proof in the man-
94 ner set forth in said motion.

It is further Ordered that copies of this order to show cause, and of said motion and affidavit of H. E. Judge, be forthwith served upon the solicitors for said defendants and intervening defendants.

Done at Sioux Falls, in said district, this 28th day of January, 1922.

By the Court:

JAS. D. ELLIOTT
(Seal of Court) Judge.

Attest:
Jerry Carleton,
Clerk.

Service of the foregoing order admitted January 28, 1922.

E. O. JONES
Attorney for Defendants.

PORTER & BARTLETT
Attorneys for Interveners.

Endorsed: Filed in the District Court on Jan. 28, 1922, at 2:30 P. M.

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96 (Affidavit of H. E. Judge in support of order to show cause.)

State of South Dakota,
County of Minnehaha—ss.

H. E. JUDGE, being duly sworn, says that he is one of the solicitors for the plaintiff in the above entitled action; that upon the trial of said action evidence was offered and received tending to establish and in the opinion of deponent establishing the fact that the defendants County Commissioners in said action in their attempted application of the purported drainage ditch statutes of the State of South Dakota to the matters involved in said action, and particularly in the matter of the attempted assessment of plaintiff's property acted arbitrarily and upon a basis purely arbitrary and speculative, and that their acts in the matter were such as would result in depriving plaintiff of its property without due process of law and to deprive plaintiff of the equal protection of the laws, all in violation of the Federal Constitution; that the question arose at the trial of said action as to whether or not plaintiff's bill of Complaint contained sufficient allegations to raise such issue; that it was deponent's opinion at the time that said bill of complaint did contain sufficient allegations; that the bill is somewhat lengthy and voluminous, and at the time such question was raised deponent was unable to take the time to consider it carefully; that upon a careful consideration of said bill it appears that there is doubt as to whether or not it raises the issue above referred to, and that in order that there may be no further question with reference to said pleading
97 deponent is desirous of amending the same to conform to the proof received upon the trial, and that plaintiff will submit to such terms, if any, as may be imposed by the court by reason of such amendment.

H. E. JUDGE.

Subscribed and sworn to before me this 28th day of January, 1922.

N. B. SAVAGE,
(Notarial Seal) Notary Public, South Dakota.

Endorsed: Filed in the District Court on Jan. 28, 1922.

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99 (Return of defendants to order to show cause why plaintiff should not be permitted to amend bill of complaint.)

Come now the defendants and intervening defendants, in the above entitled action and for return to the plaintiff's Order to Show Cause, issued hereon, on January 28, 1922, say that the plaintiffs said Motion should be denied and the prayer of the plaintiff to amend its bill be denied for the following reasons:

1. That said offer to amend comes too late, and after the entire case has been tried, argued and brief submitted.

2. That the same injects an entirely new cause of action into the bill of complaint which will require a new trial and additional evidence upon the hearing upon the same; the only evidence heretofore introduced going only to the application of the rule for the apportionment of benefits, and that the statute furnishes a determinable basis for the apportionment of benefits upon railroad and other property.

3. That the proposed amendment does not conform to the facts proven in the following particulars:

(a) That the proposed amendment assumes that the board of county commissioners were acting under jurisdiction obtained in the establishment of old Drainage Ditches No. 1 and No. 2, instead of the new drainage proceedings designated as Drainage Ditch No. 1 and 2.

100 (b) That the proposed amendment further assumes that "the equalization of the proportion of benefits" has been made, whereas, the proof shows that merely the tentative fixing of the apportionment of benefits has been made and that no equalization has been made on hearing upon equalization had.

(c) The proposed amendment assumes that the plaintiffs property "has not been and can never be benefited", etc, by old drainage ditches No. 1 and No. 2, while the evidence shows a substantial benefit under Drainage Ditch No. 1 and 2.

(d) The proposed amendment assumes "that the said assessment is so arbitrary, etc., as to deprive the plaintiff of its property without due process of law" while the evidence shows that no "assessment" or "equalization of benefits" has been made or attempted, and under the drainage law no such assessment can be made until after the proportion of benefits has been equalized and finally fixed.

(e) The proposed amendment assumes that the board of county commissioners will act arbitrarily in this matter, and not according to the proofs submitted.

4. That the amendment does not attack the drainage law as arbitrary or the unit provided by the law as arbitrary, but alleges that the acts of the board in fixing the proportion of benefits is abritrary, speculative and unjust, whereas the proof shows the board, with its engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received, and the undisputed evidence further shows that some benefits [was] received. And where there are disputable grounds of discretion or disputable degrees of benefit it cannot be said that such proof establishes arbitrary action.

5. Under the drainage law the board of county com-
101 missioners are created the initial tribunal with exclusive jurisdiction to determine the questions presented by the proposed amendment and an appeal to the state courts is provided from such determination by anyone deeming themselves aggrieved, which provides due process of law and gives the plaintiffs equal protection of the laws.

For all of which reason the defendants insist that the Motion of the plaintiff be dismissed.

E. O. JONES
Attorneys for Defendants.

PORTER & BARTLETT
Attorneys for Intervening Defendants.

Endorsed: Filed in the District Court on Jan. 31, 1922.

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103 (Affidavit of E. O. Jones, and N. B. Bartlett in support of return to order to show cause.)

State of South Dakota,
County of Minnehaha—ss.

E. O. Jones and N. B. Bartlett, being first duly sworn on oath, depose and say: That they are the solicitors for the defendants and intervening defendants above named and that they as such, draw the answers for said defendants to plaintiff's bill of complaint herein, and have had charge of the preparation and trial of the issues in the above entitled matter; that the bill of complaint herein was filed in the above named court on July 25, 1921, and that the answers of the above named defendants and intervening defendants were filed in the above named court on September 1, 1921. That upon the hearing of plaintiff's order to show cause why an interlocutory injunction should not be granted, heard before three judges in this court on or about November 28, 1921, affiants, in presence of plaintiff's attorneys, read to said court a part of plaintiff's bill of complaint herein, wherein plaintiff attempted to set forth its jurisdictional grounds and its purported constitutional question raised by said pleadings and at that time affiants stated in open court, in the presence of plaintiff's attorneys, that the bill of complaint herein did not allege fraud or arbitrary action on the part of the defendant Board of County Commissioners; that notwithstanding said
104 statement in open court, said plaintiff offered no amendment to its bill of complaint, nor did it contradict the statement of affiants nor call the court's attention to any allegation in its complaint wherein the same contained allegations of fraud or arbitrary action on the part of said Board of County Commissioners, nor did they at said time, or at all, state to said court that they were of the opinion that said bill contained any such averments, or that they were relying thereon in this cause of action, nor is there any showing before this Court now that plaintiff ever intended at any time prior to this motion, to raise by its bill the question of arbitrary action by the Board.

That on December 15, 1921, said matter came on for final determination before the above named court, and upon the first day of said hearing, affiants objected to the evidence offered by plaintiffs purporting to show that the plaintiff was not benefited by Drainage Ditch No. 1 and 2, and, among other grounds, stated at said objection, objected to said testimony for the reason that neither fraud nor arbitrary action was alleged in the bills of complaint, which objections are hereto attached, hereby referred to and made a part hereof. That at said time, the Honorable James D. Elliott, presiding judge,

overruled said objection pro forma and stated in open court that after the trial of said cause, he would take said objections and decide them in the order in which they were presented, and at said time stated in substance to plaintiff's counsel that he assumed that they had alleged that the action of the Board in fixing the apportionment was arbitrary and asked plaintiff's counsel if that were true, but that plaintiff's counsel, to the best of your affiants knowledge and belief, did not reply to said question, although plaintiff's counsel at said time did examine its bill of complaint and attempted to find such allegations therein. That said trial proceeded upon the
105 15th, 16th and 17th of December, and all of which evidence on behalf of the plaintiff was received over the foregoing objections of the defendants as hereinbefore set forth, and during all of said time, plaintiff's counsel had due notice of, and was informed of the state of its pleadings. That thereafter, and on December 20, 1921, said matter was orally argued before the Honorable James D. Elliott, presiding judge of the above named court, at which time affiant again read to said court the allegations in plaintiff's bill of complaint, setting forth its jurisdictional grounds and the constitutional questions raised, and again stated in open court that said bill of complaint contained no allegation of fraud or arbitrary or confiscatory action on behalf of the defendant Board of County Commissioners. That said plaintiff again neglected, failed and refused to offer an amendment to its bill of complaint, although duly informed of the contents thereof. That at said time, affiants distinctly called to the court's attention the allegations of plaintiff's bill, wherein it is alleged: "That said statute Exhibit "A" is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property holders situated within the drainage area and furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies" and stated to said court that said allegations did not constitute an averment of arbitrary action on the part of the Board of County Commissioners. That notwithstanding these statements in open court at the time of said argument on December 20, 1921, said plaintiff failed and neglected to offer an amendment and failed and neglected to state to the court at said time, or to contend orally at said time that said bill of complaint contained any allegations of arbitrary action on the part of said defendant Board of Commis-
106 sioners. That said plaintiff's brief herein was filed on or prior to December 30, 1921, and that more than

thirty days elapsed after the filing of said brief before said plaintiff complained that said bill of complaint was deficient and moved to amend the same. And affiants verily believe that the plaintiff never intended to allege that the actions of the Board of County Commissioners herein, were arbitrary, nor has he at any time stated in any manner, prior to the present time, that he ever intended to raise the issues presented by his proposed amendment by said bill of complaint herein.

Affiant further says that no evidence has been offered herein showing or tending to show that the equalization of benefits has ever been made by the Board of County Commissioners. That the evidence offered on the part of the plaintiff to show that the plaintiff was not benefited thereon was objected to by the defendants at the time the offer was made, which objections are hereto attached and made a part hereof, and said objections gave notice to the plaintiff that his bill did not contain any averment of arbitrary action on the part of said Board of County Commissioners, and said plaintiff neglected and failed to immediately offer an amendment to his said bill when the same was thereby objected to.

That the evidence offered by the plaintiff and by which the said plaintiff is bound does not support the proposed amendment and is substantially as follows: That the taking of the water out of the river into the ditch at a place known as Thompsons, about twelve miles north of Sioux Falls, and by-passing the same through the ditch, again returning it to the river at the spillway, is of benefit to all land and property affected adjacent to the river in that stretch of the river; that the ditch carries and by-passes from one-third to one-half of the flood water in the Sioux valley and therefore relieves the valley and the lands therein of flood water in
from one-third to one-half less time than it would
107 otherwise take to relieve said land from said flood
waters along that stretch of the river.

That the plaintiff herein is the owner of a right of way commonly known as acreage land within the stretch of the river so benefited which is adjacent to other acreage land in the benefited district, and is like affected and benefited and like apportioned as such other acreage land. That the Board of County Commissioners had a topographical survey made of the property affected by this drainage ditch included in which is the plaintiff's property. That thereafter, the Board of County Commissioners and its engineer made a personal careful inspection of plaintiff's property and found that the acreage land owned by plaintiff was benefited to the same extent

and in the same manner that adjoining acreage property was benefited, and apportioned its benefit accordingly, and found further and it was their judgment that the embankments, bridges and culverts on plaintiff's property were also benefited. That the same unit of benefit that was used and applied to acreage land in general was applied to this plaintiff's acreage land and also applied to the capitalized benefits to the embankment, bridges and culverts of this plaintiff in the same manner as it was applied to other like property within the drainage area. That Drainage Ditch No. 1 and Drainage Ditch No. 2 have been entirely completed and abandoned and are not a part of the present ditch project and that Drainage Ditch No. 1 and 2, now in controversy is an entire separate and distinct drainage project from Drainage Ditch No. 1 and Drainage Ditch No. 2.

There being no allegation of arbitrary action on the part of said Board of County Commissioners, the defendants herein did not prepare and try said case upon said issues and if such be now made a part of the bill of complaint herein, it will be necessary to introduce additional evidence to justify the proportionment made by the Board. That the defendants will be compelled to and are prepared to show by competent evidence that the right-of-way of the plaintiff company upon which the apportionment was fixed here-
108 in has been flooded in the past and prior to the completion of Drainage Ditch No. 1 and 2 and grade weakened to such an extent by reason of said waters along the same, that the action of said waters thereon increased the maintenance thereof, and that since the completion of said present drainage project, they have not suffered by reason of waters along their right-of-way, or upon their grades, and that the same has lessened the maintenance and upkeep of said grade and said railroad tracks. That since the establishment and construction of said drainage project plaintiff's bridges which it has over the river within said drainage area can be shortened and the approaches filled in, and that the plaintiff has already taken steps to shorten some of said bridges, and that the shortening of said bridges and the filling in of the approaches is a direct benefit to said plaintiff and is a resultant action of the taking away of from one-third to one-half of the flood waters by said drainage ditch project. That the defendants will be compelled to and will be prepared to establish by competent evidence that the Milwaukee Railroad bridge over the Sioux River in the City of Sioux Falls is only 205 feet long in the clear, and permits all the water now flowing in said river to pass thereunder; that the plain-

tiffs bridge within said city is not over 2000 feet above said Milwaukee bridge, is 615 feet in length and can safely be shortened to 268 feet and the approaches thereto filled thereby making a substantial saving to the plaintiff, all as a result of by-passing from one-third to one-half of the flood waters by this drainage project, away from said properties. That the only evidence that defendant offered in the trial of said case under the pleadings was that the plaintiff enjoyed some benefit but that the defendants did not attempt to show the amount of benefit, and, therefore, the amount of apportionment of benefit which the plaintiff enjoyed to any particular part of its property. That if the amendments herein are allowed, it will be necessary for the defendants to make
109 such a showing and to justify the apportionment of benefit as tentatively made by the Board of County Commissioners, and that in order to do this it will be necessary to open up said case and to have an entirely new and additional hearing. That the attempted amendment is an injection of an entirely new cause of action, and the same is not germaine to the cause of action as stated in the bill, and changes the entire character of said cause of action and would be a gross abuse of this court's discretion.

That the return of the defendants hereto attached, is hereby referred to and made a part hereof.

E. O. JONES
N. B. BARTLETT

Subscribed and sworn to before me this 31st day of January, 1922.

(Notarial Seal) R. A. BIELSKI,

Notary Public, South Dakota.

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110 Exhibit "A"

F. E. WARD, being called as a witness on behalf of the plaintiffs and being duly sworn, testified as follows:

Direct Examination

By Mr. Judge:

Mr. Bartlett: The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set aside for the reasons that said bills of complaint fail to state any matter of equity entitling the plaintiff to the relief prayed for. Nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this Court has no jurisdiction over these matters because the plaintiff's bills of complaint herein do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this Court can infer or assume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that plaintiffs have a plain, adequate and complete remedy at law.

For the further reason that it affirmatively appears from the face of the bills of complaint and record that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits assessment or tax chargeable against the property of
111 the plaintiffs if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multiplicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determination of the State Tribunal upon questions of fact before them, are conclusive upon this Court in this action, this Court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings.

The Court: I am disposed to allow you to proceed and make your records and overrule the motion at this time, pro forma, but with the understanding that the Court will take the questions of the case up in the order in which they are presented and determine them in future. I think it will be conducive to the interests of all parties to have your record perfected. The motion by the defendants is therefore denied at this time with an exception to the defendants.

Q. State your name.

Mr. Bartlett: At this time we object to the introduction of any testimony for the reasons and on the grounds urged in the motion to dismiss.

112 The Court: Same ruling.

Exhibit "B"

Mr. Bartlett: To the offer of those proceedings under this last stipulation starting with petition of Blackman concerning Drainage Ditch No. 1 and 2, the defendants offer no objection. As to the offer of the proceedings of Drainage Ditch No. 1 and Drainage Ditch No. 2, the defendants object to the offer for the reason the proceedings are incompetent and irrelevant to the issues in this case. The same touching and concerning a project not here in controversy, the controversy here being an attempt to enjoin further proceedings of the Board of County Commissioners relative to Drainage Ditch No. 1 and 2. For the further reason that the offer does not present a federal question nor a matter subject to inquiry before this court in these proceedings, and all offers of instruments up to the establishment of the ditch not being the best evidence.

The Court: It will be received subject to objection.

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113 Exhibit "C"

C. M. Bassett, Assistant Engineer of the Great Northern, on the stand, examined by Mr. Judge.

Mr. Judge: State the substance of that conversation.

Mr. Bartlett: Objected to as not binding on the defendant Commissioners.

The Court: Objection overruled.

A. We have two bridges within the area and the said Bridge 150.7 that that bridge was about the right size. The bridge 146.0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures. He figured on the amount saved by shortening of the bridge.

Mr. Bartlett: At this time, if the Court please, the defendant objects and asks that the question be stricken, and objects to the testimony of this witness on behalf of the plaintiff, going to the proposition as to whether or not the plaintiffs are

benefited or not by the drainage project, for the reason the same is incompetent, irrelevant and immaterial to the issues in the case, for the further reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction of the subject matter in these proceedings and proceeded with the construction reconstruction and the repair of the ditch in question. For the further reason that this Court has no original jurisdiction of the bill in equity to reject the method pursued by the Board of County Commissioners of Minnehaha County in the construction, reconstruction and repair of this ditch, and that the plaintiffs on the complaints herein have a plain, adequate and speedy remedy at law by appeal from the equalization arising from
114 proceedings taken by the Board of County Commissioners.

For the further reason that it calls for evidence of the facts the determination of which is in the exclusive jurisdiction of the Board of County Commissioners and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action without any allegation or proof of fraud or arbitrary action on the part of that tribunal. Is not within the issues of the case and not a proper subject of inquiry by these collateral proceedings and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these proceedings attacking the question of whether or not they are or are not benefited by the ditch proceedings?

The Court: Yes. The motion is denied. The testimony is received subject to objection.

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115 Exhibit "D"

(At the close of plaintiff's case)

Mr. Bartlett: At this time, Your Honor, at the close of plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these cases and set aside the restraining order heretofore issued, for all the reasons and upon all the grounds urged in the motion made by the defendants at the beginning of these cases.

And for the further reason that the record now shows that notice of opportunity to be heard upon the amount or proportion of benefits these plaintiffs have received and the amount

or proportion of assessment that will be made against their property for such benefits has been given, and that all the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessments to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases based upon their judgment of values and benefits conferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment, which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason that the record now shows the Board of County Commissioners of Minnehaha County charged by the law of this state with the execution of
116 the drainage ditch law has jurisdiction to proceed in respect to the property within such drainage area, including the property of these plaintiffs in these actions. And if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs and others, and the record does not indicate upon its face any departure from the requirements of the statute. Therefore this Court cannot inquire into these collateral proceedings and the same are not issues presenting federal questions.

The Court: The motion is denied pro forma, without prejudice to its renewal at the close of all the testimony.

Endorsed: Filed in the District Court on Jan. 31, 1922, at 10 A. M.

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118 (Order permitting amendment to bill of complaint.)

The above entitled matter coming on for hearing this 31st day of January, 1922, at 10 o'clock A. M., upon the order heretofore issued to defendants and intervening defendants to show cause why plaintiff should not be permitted to amend the bill herein to conform to the proof by adding to the Fifteenth paragraph of said bill the following:

"That the equalization of benefits of 616.85 units out of a total number of units of 32,549.62, amounting in dollars and cents to approximately five thousand eight hundred dollars ($5,800.00) sought to be made by the Board of County Commissioners of Minnehaha County, South Dakota,
119 against the property of plaintiff, as above set forth, is wholly arbitrary, unjust, illegal and discriminatory and was made by the Board of County Commissioners without any reasonable or rational basis therefor, and upon a purely arbitrary and speculative basis, and is not in proportion to any benefit which the property of plaintiff has received or ever can receive by the re-building of the spillway and the cleaning out, repairing and maintaining of Drainage Ditches No. 1 and No. 2, as herein set forth; that the property of plaintiff has not been and never can be [benefiffted] by the re-building of the spillway and the cleaning out, repairing and maintaining of Drainage Ditches No. 1 and No. 2, as herein set forth, to the extent of five thousand eight hundred dollars ($5,800.00) or to any extent whatever, and that the assessment sought to be collected from plaintiff above set forth is out of all proportion to the assessment sought to be made upon the agricultural lands north of the city of Sioux Falls, for the benefit of which the said Drainage Ditches No. 1 and No. 2 were originally built; that the said assessment is so arbitrary and discriminatory against the property of plaintiff as to deprive plaintiff of its property without due process of law, and that it deprives plaintiff of the equal protection of the laws."

Plaintiff appearing by its solicitor H. E. Judge, defendants appearing by their solicitor, E. O. Jones, and intervening defendants appearing by their attorneys, Porter & Bartlett, and the court being fully advised in the premises, and it appearing to the court that upon the trial of said action evi-
120 dence was offered and received by and from all parties to said action relative to the issue proposed to be raised by said amendment, and that in the furtherance of justice said amendment should be permitted.

Now Therefore, it is hereby Ordered that the motion to amend plaintiff's bill of complaint be and the same is hereby granted; that the amendment be made and filed nunc pro tunc as of the date of the trial of said action on the 15th day of December, 1921; that the amendment be made by attaching to the original bill of complaint a copy of the amendment and making it a part of the original bill; that the bill as amended need not be re-written in full; and that the answers of the de-

fendants and intervening defendants heretofore filed shall stand as answers to the bill as amended.

And the defendants and intervening defendants having asked permission to submit further evidence upon the issue set out in the amendment, it is further Ordered, that they may do so at any time within 10 days from the date hereof upon two days' notice to solicitor for plaintiff.

Done at Sioux Falls, in said District, this 31st day of January, 1922.

By the Court:

JAS. D. ELLIOTT

(Seal of Court) Judge.

Attest:

Jerry Carleton
Clerk.

Endorsed: Filed in the District Court on Jan. 31, 1922, at 2. A. M.

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122 (Exception of defendants to order allowing amendment to bill of complaint.)

January 31, 1922.

Come now the defendants, by their attorney, E. O. Jones, Esq., and the Intervening Defendants, by their attorney, N. B. Bartlett, Esq., and except to the Order permitting the amendment to the Bill to conform to the proof, which exception is allowed by the Court.

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124 (Amendment to Bill of Complaint.)

Now comes the plaintiff and by leave of the court amends its bill by adding to the Fifteenth paragraph of said bill the following:

"That the equalization of benefits of 616.85 units out of a total number of units of 32,549.62, amounting in dollars and cents to approximately five thousand eight hundred dollars ($5,800.00) sought to be made by the Board of County Commissioners of Minnehaha County, South Dakota,
125 against the property of plaintiff, as above set forth, is wholly arbitrary, unjust, illegal and discriminatory and was made by the Board of County Commissioners without any reasonable or rational basis therefor, and upon a

purely arbitrary and speculative basis, and is not in proportion to any benefit which the property of plaintiff has received or ever can receive by the rebuilding of the spillway and the cleaning out, repairing and maintaining of Drainage Ditches No. 1 and No. 2, as herein set forth; that the property of plaintiff has not been and never can be benefited by the re-building of the spillway and the cleaning out, repairing and maintaining of Drainage Ditches No. 1 and No. 2, as herein set forth, to the extent of five thousand eight hundred dollars ($5,800.00), or to any extent whatever, and that the assessment sought to be collected from plaintiff above set forth is out of all proportion to the assessment sought to be made upon the agricultural lands north of the city of Sioux Falls, for the benefit of which the said Drainage Ditches No. 1 and No. 2 were originally built; that the said assessment is so arbitrary and discriminatory against the property of plaintiff as to deprive plaintiff of its property without due process of law, and that it deprives plaintiff of the equal protection of the laws."

H. E. JUDGE,
Solicitor for Plaintiff.

Endorsed: Filed in the District Court on January 31, 1922, Nunc Pro Tunc as of December 15, 1921.

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127 (Opinion of the District Court.)

James D. Elliott, District Judge.

United States District Court, District of South Dakota.
Sioux Falls, S. Dak., Feb. 17th, 1922.

Chicago, Rock Island & Pacific Railway Company, a corporation, Plaintiff,
No. 98 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, Milwaukee & St. Paul Railway Company, a corporation, Plaintiff,
No. 99 S. D. vs. In Equity
A. G. Risty, Et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation, Plaintiff,
No. 100 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Northern States Power Company, a Corporation, Plaintiff,
No. 101 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

City of Sioux Falls, a Municipal Corporation, Plaintiff,
128 No. 102 S. D. vs. In Equity.
A. G. Risty, et al., Defendants

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Great Northern Railway Company, a Corporation, Plaintiff,
No. 103 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

C. O. Bailey, Esq., Sioux Falls, S. D. and others, Counsel for Plaintiffs.

Messrs. Porter & Bartlett, and C. O. Jones, Esq., Sioux Falls, S. D., Counsel for Defendants.

Gentlemen:—

I have finally disposed of the questions presented in the various drainage ditch cases, consolidated for the purpose of trial, and which were tried and submitted upon single record.

The question of the constitutionality of the South Dakota drainage statute is pleaded by each plaintiff, and upon this issue, the interests of the plaintiffs in all these suits are identical. It is urged by the plaintiffs in the various suits that the entire South Dakota drainage statute is unconsti-

tutional for the reason that it is in conflict with the Fourteenth Amendment of the Constitution of the United States.
129 Plaintiffs call the Court's attention to the provision of the Fourteenth Amendment that prevents the taking of property "Without due process of law."

If the South Dakota statute does not give the person whose land is to be assessed for the drainage of agricultural lands his "day in court", then there is no "Due process of law." I find upon investigation of the various drainage ditch statutes that almost universally the provision is made for the organization at the inception of the proceeding of a drainage district, with boundaries defined, organized after notice to all property owners within the district, and endowed by statute with certain powers consistent with the purpose for which the district is organized. I also note that ordinarily, where no provision is made for the formation of a drainage district, as is the case in this state, provisions are usually made for the notification of the property owners whose interests are supposed to be included in the drainage district, and for the giving to them of an opportunity to be heard in respect to the question of the practicability or feasibility of the drainage proposition, and whether or not the benefits will exceed the cost, and whether or not the particular lands of the owner, shall be included within the drainage district and assessed its pro-rata share of the benefits.

It is urged by the plaintiffs, and must be conceded, that in this regard the South Dakota statute differs from the drainage statutes of most other states. Section 8459, Revised Statutes of South Dakota, provides that a petition for proposed drainage may be filed with the Board of County Commissioners. This is the first step in the proceeding.
130 This petition is only required to set forth the necessity for the drainage, a description of the route, its initial and terminal points, and its general course, or of its exact course in whole or in part, and a general statement of the territory likely to be affected thereby.

Under this statute petitioners are not required to describe the specific tracts of land to be included within the drainage area, or which will be affected thereby or assessed therefor. Neither is it necessary to give the names of the owners of the property. The statute requires only a "general statement" as to the extent of the territory affected.

Section 8461 of said Revised Statutes, provides that the Board shall fix a time and place for the hearing of the petition and shall give notice by publication at least once each week for two consecutive weeks in a newspaper in the county, and by posting notices near the route of the proposed drainage. It also provides that such notice shall describe the route of the proposed drainage, and the tract of country likely to be affected thereby, in general terms, the separate tracts of land through which the proposed drainage will pass, and give the names of the owners thereof as appears from the records in the office of the Register of Deeds on the date of the filing of the petition. It is further provided that such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed.

Plaintiffs note that this statute, except as to property
131 owners through whose property the proposed drainage will pass, provides only this general notice, and especially complain that it gives no property owner any notice that his particular tract of land is included among the lands affected by the proposed drainage, and insist that the notice is broad enough to take in each and every tract of land included within the boundaries of the county in which the drainage project is situated.

It is true that, other than this general notice, there is no notice whatever given to the property owner that his particular land is affected by the drainage proposition, or that he has any interest in it, or will be mulcted in assessment for benefits by reason thereof. He receives no summons or other notice, either by personal service or by mail. He has, however, the general notice given in the published summons by the Commissioners to "All persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed."

By Section 8461 of the said Revised Statutes, the County Commissioners pass upon the petition at the time named in the summons and notice, and if they find it feasible to establish the drainage, no provision is made for any other notice to any property owner, unless it should be found necessary to change the initial or terminal points so that the drainage will pass through other lands than those described in the original notice, or to increase the width of the lands to be taken for the proposed drainage, in which case the Board

must give the owners of such lands notice. There is
132 no provision, however, for any notice to any property owner after the drainage ditch is established.

The Board may then proceed without further notice, to its construction. It may incur construction expense before taking any proceedings towards making an assessment for the payment of the costs, or it may before doing the work, estimate the costs and make an apportionment of benefits upon which the assessment may subsequently be spread by the County Auditor.

Section 8463 of said Revised Statutes authorizes the said County Commissioners, after establishing the drainage, to fix the proportion of benefits of the proposed drainage among the lands affected, and also appoint a time and place for equalizing the same. It is then provided that notice of such equalization of proportion of benefits shall be given by publication for two weeks. It is provided that this notice must give a description of each tract of land affected by the proposed drainage, and the names of the owners as appears from the records of the office of the Register of Deeds. It is further provided that the lands to be charged with benefits include all pieces of property that, in the judgment of the Board of County Commissioners are benefitted by the drainage proposition. At this hearing the Board fixes the proportion of benefits for each tract of land, taking any particular tract as a unit, and also fixes the benefit which any railroad company may obtain for its property by such construction and equalizes it together with the proportion of the bene-
133 fits to tracts of land. This statute seems to provide for this hearing for fixing the proportion of the benefits before the ditch is constructed and before it is known what will be the actual amount of money expended. This hearing may be delaved until after the ditch has been built. It also provides that in event there is further expense incurred, or if for any reason, parties assessed do not pay the tax, a new proportion of benefits shall be fixed and new assessments made.

At this hearing the owners of the lands alleged to be benefitted have notice, have the right to appear and contest the amount of the benefits upon their lands, and may even urge that no benefits are derived. From this assessment there is a provision granting an appeal to the Circuit Court of the County in which the lands are situated, in which the proportional benefit may be an issue, and the owner of the land, upon such appeal, may contest the fact that there are any

benefits to the land in question. The law further provides for an appeal from the determination of such issue in the Circuit Court to the Supreme Court of the State.

After such proportional benefits are determined the County Auditor spreads the tax and it then becomes a lien upon the property benefitted.

This brief statement of the provisions of the statute, not at all complete, but in a general way outlines the general powers of the Board and the method of the establishment of the ditch, and the various steps up to the spreading of the tax against the lands benefitted.

134 These proceedings are peculiarly limited to the drainage of agricultural lands, because the Constitution of the State of South Dakota provides that:

"The drainage of agricultural lands is especially declared to be a public purpose and the Legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest corporate authorities thereof and the corporate authorities of counties, townships and municipalities, with powers to constitute levees, drains and ditches * * * * * by special assessments upon the property benefitted thereby according to the benefits received."

Pursuant to this provision of the Constitution, the Legislature of the State has provided for the drainage of agricultural lands, but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands "for any public use". Without repetition, and calling attention now to the reasons urged by the plaintiffs sustaining the unconstitutionality of this statute enacted for the purpose of draining agricultural lands, and considering the objections urged in various forms by the different plaintiffs, we find that all of the objections center about the criticism that no notice is provided the owners of lands affected by the drainage ditch, except the general notice, and in fact, no personal notice until the date fixed by the Board for the equalization of proportional assessments for the various tracts of land
135 benefitted by the drainage. It will be noted that the Legislature has provided that no tax can become effective, no assessment can be made, until the benefits have been ascertained and proportioned, and before this can be done a definite day must be named by the Board and the various land owners are given notice.

The question resolves itself into one of whether or not this hearing after notice, with the right of appeal, constitutes "a day in Court" to the various land owners. I have reviewed the authorities submitted by plaintiffs and I am frank to confess that the statutes of this state do not provide for the description of the lands alleged to be benefitted by the ditch, or the owners of the lands, or that notice shall be given to such owners, or that the owners shall appear and show cause, if any they have, why the ditch is not practicable or should not be established, or have the opportunity to show that the cost would be greater than the benefits, or would be confiscatory, and yet, I am satisfied that the courts of the various states and the Supreme Court of the United States have recognized the power of the Legislature to provide the method of the levying of this tax against the lands benefitted by a drainage ditch, and have held that a law that provides for notice and an appearance and the right to contest the amount of the tax, and to contest the right to tax at all, with the right of appeal therefrom, if given to the land owner prior to
136 the time that a tax is levied and becomes effective, is "due process of law."

I was impressed upon the oral argument with counsel's reference to the decision in the North Dakota case, Soliah vs. Heskin, etc., 222 U. S. 522. Counsel urged that the law of North Dakota, very similar to ours, was sustained because it provided for a notice at the time of the establishment of the ditch. Reference to this opinion demonstrates that the Court held as follows:

"Neither does that Amendment invalidate an act authorizing an appointed Board to determine whether a proposed drain will be a public benefit and create a drainage district consisting of land which it decides will be benefitted by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property.

(Underscoring is mine.)

Under the South Dakota statute, applying this rule as announced in the North Dakota case, clearly, the notice is provided and an opportunity to be heard is afforded the land owner before the assessment becomes a lien upon his property, in the drainage of agricultural lands.

Louisiana has held that:

"Whenever by the rules of the state or by state authority, a tax assessment, servitude or other burden is imposed upon property for the public use, * * * * * * * * and those
137 laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person of such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without 'due process of law.' " Davidson vs. New Orleans, 96 U. S. 97.

Massachusetts has held that:

"If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." Spencer vs. Merchant, 125 U. S. 578.

Construing the statutes of the State of Missouri, it was held that:

"It is granted that the land owners were not afforded an opportunity to be heard in respect to the value of their land. While no hearing is given when the lands are appraised a hearing is given when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice when owners aggrieved by the valuation may have a full hearing upon that question. This is due process of law." Embree vs. K. C. & L. Road Dist. 240 U. S. 242.

The drainage statute of Michigan was considered in re Roberts vs. Smith, 72 N. W. ....., and also in Gillette vs. McLaughlin, 37 N. W. 551, and in Smith vs. Carlo, 72 N. W.

22. In these cases the same objections were made to
138 the constitutionality of the law that are argued by the plaintiffs here, and especially that the persons who did not own lands traversed by the drain, but who are within the assessment district, have no opportunity to be heard upon the necessity for laying the drain. And, further, that persons within the assessment district are entitled, under the constitution, to a hearing upon the question of the public necessity for the drain. These contentions were denied in these cases, the law held constitutional, and a full discussion of the questions is to be found in these cases and the cases therein cited.

The Michigan statute is construed again in re Voight vs. Detroit, 82 N. W. 253, and on appeal, 184 U. S. 115, in which it was urged that no provision is made for a notice to property owners of the time and place of hearing upon either the question of fixing the taxing district or the amount of the award to be spread thereon. This, it is claimed, leads to taking property without due process of law, and therefore the law is unconstitutional. It was claimed in this case, by counsel, that the complainant was entitled to notice of the hearing relating to the establishment of the assessment district, and of the amount of the total assessment, and because the statute did not provide for these notices it was unconstitutional. It was held in this case that this position could not be maintained.

"The provision of law by which, when the proceeding has reached the stage where it is proposed to levy the tax, a notice must be served on the property owner, was held sufficient to avoid the constitutional objection, notwithstanding no
139 notice is required in respect to the creation of the district or the determination of the aggregate amount of the tax to be collected.

In re Paulson vs. Portland, 149 U. S. 30 it is held:

"It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question, What proportion of tax shall be assessed upon his land, there is no taking of his property without due process of law."

I repeat that under the South Dakota statute there is ample provision for notice to every land owner, and an opportunity given to be present at the hearing, at which time and place he may assert all objections against the validity and justice of the proposed charge upon his property before the tax is levied, and carried by the County Auditor as such on the books of his office and made a lien upon the property. It follows that, in my judgment, the South Dakota [statutes], enacted in the light of that provision of the Constitution of the State providing for the drainage of agricultural lands, is constitutional.

The case made by the bills filed by the plaintiffs in these various actions involve a real and substantial question under the Constitution of the United States. The amount involved in each case is greatly in excess of Three Thousand Dollars,

exclusive of interest and costs. On the question of the jurisdiction of this Court, I am of the opinion that each
140 plaintiff states a case in his bill plainly cognizable in this court. All of the plaintiffs except the City of Sioux Falls allege diversity of citizenship, in addition to the Constitutional question, and the proper amount involved. I repeat that there can be no question as to the bills involving a real and substantial question under the Constitution of the United States, and in such a case the jurisdiction of this Court extends to every question involved, whether of Federal or State law, and enables the Court to rest its judgment or decree on the decision of such of the questions as in its opinion effectually dispose of the cases. Davis et al. vs. Wallace et al. (Opinion Jan. 9, 1922,.... U. S. .... with cases there cited).

It conclusively appears on the face of these pleadings that there is no speedy or adequate remedy at law. The remedy at law must be a remedy on the law side of the Federal Court, not a remedy in the State Courts of South Dakota. In each of the cases where there is a diversity of citizenship, this Court of Equity will not deny the plaintiff relief because there may be a remedy in the courts of the state, for the reason that the non-resident is not required to subject himself to jurisdiction of the Courts of the State in order to obtain relief. U. S. Life Ins. Co. vs. Cable, 95 Fed. 761.

In neither of the cases at bar is there a remedy at law on the law side of the Federal Court. If plaintiffs, or either of them are compelled to pay this tax, no action would lie on the law side of the Court that would give them relief. No action on the law side of the Court would protect them,
141 or either of them, from future assessments and future responsibilities.

There is the further issue presented on the face of the bills, that for the reasons therein stated, no Drainage Ditch No. 1 and 2, under which it is pretended this assessment is made, was ever established. That this is simply a pretense for the maintenance and repair of the ditches that had been theretofore established, and that the steps that have been taken by the County Commissioners are without authority of law. In substance, that the Board of County Commissioners are trespassers, acting with no right or color of right. That insofar as there is an attempt to assess benefits to the property of the plaintiffs, or other property in the City of Sioux Falls, the proceedings are entirely void. That as to each of the plain-

tiffs the assessment of benefits made is arbitrary, unjust, illegal and void. This is the basis of the claim that the assessment is such as to result in the property of the plaintiffs bearing more than its share of the burden of improvements while such property is in no wise benefitted thereby. That the alleged benefits from this improvement have not been estimated upon these properties with the farm lands according to any standard which will produce approximately correct general results. That the taxes upon the plaintiff's property are upon some fanciful view of future benefits, while the farm
142 property is assessed wholly according to its area and position. That the property of the respective plaintiffs is sought to be burdened for this improvement upon a basis so wholly different from that used for ascertaining the contribution demanded from individual owners of agricultural lands adjacent to the drain, as necessarily to produce manifest inequality. That the plaintiffs are therefore deprived of the protection of the law which must be extended to all.

The determination of these various issues necessarily requires a consideration of the facts as they appear in the record. Fortunately there is practically no dispute as to the facts. The only dispute is as to the legal effect of the acts of the Board of County Commissioners.

What, then, was the situation at and prior to the time that the said Board assumed authority to require the plaintiffs and others in the City of Sioux Falls, to pay for the building of this new spillway, and the repair of the ditches hereinafter referred to? The Sioux River flows from the north, in a southerly direction, west of the City of Sioux Falls, then flows in an easterly direction, south of the main portion of the city, then flows north through the city of Sioux Falls, flowing a distance of some ten miles from a point north of the city where the drainage ditch hereinafter referred to leaves the river, to a point where the drainage ditch empties its waters into the river. The river thus describes a large horse-shoe, the drainage ditch cutting across the open end, practically from the river on one side to the river on the
143 other. Dell Rapids is situated in the Sioux Valley more than twenty miles north of Sioux Falls.

At first there was established Drainage Ditch No. 1, and then Drainage Ditch No. 2. These two ditches extended from a point north of the City of Sioux Falls some distance to a point some fifteen miles north of Sioux Falls, at which point

Drainage Ditch No. 2 was intended to take the flood water from the Sioux River and conduct it down its length into and through Drainage Ditch No. 1, to the river north of Sioux Falls, cutting through the hills adjacent to the river, and necessitating the conduct of the water down a fall of more than one hundred feet into the river. Drainage Ditch No. 1 and Drainage Ditch No. 2 were duly constructed under the provisions of the Constitution and laws of the state for the drainage of agricultural lands and were operated for the purpose for which they were constructed. The first petition for said Drainage Ditch No. 1 was filed in 1907, and the petition for Drainage Ditch No. 2 was filed in 1910. Such proceedings were had that these two ditches were constructed down the valley in a southerly direction, near the Sioux River until a point was reached north of the City of Sioux Falls, when the ditch was turned in an easterly direction across to the Sioux River at a point north and east of the City of Sioux Falls. Benefits were assessed and paid by the owners of adjacent lands under the provisions of the statutes of the State of South Dakota to which I have referred. In
144 1915 the force of the waters conducted by these two drainage ditches was so great as to wash out what is called the spillway, through the bluff adjacent to the point where the waters from the ditches entered the river. The ditches in the meantime also became out of repair, and at one point several miles above the City where the ditch approached the river, the water was cutting from the river into the ditch, threatening to turn the entire course of the Sioux River at this point into the ditch, and through the ditch back into the river, leaving the Sioux River from that point and for about twelve miles around to where the ditch flowed into the river, without water. The spillway from the ditch through the bluff down into the river was so unskilfully, inefficiently and unscientifically constructed that it would not stand the force of the water with a fall of one hundred feet into the river. It was washed out, and the bluff being of soil and sand, washed out of the entire depth of the river and began washing back through the bluffs, threatening to cut clear back to a point where the water cut through from the river to the ditch, thus taking away from the City of Sioux Falls the benefits of the river, its sewer system and the advantages of the stream, and take the water from the plaintiff, The Northern States Power Company, that naturally flowed down the river except for the interference by this drainage ditch. And in the cutting into this bluff also threatened to cut into the gravel bed in which the water supply of the City is located, a few

miles west of it, and thus drain and destroy and take away from the City of Sioux Falls, its water supply. This was the situation in 1916.

This situation presented no question of the
145 drainage of agricultural lands. The people who had been responsible for the establishment of these two drainage ditches and the conduct of the water down through the hill to the river below, because of the inefficient manner in which the spillway had been constructed, had caused all of the trouble. The thing that confronted the Board of County Commissioners at that time, having charge of these two drainage districts, was the maintenance of the ditches and of the spillway which was a part of the ditch that had already been constructed. In the construction of these ditches no suggestion had ever been made that the City of Sioux Falls, all lying entirely south of the districts drained, was in any manner interested in the drainage, or that there could be any benefits assessed to such city or any property owner thereof. The situation that confronted them was not drainage of agricultural lands, it was the maintenance of the ditches that had been established by them, and the prevention of the dangers threatened by the water that they were conducting down through these ditches, through this hill, into the river. They might have taken their chances upon the damages that their acts were responsible for, and let the river cut down through the ditch that they had constructed and turned the course of the river there and taken the water away from the City of Sioux Falls entirely, and exhausted and destroyed the City's water supply, and destroyed the power of the plaintiff, the Northern States Power Company, by taking the water from the stream at the point where the power plant is located, without in any way endangering the agricultural lands along this ditch, except so much of it as would be
146 washed away in forming this new bed of the river. I apprehend that we may reasonably find from the evidence here that such a cut-off in the river would be to the advantage of the land owners and prevent floods, so that it was not the drainage of the lands that was bothering the Commissioners, it was not the purpose to drain agricultural lands that impelled the Commissioners to act; the thing that impelled them to give this situation any consideration was the dangers that were threatened by reason of their having constructed these two ditches, and an effort to stop the ravages of the water they were conducting down there, by the construction of a substantial, adequate spillway. It was also

necessary for them, in order to stop this threatened danger, to stop the ravages of the water at the point where it was cutting into their ditch. Certainly, this condition never could have existed if they had never built the ditch. They were responsible for it and it was their duty to maintain the ditch and to stop the ravages of the water cutting into it and through it.

This was one of the questions that they had before them, one of the problems that they had to solve, and they did proceed to construct this spillway in a substantial way and to dike, and with cement to hold the water in the stream at the place where it was cutting into the ditch. The statutes of the State of South Dakota specifically provide the duty and the method for the maintenance of these ditches. Section 8470 of the said Revised Statutes, provides as follows:

"Assessments for maintenance. For the cleaning and
147 maintenance of any drainage ditch established under the provisions of this article, assessments may be made upon the land owners affected, in the proportion determined for such drainage, at any time, upon the petition of any person setting forth the necessity therefor, and after due inspection by the Board of County Commissioners."

When this river cut through into the ditch, when the ditch became clogged in places and was not wide enough in others, when the spillway washed out by the force of the water they were conducting down the ditch, and the cutting of the bluff began and large areas of land were being washed away, and the other dangers were threatened, there was only one proposition presented to the Commissioners, and that was one of maintenance; was one of taking care of the water that they were conducting down these two ditches, No. 1 and No. 2.

Instead of proceeding frankly to maintain the ditches they had established in the manner provided by statute; instead of carrying out the obligations they had assumed when they brought the water down through these ditches, and attempted to deliver it through this bluff into the river; instead of proceeding regularly under this statute to do that which it was their duty to do; instead of performing the obligation that they had assumed when they established the ditches, that of maintaining them, they proceeded to act upon the assumption that because they had conducted the water down into these
ditches, and because of the inefficient manner in which
148 they had constructed the ditches and built the spillway, and all of these dangers were threatened, there-

fore, the plaintiffs, and others in Sioux Falls, were necessarily to be damaged. And, although a proper maintenence of these two ditches, No. 1 and No. 2, would stop the damage, would prevent any danger, the Commissioners evidently reasoned that because the plaintiffs and others in Sioux Falls were in danger, they must pay for the repair of these ditches. That could not be done by simply saying the ditches shall be repaired and the City of Sioux Falls, the plaintiffs, and others, shall pay for it, or pay a part of it, and therefore, they proceeded to do indirectly what it was conceded they could not do directly. In other words, they then began to look around and see what they would do in the way of taking care of the water and stopping these dangers.

At first it was proposed to change the spillway and conduct the water down in a southerly direction, through a slough or lake, into the river west of the City, and save the great fall that is involved at the point where the water enters the river from the spillway northeast of the city.

This was abandoned and they finally then pretended to act under a statute authorizing the abandonment of ditches. As a matter of fact there was no abandonment in good faith. No attempt to abandon the ditches. In fact, the reading of the resolution shows it was simply that they abandoned the spillway. That they filed a petition which was headed, "To reconstruct and improve Drainage Ditches No. 1 and No. 2, Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches
No. 1 and No. 2, and to pay therefor by assessment
149 upon the property, persons and corporations benefitted
thereby."

This petition was filed in July, 1916, with the Board of County Commissioners. There had never been an abandonment of Ditch No. 1 and Ditch No. 2. There had been a pretended abandonment of the spillway. But the Commissioners proceeded then to construct a proper spillway on the identical location of the old one. In other words, no change whatever was made in the two ditches, No. 1 and No. 2, except to properly construct an efficient, adequate, substantial spillway, and prevent the river cutting from its bed into the ditch, cleaning out the ditch and repairing it, changing the gates at the head of the ditch where the flood waters were taken from the river.

Upon this petition, for this purpose, the Board of Commissioners assumed authority and power to re-christen this

Ditch No. and Ditch No. 2, and call it Ditch No. 1 and 2, and for the purpose of making these repairs and maintaining the old ditches under the new name, proceeded as if no ditch had been established, and as if the Ditches No. 1 and No. 2 were not in existence, and as if no obligation had been assumed by the drainage districts when they diverted the water down through the bluffs to the river, and proceeded to make the repairs and to reach out and say that the various plaintiffs were benefitted. Instead of charging the repairs and [maintainence] of the ditches to those who were responsible for their construction under the provisions of the statutes above referred to, the Commissioners proceeded to assume
150 the right and authority to constitute a new drainage ditch without any abandonment of the old ditches, with no thought of using new or different drainage in any way, except to maintain them and to perfect that which had been inefficiently constructed, with no thought or purpose except to repair the damage that had already been done, and pre vent future damage.

Under these circumstances, I am of the opinion that the Commissioners were acting entirely without authority of law. There is no provision in the statutes of the State of South Dakota for the taking in of any other lands and assessing them, for the maintaining of a ditch after it has been constructed, and the benefits of its building have been assessed.

I am of the opinion that the forming of this new ditch was simply a pretense, and that the plaintiffs' pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed.

I am of the opinion that Section 8489 of said Revised Statutes, in regard to invalid and abandoned proceedings is not applicable to any situation such as existed here. That section has reference to the abandonment of a ditch that has been enjoined, vacated, set aside or declared void, and specifically provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expenses paid on the old ditch, and give credit for any payment
151 made upon the old ditch by people benefitted. No such proceeding was attempted to be followed in this case. The proceedings establishing old ditches No. 1 and No. 2 have never been held void, never been set aside, never been abandoned. They are in force today and are responsible for

the manner in which the ditches were constructed and for any damages that result from their negligence.

Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and [maintainence] of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage Ditch No. 1 and 2 was ever establised and has no existence.

I am of opinion that the proceedings of the Board of Commissioners in the repair and [maintainence] of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the City of Sioux Falls, are void. Entertaining this view it follows that plaintiffs' prayer for an injunction should be granted.

I may suggest in conclusion, however, that even if the Court had found that Drainage District No. 1 and 2, was legally constituted, and that the Board of County Commissioners had the right to extend the benefits to property within the City of Sioux Falls, the proofs overwhelmingly bring the plaintiffs within the rule recently expressed in re Thomas et al. v. Kansas City Southern Railway Co., et al. (December term A. D. 1921,....Fed....) in that the taxation that is imposed upon each of the plaintiffs is a much higher rate, and upon a different basis, than the tax upon land lying within the district. As a matter of fact no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiffs' property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. Taking, for instance, the tax upon one of the plaintiffs, the City of Sioux Falls, for its miles of streets in the City of Sioux Falls, with no pretense that there is any method of taxation or measuring a benefit or a gain, that would produce even approximately correct general results, when considered with benefits to the lands in the district. Simply a vague, indefinite generality, indulged in by the engineer and adopted by the Board. Benefits purely fanciful, with no substantial basis. Take the railroads, different plaintiffs, there is no pretense that the basis used had any relation to that used in fix-

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ing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all.

Referring to the testimony showing the manner of making assessments and the amount, in a general way: I think it fairly appears from the record in the case that the contention of the plaintiffs that the attempt to assess the property of these plaintiffs was an afterthought. It, in my judgment, is established that they could not be benefitted, even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the Board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands. The plaintiff, Chicago, Rock Island & Pacific Railway Company, is simply arbitrarily assessed Eight Thousand Dollars, in raising a total of Three Hundred Thousand Dollars. The Northern States Power Company was assessed Fifty Thousand Dollars, one fifth of the entire expense although there is included in the pretended district agricultural lands something like twenty miles in length and several miles in width. The injustice of this is apparent when it is noted that the record disclosed that it was located upon the rapids of the Sioux River, in the City of Sioux Falls, had been located there for many years. It was, therefore, entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business.

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The injury that was to be remedied by this improvement was one that had been caused by Drainage Ditch No. 1 and Drainage Ditch No. 2, one that could not have existed but for the establishment of those ditches. The duty to maintain these ditches involved the duty to repair the break from the banks of the river, and the duty to prevent the taking of the water from the river, that would, or should, naturally flow therein to plaintiff's benefit.

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Even if there had been a valid establishment of a drainage ditch at the time and place in controversy, and even if the Board of County Commissioners had jurisdiction, there was an entire failure to present any evidence upon which any benefit could possibly be predicated against this plaintiff. The engineer who pretended to work out the hypothetical benefit admitted that he was not a hydro-electric engineer, and therefore, not able to analyze and state the result of the different conditions of the water in the river. The suggestion applies with special force to the status of this plaintiff that the amount of benefits were fanciful, exorbitant and arbitrary, with no possible appreciation in the value of its property as a result of this improvement, and it is self-evident that upon no basis that can be used and applied to all of the property tributary to this ditch, could Thirty Thousand Dollars be ascertained as the reasonable contribution to be demanded of this particular plaintiff.

These suggestions are applicable in a general way to the attempted assessment of the property of all of the plaintiffs, and I am of the opinion that the plaintiffs have all properly invoked the aid of this Court from an arbritary, unwar-
155 ranted exercise of power by the Board of County Commissioners of Minnehaha County, who, without due process of law or compensation, threatened to deprive them, and each of them, of their property. What I have said, I think, should apply with equal force to all property in the City of Sioux Falls, attempted to be assessed by the Board of Commissioners for the maintenance of this ditch under the name of a new ditch. The responsibility for the maintenance of this ditch, for the repair of the break from the river into the ditch, and the change of the head gates, and the cleaning out of the ditch, and the repair and reconstruction of the spillway, was, and is, upon the two drainage districts responsible for their construction and maintenance, and the amount expended, some $250,000.00, which, with interest, now amounts to $300,000.00 or more, is a charge upon those districts to be assessed and made a lien upon the property within the districts, assessed in the proportion and collected in the manner, provided by the statutes of the State of South Dakota for the maintenance of drainage ditches.

There is another and further suggestion. I am of the opinion that this reconstruction of the old spillway without change of location, the repair of the break from the river into the

ditch, the cleaning of the ditch, the change of the head gates where the flood waters are taken from the river, everything that was done under this pretended establishment of a new ditch, could not be viewed in the same light or as serving the same purpose as the construction of the original
156 ditches, because the thing that caused the Board of Commissioners to take any action with reference to the condition that then existed was the danger that existed because of the conduct of the water down through these two drainage ditches to and through this spillway. The danger that was threatened was not that the agricultural lands would not be drained, but that immense damage was threatened, that the course of the river was to be diverted to this cut-off, that great areas of land were threatened to be cut away by this river one hundred feet deep, that the water supply of the City was threatened to be taken away because of this drainage ditch and this imperfect spillway. Because the water was to be taken from the river and all of the benefits of the river for several miles, through and around the City of Sioux Falls would be destroyed. The power of the Northern States Power Company would be destroyed by taking the water from the river. If it had not been for those conditions, for these threatened dangers, no action would have been taken, the ditches would have continued to function as they had functioned before. If the spillway had been properly constructed originally, and if it had not proven inadequate, there would have been no cause for any action by the Board in the year 1916. Every consideration that impelled action by the Board was some phase of the threatened danger by reason of the inadequate and imperfect construction and [maintainence] of these two ditches. Neither of these considera-
157 tions that influenced the action of the Board had anything to do with draining agricultural lands.

It may be said that to remedy these wrongs constituted a public use, as referred to in the Constitution of the State of South Dakota. Admitting that that is true, we are confronted with the proposition that there has been no legislation conforming with the provisions of the Constitution, authorizing the Legislature to provide for the establishment of drainage ditch districts, and the naming of officers with the powers therein referred to. If, therefore, any claim were made that the Commissioners were acting under this authority, independent of the provision of law with reference to the drainage of agricultural lands, the answer is that the provision of the Constitution is not self-executing, and that no legislation has been

provided carrying this provision of the Constitution into effect.

You may prepare proper orders in each case granting plaintiff an injunction as to all property located in the city of Sioux Falls and all Property not within the old Drainage District No. 1 and Drainage District No. 2. Provide an exception in behalf of the plaintiffs to the order of the Court denying the plea of the unconstitutionality of the drainage statute as applied to agricultural lands and the defendants a general exception to each order.

Yours truly,

JAS. D. ELLIOTT
U. S. District Judge.

Endorsed: Filed in the District Court on Feb. 23, 1922, at 4:15 P. M.

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160 (Decree, February 28, 1922.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Great Northern Railway Company, Plaintiff,
No. 103, S. D. vs. In Equity.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Channock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

and

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls

Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, and W. G. Porter, Intervening Defendants.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was Ordered, Adjudged and Decreed as follows, viz: that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, as County Commissioners of the County of Minnehaha, and State of South Dakota, their agents, servants, employes, attorneys, and successors in office, and each and every of them, be and
161 they are hereby forever restrained and enjoined from making any apportionment of benefits upon the following described property of the plaintiff herein, Great Northern Railway Company, situated in the county of Minnehaha, state of South Dakota, to-wit: Tract Eleven (11) of the Southeast Quarter (S.E.¼) of Section Sixteen (16), in Township One Hundred One (101) North, of Range Forty-nine (49), West of the Fifth Principal Meridian, and right of way, tracks, embankments, and bridges across Sections Twenty-seven (27), Sixteen (16) and Thirty-one (31), in Township One Hundred One (101), Range Forty-nine (49), West of the Fifth Principal Meridian, for the construction of the spillway, dams, retaining gates, ditches, and for all other work done or that may hereafter be done under the supervision of the Board of County Commissioners of Minnehaha County, South Dakota, in the matter of the construction or re-construction, repair and maintenance of Drainage Ditch No. 1 and Drainage Ditch No. 2, otherwise designated by said County Commissioners as Drainage Ditches No. 1 and No. 2 and as Drainage Ditch No. 1 and 2, of Minnehaha County, South Dakota, and they and each of them are hereby perpetually restrained and enjoined from making and levying any assessment upon said property or any part, parcel or portion thereof, for the cost of the construction or re-construction, repair, maintenance of the said spillway, dams, retaining gates, ditches, and other work heretofore done or which may be hereafter done, or any part thereof, upon the said drainage ditches above referred to, or any of them, and from in any manner including any of said property of the plaintiff, Great Northern Railway Company, within the territory benefitted by said drainage ditches or any of them.

And the defendant, Fred E. Ward, as Auditor of the County of Minnehaha, and State of South Dakota, his agents, servants, employes, attorneys, and successors in office are hereby forever restrained and enjoined from making any such ap-

portionment of benefits, or making or levying any such assessment upon any of said property, and from certifying any such assessment to the county treasurer of the said county of Minnehaha, state of South Dakota.

And the defendant, J. O. Anderson, as Treasurer of the
162 County of Minnehaha, and State of South Dakota, his agents, servants, employes, attorneys, and successors in office are hereby forever restrained and enjoined from filing any such assessment and from collecting any such assessment against the said property hereinbefore described.

It is further Ordered, Adjudged And Decreed that the plaintiff herein, the Great Northern Railway Company, have and recover from the defendants and intervening defendants herein, and each of them, its costs and disbursements herein taxed and allowed in the sum of ....dollars ($.....), the amount thereof to be inserted herein by the clerk of the court after the costs shall have been taxed by him).

Done in open Court, at Sioux Falls, in said Southern Division of the District of South Dakota, on the 28th day of February, 1922.

By the Court:

JAS. D. ELLIOTT,

(Seal of Court) Judge.

Attest:

Jerry Carleton,
Clerk.

To the entry of the foregoing decree, the defendants and the intervening defendants duly and severally excepted, which exceptions are allowed by the court.

Dated February 28, 1922.

JAS. D. ELLIOTT, Judge.

163 Endorsed: Filed in the District Court on Feb. 28, 1922, at 3 P. M.

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164 (Assignment of Errors.)

And now, on this 25" day of August, A. D. 1922, come the defendant, by their Solicitors, Elbert O. Jones and L. E. Waggoner, and the intervening defendants, by their Solicitor, Norman B. Bartlett, and say that the decree entered in the

above entitled cause on the 28th day of February, A. D. 1922, is erroneous and unjust to the defendants.

First:

Because plaintiff's bill of complaint herein does not set forth any matter of equity entitling the plaintiff to the relief prayed for and it affirmatively appears from said
165 bill of complaint that the plaintiff has a plain, adequate and complete remedy at law.

Second:

Because the bill of complaint does not set forth any matters of equity in addition to the pretended constitutional question, or any special circumstances to bring the case under some recognized head of equity jurisdiction, and it is necessary to allege and prove some special circumstances in addition to the constitutional question, and thereby bring the case under some recognized head of equity jurisdiction, in order that this Court shall have jurisdiction of said matters.

Third:

Because the bill of complaint fails to set forth facts sufficient from which this Court can infer or presume that there will result a multiplicity of suits, irreparable injury, or a cloud cast upon the title of its property, and it is necessary to specifically allege facts from which this Court can infer that either a multiplicity of suits, irreparable injury or a cloud will be cast upon the title of its property as a direct result of the action that plaintiff is attempting to enjoin, and such allegations must be specific allegations of fact, and not conclusions.

Fourth:

Because it affirmatively appears from the fact of plaintiff's bill of complaint, and the record herein, that there is no jurisdictional amount in controversy in this case at this time, and can be none, and that, therefore, this action is prematurely brought, for the reason that no assessment, levy or tax has been, in fact, made, assessed, equalized, fixed or levied against the property of the plaintiff, or at all.

Fifth:

Because it affirmatively appears from plaintiff's bill
166 of complaint, and the record herein, that the State Tribunal having jurisdiction of said drainage ditch proceedings, was enjoined by this proceeding before such State

Tribunal had had an opportunity to perform its statutory duty to determine, equalize, assess, fix or levy the amount of benefit, assessment or tax, if any, chargeable against the property of the plaintiff, and for this Court to maintain jurisdiction before such State Tribunal had performed its full statutory duty, determined, equalized, assessed and fixed the amount of benefit, assessment or tax, was a usurpation of the authority invested in the State Tribunal, and an attempt to substitute this Court for such State Tribunal; and for the further reason that there is no provision of law giving this Court original jurisdiction over said matters.

Sixth:

Because the allegations of plaintiff's bill of complaint herein involve and present for litigation the determination of facts and matters controlled and governed by the drainage statutes of South Dakota, which, by their terms, create and provide a special tribunal with exclusive original jurisdiction to try and determine the questions presented in said bill of complaint, which determinations of said State Tribunal are final and conclusive upon this Court in this action, for the reason that this Court has no original jurisdiction by a bill in equity, to direct, reject, or control the proceedings and determinations of that tribunal, and thereby take away from that tribunal the power of discretion, and the exercise of its judgment in arriving at a proper determination of the matters before it.

Seventh:

Because until the tribunal created by the drainage statutes of South Dakota has exercised its judgment and discretion in the determination of questions of fact properly before
167 it, and the necessary steps of procedure have been taken, and it has finally determined, equalized and fixed the proposed tax or assessment, if any, against the plaintiff's property, this Court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, for the reason that until such proposed assessment, tax or servitude has been equalized and fixed and assessed, this action is premature.

Eighth:

Because the undisputed evidence shows that on or about December 4, 1920, an equity suit was instituted in the State Circuit Court, within and for Minnehaha County, South Dakota, the same being a court of general jurisdiction and having jurisdiction over the subject matter therein presented,

by one Oluf O. Gilseth, being a person belonging to the same class of persons as the plaintiff herein, whose lands were affected by the construction of Drainage Ditch No. 1 and 2, and against whose lands the proportion of benefits for the construction of said ditch had been proportioned at the same time, upon the same basis, and in like manner and under the same law as the proportion of benefits to the land of this plaintiff, which said action was brought by said Oluf O. Gilseth for himself, and as a representative of the class to which he and this plaintiff belong, and which action was brought against the defendants herein, and was instituted, tried and determined with notice to and knowledge by, approval, acquiescence and consent of this plaintiff, its officers, agents and attorneys, and in which said case the same facts were alleged and relied upon in the bill of complaint of the said Oluf O. Gilseth as are alleged and relied upon by the plaintiff herein in its bill of complaint, and which bill of complaint prayed for the same relief, and which said action came on for trial, in which trial this plaintiff was entitled to be
168 heard, on the 31st day of January, 1921, and thereafter said State Court entered its judgment and decree dismissing said action upon its merits, and denying the plaintiff the right to an injunction against these defendants, which said judgment and decree is now in full force and effect, and which determination is binding upon this plaintiff, and is, therefore, a bar to this action, for the reason that all matters presented by plaintiff's bill of complaint herein are res adjudicata.

Ninth:

Because the uncontradicted evidence in this case shows that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, and upon which the drainage ditch designated as Drainage Ditch No. 1 and 2, was ordered established and constructed, and the notice of hearing said petition given pursuant to law, and the resolution of the Board upon the hearing of said petition establishing said ditch, all contained a description of plaintiff's property, and alleged that the same was affected thereby, and said resolution determined that plaintiff's property so described was affected by said Drainage Ditch No. 1 and 2, which determination, unappealed from, is now final and conclusive upon this plaintiff, and this Court, and, therefore, this Court was unwarranted in determining and decreeing that plaintiff's property is not affected by Drainage Ditch No. 1 and 2, no extrinsic fraud being alleged in plaintiff's bill of complaint.

Tenth:

Because the undisputed evidence in this case shows that the plaintiff's property is receiving some benefit, and that it has not exhausted its statutory remedy for an equalization of such benefits, and its only complaint is that too many units of benefit have been apportioned against its property; and, therefore, this Court has no jurisdiction under its gen-
169 eral equity powers to correct an unequal or unjust assessment, since the statute prescribes a method for reviewing or correcting unequal or unjust assessments.

Eleventh:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was a new project, with plaintiff's property included therein, which finding and judgment of said Tribunal are binding upon this plaintiff and upon this Court, and can not be attacked in this collateral action, for the reason that said Tribunal is, by the drainage law of the State of South Dakota, given jurisdiction to determine the nature, kind and character of the proposed drainage, and the description of and the amount of property affected by said drainage project, and having made said findings and judgment, and this plaintiff not having appealed therefrom, said plaintiff is now bound thereby.

Twelfth:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was conducive to the public health, convenience and welfare of the territory described in the petition of the City of Sioux Falls, F. L. Blackman and others, and was necessary and practicable for draining agricultural lands, which findings and judgment of said Tribunal are now binding upon this plaintiff and
170 upon this Court. and cannot be attacked in this collateral action, for the reason that, by the drainage law of the State of South Dakota, the Board of County Commissioners are given authority to determine whether or not a proposed drainage ditch will or will not be conducive to the pub-

lic health, convenience and welfare of the territory described in the petition therefor, or necessary and practicable for draining agricultural lands; and having found in the affirmative in both instances, and the plaintiff herein not having appealed from such determination, the same is now binding upon this plaintiff and upon this Court.

Thirteenth:

Because no facts have been alleged in plaintiff's bill of complaint constituting extrinsic fraud on the part of the Board of County Commissioners of Minnehaha County, South Dakota, or any one else, in filing the petition of the City of Sioux Falls, F. L. Blackman and others, or in the allegations contained therein, or the resolution or other proceedings on, and prior to, or in the establishment of said drainage ditch designated as "Drainage Ditch No. 1 and 2", on October 3, 1916; and there is no evidence in the record of any extrinsic fraud on behalf of the Board of County Commissioners, or anyone else, in any of said proceedings, and, therefore, the determination of the facts found by said Board in said resolution of October 3, 1916, are now binding and conclusive upon this plaintiff and upon this Court, and this Court has no right, authority, or jurisdiction to enter upon, attempt to decide, to decide or re-litigate such questions of fact as were previously determined by such special Tribunal.

Fourteenth:

Because the undisputed evidence in this case shows that more than five years have elapsed after this plaintiff
171 had actual knowledge and legal notice of the establishment and construction of Drainage Ditch No. 1 and 2, and during all of said time this plaintiff took no steps to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars ($250,000.00) thereon and plaintiff's bill of complaint wholly fails to make any distinct averments, and none of the evidence tends to excuse this unwarranted delay, and for these reasons this Court should not come to its relief.

Fifteenth:

Because the drainage statutes of South Dakota provide a fixed and determinable basis, method and rule of apportionment of benefits, and, pursuant thereto, the Board of County Commissioners of Minnehaha County, South Dakota, applied such fixed and determinable basis, method and rule of apportionment of benefits, which will probably produce approxi-

mately correct general results as to the benefits to plaintiff's property, as well as all other property in the drainage district, and, therefore, such apportionment is not arbitrary, and this Court cannot usurp the power of the Board to equalize the proportion of benefits as provided by
172 said statutes.

Sixteenth:

Because the evidence wholly failed to show that there would result a multiplicity of suits, or irreparable injury, or a cloud cast upon the plaintiff's property, and also failed to show any circumstances to bring the case under some recognized head of equity jurisdiction, and the evidence does show that the plaintiff had a plain, adequate and complete remedy at law.

Seventeenth:

Because all the evidence now shows that there is no jurisdictional amount in controversy in this action, and that, therefore, this action was prematurely brought, in that the apportionment had not been equalized, and no tax had ever been assessed or levied against the plaintiff's property, or any other property, and that the amount of such tax, if any, and, therefore, the amount in controversy herein, has not been, and cannot be, determined until after such equalization and final assessment has been made, as provided by the law of South Dakota, and the uncontradicted evidence shows that said equalization of the apportionment of benefits was prevented by the temporary restraining order and the final decree in this case.

Eighteenth:

The Court erred in not adjudging and decreeing that on October 3, 1916, Drainage Ditch No. 1 and 2 was duly and legally established by the Board of County Commissioners of Minnehaha County, South Dakota, for a public purpose, including but not limited to the drainage of agricultural lands, for the reason, that the Constitution of the State of South Dakota and Section 8458 of the Revised Code of South Dakota, 1919, provide therefor.

Nineteenth:

The Court erred in not adjudging and decreeing that the proceedings taken by the Board of County Commissioners of Minnehaha County, South Dakota, upon the petition of the City of Sioux Falls, F. L. Blackman and others, filed with the County Auditor on August 3, 1916, and upon which Drain-

age Ditch No. 1 and 2 was established on October 3, 1916, constituted the establishment of an entirely new drainage proceeding, and gave the Board of County Commissioners jurisdiction to construct such drainage as a new project, for the reason that such petition prayed for the construction of a drainage ditch over the exact line of drainage ditches
173 previously abandoned, and contemplated a more comprehensive and perfect drainage system for the purpose of draining and benefitting additional property, in compliance with and as authorized by Sections 8458, 8476 and 8489 of the Revised Code of South Dakota, 1919, and the undisputed evidence shows the work done consisted of about eight miles of canalizing the river, doubling the capacity of the ditch and outlet, building dikes, dams and controlling works, and an adequate spillway or outlet to said ditch, at a total cost of over Two Hundred Fifty-five Thousand Dollars ($255,000.00), which was more than double the amount of the total assessments for old Drainage Ditch No. 1 and Drainage Ditch No. 2, which was the sum of One Hundred Twenty-seven Thousand, Seven Hundred Six and 10/100 Dollars ($127,706.10).

Twentieth:

The Court erred in not adjudging and decreeing that plaintiff's land was subject to assessment for benefits which it received, if any, under the establishment and construction of Drainage Ditch No. 1 and 2, without regard to whether its lands had been assessed and included within the assessment district of Drainage Ditch No. 1 and Drainage Ditch No. 2, or not, for the reason that Drainage Ditch No. 1 and 2, as established on October 3, 1916, was established as a new project upon due and legal notice to the plaintiff, and in the manner provided by the drainage statutes of South Dakota.

Twenty-First:

The Court erred in entering its decree herein in favor of the plaintiff and against the defendants, upon this plaintiff's bill of complaint and the amendment allowed thereto, for the reason that said plaintiff's offer to amend said bill of complaint came too late, and long after plaintiff's attention was called to the fact that its bill contained no allegation
174 of arbitrary acts by objection to the introduction of testimony during the trial, and after the entire case had been tried, argued and submitted, and briefs had been filed twenty days, which amendment injected an entirely new cause of action into the bill of complaint, and to overcome which, the Court refused to receive evidence showing or tend-

ing to show that plaintiff's property was receiving a substantial benefit, and that the apportionment was not arbitrary and which amendment, when offered, did not conform to the facts established upon said trial, in that said proposed amendment assumed that the Board of County Commissioners were acting under jurisdiction obtained in the establishment of old Drainage Ditch No. 1 and Drainage Ditch No. 2, and not under the new drainage proceedings designated as "Drainage Ditch No. 1 and 2", as shown by the undisputed evidence; assumed that the equalization of the proportion of benefits had been had and assessment duly made thereon, whereas, all the evidence shows that merely a tentative fixing of the proportion of benefits had been made; assumed that the property of plaintiff had not been, and never could be, benefited by old Drainage Ditch No. 1 and Drainage Ditch No. 2 while the uncontradicted evidence shows a substantial benefit from the construction of Drainage Ditch No. 1 and 2; assumed that the assessment for benefits had been made, while the uncontradicted evidence shows that no equalization or assessment of benefits had ever been made, and cannot be made until after the proportion of benefits has been equalized and finally fixed; assumed that the acts of the Board in making the so-called assessment were arbitrary, while the evidence shows that no assessment or equalization of benefit has ever been made; and further, said amendment does not attack the drainage law as arbitrary, or the unit provided by law as arbitrary but alleges that the acts of the Board in fixing the amount
175 of the benefits to plaintiff's property were arbitrary, speculative and unjust, whereas, all the evidence shows that the Board, with its Engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received by plaintiff's property, using the fixed and determinable basis, method and rule of apportionment provided by the drainage law of South Dakota, and the undisputed evidence further shows on behalf of both parties that some benefit was received by the plaintiff; assumed the amount of the assessment and made an issue as to the amount of benefit, if any, plaintiff received, which matter this Court has no jurisdiction to determine; assumed and made an issue of the inequality of the so-called assessment upon plaintiff's property, and other agricultural land, which issue is within the exclusive jurisdiction of the State Tribunal, and this Court in this action has no jurisdiction to try or determine the same.

Twenty-second:

The Court erred in not adjudging and decreeing that the plaintiff herein is not in a position to question the regularity of the proceedings in the establishment and construction of Drainage Ditch No. 1 and 2, as an independent drain-
176 age proceeding, as it, by its officers and agents, had actual knowledge and legal notice of the proceedings taken to establish said drainage; as it, through its officers and agents, saw the work in the course of construction, assisted in the work of construction thereof, by furnishing services and materials used therein, with knowledge that such services and materials were furnished therefor, and were being used in the construction of said drainage, and received compensation for said services and materials so furnished and used; as it, through its officers and agents, urged and encouraged the Board of County Commissioners to take the action and do the work which was done under such drainage proceedings for its benefit, and as it is now, and has been for more than three years last past, receiving protection and substantial benefits from said drainage construction, with the full knowledge that there was no manner of paying for such construction except by assessment upon the property benefited, included in which was plaintiff's property, all without protest against the doing of any such work, or the extent or manner thereof, until such work and drainage project had been substantially completed, and until this action was brought to restrain the making of an assessment to pay for the cost of said construction, and, therefore, the plaintiff is now estopped from questioning said proceedings and maintaining this action.

Twenty-third:

The judgment and decree herein is not supported by the evidence, and is contrary to law, in that it appears from the undisputed evidence that the outlet to old Drainage Ditch No. 1 was destroyed and abandoned and thereby said ditch abandoned and that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, fully complied with the requirements of the drainage statutes of South Dakota for the establishment of a new drainage, and that thereafter all the statutory requirements were duly and fully followed and pursued, and such proceedings were had that, pursuant to statute, on October 3, 1916, the Board of County Commissioners of Minnehaha County, upon due notice and hearing of said petition, ordered and adjudged the establishment of said drainage as a new project and drainage ditch, and desig-

nated it as "Drainage Ditch No. 1 and 2", and further adjudged and decreed that the construction thereof was for a public purpose, and was necessary and practicable for draining agricultural lands, and that the property of this plaintiff was included within the drainage area, and affected
177 thereby, which property was described in the petition, notice, and said resolution and judgment, which resolution and judgment was never appealed from by this plaintiff, or anyone, and is now in full force and effect, and has been for more than six years last past; that there is no evidence at all in the record that the plaintiff has been in any manner prevented from fully presenting its defense, if any, to the allegations and prayer contained in said petition of the City of Sioux Falls, F. L. Blackman, et al, or from fully trying all the issues therein presented, or that the jurisdiction of the Board of County Commissioners was imposed upon.

And it further appears from the undisputed evidence that an apportionment of benefits has been made for the payment of the costs of construction of said Drainage Ditch No. 1 and 2, and that the law provides, and the County Commissioners applied, after personal inspection, and exercising their best judgment, a fixed and determinable basis, method, and rule of apportionment of benefits, which will probably produce approximately correct general results as to the plaintiff's property, as well as all other property in the drainage district; and that no equalization of benefits or assessment has been had thereon, and that no legal charge or servitude has yet been placed upon the property of plaintiff, or anyone else, and that this action is premature.

Twenty-fourth:

The said decree is not sustained by the evidence, but is contrary thereto, in that it appears from the undisputed evidence that Drainage Ditch No. 1 and 2 was established as a new ditch by the Board of County Commissioners of Minnehaha County, South Dakota, on October 3, 1916, included in which drainage district was plaintiff's property, and of which proceedings this plaintiff had knowledge and legal notice for more than six years last past, and has never taken any
178 steps prior to the institution of this action, to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars ($250,000.00) thereon, and has wholly failed to establish any lawful excuse for said unwarranted delay; and that all steps taken by the Board of County Commissioners leading up to and the establishment of said Drainage Ditch No. 1 and 2, were war-

ranted in law, and said Board was lawfully acting under and in conformity with the Constitution and drainage statutes of the State of South Dakota; and that said drainage ditch was petitioned for, and lawfully established for a public use and purpose, and for the purpose of draining agricultural lands; that the apportionment of benefits, as made by the Board of County Commissioners, was made pursuant to and in conformity with the method and rule laid down by the drainage statutes of South Dakota, and after a personal inspection and deliberation by said Board, applied in conformity therewith in such a manner as will probably produce approximately correct general results as to the benefits enjoyed by plaintiff's property, as well as all other property in the drainage district and that plaintiff's property is enjoying substantially the amount of benefit apportioned to it.

179 Twenty-fifth:

For all the reasons and errors aforesaid, the Court erred in not entering and rendering a decree in favor of the defendants, and against the plaintiff, dismissing its bill of complaint, and denying the injunction herein, and in not entering its judgment and decree in accordance with the prayer of defendants' answers.

Wherefore, defendants pray that the judgment and decree of said Court be reversed, with directions to enter a decree in favor of the defendants and against the plaintiff, dismissing plaintiff's bill, as prayed for in defendants' answers.

ELBERT O. JONES and
L. E. WAGGONER
Solicitors for Defendants.

NORMAN B. BARLETT
Solicitor for Intervening Defendants.

Endorsed: Filed in the District Court on Aug. 25, 1922, at 5 P. M.

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180 (Petition for appeal and allowance thereof.)

To The Honorable James D. Elliott, Judge of the United States District Court Within and for the Southern Division of the District of South Dakota:

The above named defendants and intervening defendants feeling themselves aggrieved by the decree made and entered in this case on the 28th day of February A. D. 1922, do hereby

appeal from said decree to the Circuit Court of Appeals, for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that their appeal be allowed, and that citation issue, as
181 provided by law, and that a transcript of the record, proceedings and papers, upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Paul, Minnesota, and your petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

ELBERT O. JONES and
L. E. WAGGONER
NORMAN B. BARTLETT
Solicitors for Defendants and Intervening Defendants.

The foregoing petition granted, and the appeal allowed upon giving bond, conditioned as required by law, in the sum of One Thousand and No/100 Dollars ($1,000.00).

JAS. D. ELLIOTT
Judge of the United States District Court within and for the Southern Division of the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25,1922, at 5 P. M.

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183 Bond On Appeal.

Know All Men By These Presents: That we, A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, as Principals, and the Southern Surety Company of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the Great Northern Railway Company, appellee in the above cause, in the sum of One Thousand Dollars ($1,000.00), conditioned that, whereas on the 28th day of February A. D. 1922, in the District Court of the United States, for the Southern Division of the District of South Dakota, in a suit pending in that court wherein the Great Northern Railway
184 Company was plaintiff, and A. G. Risty, et al, were defendants, and the Minnehaha National Bank of Sioux

Falls, South Dakota, et al, were intervening defendants, numbered on the Equity Docket as 103, a decree was rendered against the said A. G. Risty, et al., defendants, and the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, and the said A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, having obtained an appeal to the Circuit Court of Appeals for the Eighth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation directed to the said Great Northern Railway Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals, for the Eighth Circuit, to be held in the City of St. Paul, in the State of Minnesota, on the 2" day of May, A. D. 1923, next.

Now, if the said A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

A. G. RISTY
Signing for all Defendants.

THE MINNEHAHA NATIONAL BANK OF SIOUX FALLS,
H. V. Harlon, V. P.
Signing for all Intervening Defendants.

SOUTHERN SURETY COMPANY OF DES MOINES, IA.
By C. T. Charnock,
Attorney-in-Fact, Surety.

(Corporate Seal Southern Surety Company)

185 State of South Dakota,
County of Minnehaha—ss.

On this 15th day of August, 1922, before me H. B. Charnock, a notary public in and for said County, and State, personally appeared C. T. Charnock, well known to me to be the Attorney-in-fact of the Southern Surety Company, a corporation that is described in and that executed the above and foregoing instrument and duly acknowledged to me that said corporation executed the same.

And I further certify that at the same time the said C. T. Charnock exhibited to me the original certificate of authority

issued to said Company by the Commissioner of the State of South Dakota, and that the following is a true, perfect and complete copy thereof:

STATE OF SOUTH DAKOTA
DEPARTMENT OF INSURANCE,

Renewable Annually.

Office of the Commissioner

Company's Certificate of Authority.

No. 11050

Whereas, The Southern Surety Company, a corporation organized under the Laws of Iowa, has filed in this Office a sworn statement exhibiting its condition of business for the year ending December 31st, 1921, conformable to the requirements of the Laws of this State regulating the business of Insurance, and

Whereas, The said Company has filed in this office a duly certified copy of its charter, with certificate of organization, and has complied with all the requirements of the Insurance Laws aforesaid;

Now Therefore, I, W. N. Van Camp, Commissioner of Insurance of the State of South Dakota, pursuant to the provisions of said laws do hereby certify that the above
186 named Company is fully empowered through its authorized agents to transact its appropriate business of Accident and Health, Liability, Workmen's Compensation, Fidelity, Surety, Burglary, Theft, Plate Glass and Automobile Insurance in this State according to the Laws thereof, until the last day of February, 1923.

In Testimony Whereof, I have hereunto set my hand and official seal at Pierre, this First Day of March, A. D. 1922.

(Notarial Seal)

W. N. VAN CAMP,
Commissioner of Insurance.
By W. J. Madden,
Deputy Commissioner.

H. B. CHARNOCK,
Notary Public, South Dakota.

The foregoing bond is hereby approved.

JAS. D. ELLIOTT,
Judge of the United States District Court
Within and for the Southern Division of
the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25, 1922, at 5 P. M.

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188 (Praecipe for Transcript.)

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the Circuit Court of Appeals of the United States, for the Eighth Circuit, by including therein the following:

1. The Bill of Complaint, except the title and verification, and except the Exhibits thereto attached.

2. Order Allowing Intervention.

3. The following portions of Defendants' Answer, viz:

(a) Paragraphs "A", "B", "C", "D", and "F" of Defendants' Special Answer.

(b) Introduction and Paragraphs "First" to "Eighteenth" inclusive, of Defendants' General Answer; and

(c) Paragraphs "VIII", "IX", "XII", "XIV" and "XV" of Defendants' Affirmative Defense, together with the prayer.

4. The Statement of the Evidence Submitted, and Approved by the Court.

5. Order to Show Cause for Permission to Amend Bill, and Affidavit supporting the same.

189 6. Return to Order to Show Cause and Affidavit.

7. Order Permitting Amendment of Bill, and Exception taken to said Order.

8. Amendment to Bill.

9. The Opinion and Decree of the District Court.

10. Assignments of Error.

11. Petition for Appeal.

12. Order Allowing Appeal.

13. Bond upon Appeal, and Approval of same.

14. Notice of Deposit of Statement of Evidence with Clerk and Proof of Service thereof.

15. Approval of Court of the Statement of the Evidence.

16. Citation in Appeal, and Service thereof.

17. Praecipe and Clerk's Certificate.

Dated at Sioux Falls, South Dakota, this 23 day of September, A. D., 1922.

E. O. JONES
N. B. BARTLETT,
Solicitors for Appellants.

Endorsed: Filed in the District Court on Sept. 25, 1922.

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191 (Notice to plaintiff of lodgment of statement of evidence in District Clerk's office.)

To H. E. Judge, Solicitor for Great Northern Railway Company, Plaintiff:

Please take notice that the Appellants have prepared a Statement of the evidence to be included in the record upon the appeal of the above entitled matter to the Circuit Court of Appeals, for the Eighth Circuit, and has lodged the same in the office of the Clerk of this Court for your examination, (a copy of which Statement is herewith served upon you).

You will further take notice that the Appellants will ask the Court, at the Government Building, in the City of Sioux Falls, in said District of South Dakota, at ten o'clock in the forenoon of the 3rd day of October, A. D. 1922, or as soon thereafter as counsel can be heard, to approve said Statement.

Dated this 23 day of September, A. D. 1922.

E. O. JONES
N. B. BARTLETT
Solicitors for Appellants.

Service of the foregoing Notice this 23 day of September, A. D. 1922 is hereby acknowledged also service of the Statement therein referred to.

. . . . . .

192 Solicitor for Great Northern Railway Company, Plaintiff.

Endorsed: Filed in the District Court on Sept. 25, 1922.

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193 (Affidavit of service of notice to plaintiff of lodgment of statement of evidence.)

State of South Dakota,
County of Minnehaha—ss.

N. B. Bartlett, being first duly sworn on oath, deposes and says: That he served the hereto attached notice of lodgement of the statement of the evidence and a statement of such evidence and notice of the time and place set for approval of said statement upon H. E. Judge, Esquire, Solicitor of the above named plaintiff, Great Northern Railway Company, on September 23, 1922, in the city of Sioux Falls, South Dakota, by then and there handing to and leaving with the said H. E. Judge personally, true copies of the hereto attached notice and statement of evidence.

N. B. BARTLETT

Subscribed and sworn to before me this 25 day of September, 1922.

G. J. CLUTTERBUCK
(Notarial Seal) Notary Public, South Dakota.

194 Endorsed: Filed in the District Court on Sept. 25, 1922.

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195 (Additional praecipe for transcript.)

The Clerk of this court is hereby directed to incorporate into the transcript upon appeal in the above entitled cause, for the use of the Circuit Court of Appeals to the United States for the Eighth Circuit, the following additional portions of the record, which are not indicated in the praecipe filed by appellants, to-wit:

1. The title of the case as a part of and as it appears in the bill of complaint and Exhibit B and Exhibit C attached to and made a part of the bill of complaint.

2. The title of the case as a part of and as it appears in the defendant's answer.

3. Paragraph I, VII and XIII of defendants' affirmative defense, as a part of defendants' answer.

4. The following exhibits made a part of the answer,
196 to-wit: The petition of F. L. Blackman, and others, upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had; the order for filing said petition; the resolution for sur-

vey under said petition; the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman, and others; the published notice of hearing said petition, (said notice not being attached to the answer but having been filed after the filing of the answer and on November 28th, 1921 together with a stipulation that it might be considered as a part of the answer); and the resolution establishing Drainage Ditch No. 1 and 2, all of said exhibits to be inserted as a part of said answer.

H. E. JUDGE
Solicitor for Appellee.

Endorsed: Filed in the District Court on Oct. 24, 1922, at 4 P. M.

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198 (Statement of Evidence.)

(Filed in U. S. District Court on January 10, 1923.)

The above entitled suit came on for hearing before the Court on December 15th, 1921, before the Honorable J. D. Elliott, Presiding Judge, plaintiff appearing by Mr. H. E. Judge, its solicitor, defendants appearing by Mr. E. O. Jones, their solicitor, and the intervening defendants appearing by Messrs. Porter & Bartlett, their Solicitors, the following proceedings were had:

199 Evidence of Plaintiff.

F. E. WARD, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Stipulation.

"It is stipulated and agreed between all parties that the testimony received in these consolidated cases shall be considered as received in each case, so far as such testimony is pertinent to such case, and that such testimony apply only to that case."

Q. You may state your name?

The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set aside, for the reasons that the said bills of complaint fail to state any matter of equity entitling the plaintiffs to the relief prayed for, nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this court has no jurisdiction over these matters, because plaintiffs' bills of complaint herein do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this court can infer or presume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property, or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that the plaintiffs have a plain, adequate and complete remedy at law.

200 For the further reason that it affirmatively appears from the fact of the bills of complaint and record, that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits, assessment or tax chargeable against the property of the plaintiffs, if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multiplicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determinations of the state tribunal upon questions of fact before them, are conclusive upon this court in this action, this court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings. Motion denied, defendants and intervening defendants excepting.

201 The defendants and intervening defendants then objected to the introduction of any testimony for the reason and on the ground urged in the motions to dismiss. Objection overruled. The Defendants and intervening defendants excepting.

(Testimony of Witness F. E. Ward)

I am the auditor of Minnehaha County, South Dakota; drainage ditch records A and B and Commissioners records 5 and 6 are part of the records of Minnehaha County, and of

the drainage proceedings of the Board of County Commissioners of Minnehaha County.

Plaintiff offered and there were received in evidence the following portions of Drainage Ditch Record A.

July 1, 1907.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioner respectfully represents: That he is a resident of the City of Sioux Falls in said County; that he is the owner of certain lands in the valley of the Big Sioux River north and west of the City of Sioux Falls in said County, viz: Blocks Three (3) and Thirty-one (31) of Meredith's First Addition to Sioux Falls, according to the recorded plat thereof; the Northwest Quarter of the South West Quarter of Section Eighteen (18), and the South West Quarter of the North West Quarter of said Section Eighteen (18), except the railroad right of way, all in Township One Hundred and One (101 North, of Range Forty Nine (49); also a certain
202 tract or parcel of land bounded and described as follows, to-wit:—Commencing at a point twenty-four (24) rods north of the southeast corner of the North-West quarter of Section Thirty Two (32), in Township One Hundred and Two (102) North, of Range Forty-Nine (49); running thence north ten (10) rods; thence west eighty (80) rods; thence south ten (10) rods; thence east eighty (80) rods to the place of beginning all of which lands will be affected by the drainage herein proposed;

Your petitioner further represents that it is necessary for the drainage of agricultural lands in said Big Sioux Valley between the dam of the Cascade Milling Company in the City of Sioux Falls and the City of Dell Rapids that the proposed drainage be established.

Your petitioner further represents that the establishment of such drainage will be conducive to the public health, convenience and welfare of the inhabitants of the City of Sioux Falls and of the inhabitants of the Big Sioux Valley between Sioux Falls and Dell Rapids that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in said valley and will prevent great damage to the buildings and their contents; and will prevent great damage to the highways in said County, and also to the railroad tracks and rights of way of the Chicago, Mil-

waukee & St. Paul Railway Company and of the South Dakota Central Railway Company in said valley; and will prevent damage and destruction of many bridges and their approaches in said valley;

Your petitioner further represents that the general purpose of said proposed drainage is, among other things, to
203 prevent the annual or occasional flooding of lands in said valley caused by high water in said river, by providing a drain to carry off all the water of said river above its normal stage or above the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the center line of Section Five (5) in Township One Hundred and One (101) North of Range Forty Nine (49), and running thence southeasterly across said Section Five (5), Section Four (4) and the North Half of Section Nine (9), all in Township One Hundred and One (101) North of Range Forty Nine (49) and east of the buildings of the State Penitentiary to a terminal point on said river in the City of Sioux Falls near the center of Section Nine (9) in said Township, the length of which will be approximately one and three-fourths miles.

Your petitioner further represents that the territory likely to be affected thereby is that portion of the Townships of Dell Rapids, Sverdrup, Mapleton, Wayne and Sioux Falls and of the City of Sioux Falls in the immediate valley of the Big Sioux River subject to overflow from said river.

Dated July 1, 1907.

WILLIAM H. LYON

Petitioner.

State of South Dakota,
204 County of Minnehaha—ss.

Personally appeared William H. Lyon, who being first duly sworn, deposes and says; that he is the petitioner in the above entitled matter; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

WILLIAM H. LYON

Subscribed and sworn to before me, this 1st., day of July, 1907.

M. E. McDOUGAL,
(Notarial Seal) Notary Public.

Petition for Drainage, Filed this 1st day of July, 1907.

C. E. HILL, County Auditor.
By H. W. Ward, Deputy.

Plaintiff offered and there was received in evidence pages 562 and 563 and the first two lines of 564 of Commissioners' Record 5, it being a resolution of the Board of County Commissioners fixing the route and width of the proposed ditch and the time and place of hearing the petition of W. H. Lyon for the proposed drainage ditch thereafter established as Drainage Ditch No. 1.

This resolution is not printed at length herein because it contains matter not deemed of importance. It established the line of Drainage Ditch No. 1 as follows: Commencing 58 feet west and 135 feet north of the southeast corner of Sec-
205 tion 29, Township 102, Range 49, thence south parallel to the adjacent highway 2085 feet to station No. 114; also commencing 674 feet north and about 35 degrees west of Station No. 114; thence southeasterly 674 feet to said Station 114, thence south and parallel to said highway 7700 feet to Station No. 37, thence south 45 degrees, east 3700 feet to Station Zero (0), thence south 59 degrees, 36', east to the Big Sioux River.

It also contains the following provisions: "Be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the width of said drainage ditch be and it is hereby fixed at 40 feet at the bottom thereof, with a side slope of one foot to one."

Plaintiff offered and there was received in evidence the following part of Commissioners Record 5:—

Sioux Falls, S. D., Dec. 31, 1907.

Pursuant to adjournment, at 10 o'clock A. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the County Court House.

Present:

Dist. No. 5: Thomas McKinnon, Chairman.

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson.

Dist. No. 3: Alfred Acheson.

Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. J. H. Gates, attorney for the Board in the matter of Drainage Ditch No. 1, filed and read a written opinion in regard to the legal propositions presented.

Further remarks were made by Messrs. Porter, Keith and Bates and by Mr. Blackman.

On motion, the Board adjourned at 2 o'clock P. M. Tuesday, December, 31, 1907.

206 Sioux Falls, S. D., Dec. 31, 1907.

Pursuant to adjournment, at 2 o'clock P. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the county court house.

Present:

Dist. No. 5: Thomas McKinnon, Chairman.

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson,

Dist. No. 3: Alfred Acheson.

Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. Howard offered the following resolution:

Resolution Establishing Drainage Ditch No. 1:

The matter of the petition of William H. Lyon for the establishment of a drainage ditch filed in the County Auditor's office of Minnehaha County, South Dakota, on July 1, 1907, the said drainage ditch having been heretofore described and named "Drainage Ditch No. 1", coming on to be heard by the Board of County Commissioners at a regularly adjourned meeting, on Monday, December 30, 1907, pursuant to notice heretofore given, and written objections thereto having been filed by Martin Oien, et al, and by Joseph C. Carpenter, and by the Chicago, Milwaukee and St. Paul Railway Co. and the claims of said parties having been presented orally by their

counsel, and William H. Lyon, F. S. Blackman, O. Benson and others having appeared in behalf of said petition, and said hearing having been adjourned to this 31st, day of December, 1907, and this Board having fully heard and considered said petition and all matters in opposition to and in support of the same; Now Therefore

Be it Resolved by the Board of County Commissioners
207 of Minnehaha County, South Dakota, that said Drainage Ditch No. 1, is conducive to the public health, convenience and welfare, and is necessary and practicable for draining agricultural lands, and it is so found:

Be it further Resolved that said Drainage Ditch No. 1, be and is hereby established:

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land, or other property through which the same shall pass, and damages as compensation for the land taken for the route of such drainage.

Mr. Howard moved the adoption of said resolution, and that the vote be taken by districts. Mr. Harvey seconded the motion. Upon roll call,

Charles Harvey, Dist. No. 1 voted, Yes;

J. E. Johnson, Dist. No. 2 voted, No;

Alfred Acheson, Dist. No. 1 voted, No;

J. D. Howard, Dist. No. 4. voted, Yes;

Thomas McKinnon, Dist. 5 voted, Yes;

The Chairman declared the resolution adopted.

Plaintiff offered and there was received in evidence the following portions of Ditch Record A;

April 11, 1908.

Resolution Assessing Benefits.

Whereas, The Board of County Commissioners of Minnehaha County, South Dakota, has established Drainage Ditch No. 1, and has fixed the damages arising therefrom, and has been investigating and considering the proportion of bene-
208 fits that will accrue to the lands, tracts and lots within the drainage area of said Drainage Ditch; and

Whereas, in arriving at this determination of the proportion of benefits it has considered, not only the benefits which

will accrue directly by virtue of the construction of said Drainage Ditch, but also the indirect benefits by virtue of said drainage being an outlet for connecting drains that may hereafter be constructed, and particularly is this so in reference to the lands within the drainage area lying north of a line running east and west through the center of Section Twenty Nine (29) Mapleton Township; and

Whereas, the number of acres set opposite each tract hereinafter described represents the actual number of acres of land within said tract that are benefitted, and excluding therefrom lands taken by said Drainage Ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said Drainage Ditch, the land taken by the drainage is excluded; and

Whereas, in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat of the County Auditor's Subdivision of the particular quarter section in which the land is located on file in the Register of Deeds office; and

Whereas, in the consideration of benefits said Board has assumed that the North-East Quarter of the North-East Quarter of the South-West Quarter of Section Thirty-Three (33) in Township One Hundred and Two (102) of Range Forty-Nine (49) West of the Fifth P. M., owned by the
209 state of South Dakota, and containing ten acres is benefitted "one", and taking the same as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sverdrup, Mapleton, Sioux Falls and Wayne; the benefits to the County of Minnehaha; and the benefits to the several Railroad Companies hereinafter described, arising and accruing by the construction of Drainage Ditch No. 1, be, and they are hereby fixed and determined in the following proportions, viz:—

(Here follows descriptions of lands in Sections 31, 32, 33, 29, 28, 21, 20, 19, 17, 16, 9, 8, 5, 4, and 3, Township 102, Range 49, Sections 34, 33, 32, 29, 28 and 27 in Township 103, Range 49; and Sections 4, 5, 6, 7, 8, 9, 17, 18, 19, 30, and 31, in Township 101, Range 49; and Sections 13, 24, and 25 in Township 101, Range 50; and of lots and blocks in the following additions to Sioux Falls, to-wit: Berwick; Brookings, Brooks; Bunkers; Minnehaha Trust Company Subdivision of Block 3 of Carpenter's Addition; Carpenters; Central Park; Englewood; Harrison; Lake View; Lincoln Park; McClellan

Second; Meredith's First; Meredith's Second; Millard Park; North Boulevard; North Park; North Park Second; Sioux Falls Improvement Company; Summit; West Lawn; West Park, and of certain lots in the Town of Renner, with the names of the owners and the proportion of benefits assessed to each; the Northern States Power Company, the Sioux Falls Light & Power Company, The Great Northern Railway Company, and the Chicago, Rock Island & Pacific Railway
210 Company are not named or mentioned, and no property now or ever owned by any of them is described or referred to. A large amount of property situated in a southerly direction from the ditch and its outlet, commonly called "the spillway," and now attempted to be assessed under the proceedings [iniatated] by the filing of the petition of F. L. Blackman, and others, attached to and made a part of the answer herein, and which property is described in the "Drainage Ditch Notice" attached to and made a part of the bill of complaint herein is likewise not described in this exhibit. Following the description of lands, lots, and blocks above referred to and omitted here for the purpose of diminishing the record, are the descriptions of railroad and certain other properties, and the conclusion of the exhibit, which are as follows:

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Name of Owner.	Description	Acres.	Proportion of Benefits
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 28, 29, and 33, township 103, range 49, west 5th p. m.....	25.02	3.75
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4, 9, 16, 21, 28 and 33, township 102, range 49, west 5th p. m. Sioux Falls and Egan line....	72.50	15.41
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 5, 8, and 9, township 102, range 49 west 5th p. m. (Sioux Falls and Madison line)	17.30	2.60
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4 and 9, township 101, range 49, west 5th p. m.	17.05	5.12
South Dakota Central Railway Co.	Right of way as now laid out and located across sections 29 and 32, township 102, range 49 west 5th p. m.	11.06	3.32

South Dakota Central Railway Co.	Right of way as now laid out and located across sections 4, 5, and 9, township 101, range 49, west 5th p. m.....	17.72	5.32
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 18, Township 101, range 49, west of 5th p. m.	12.18	3.65
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 13, Township 101, range 50, West 5th p. m.	16.88	5.06
Sverdrup Township.	Seven miles and 84 rods of laid out and established highways within the drainage area.		2.9
Mapleton Township.	Twelve miles and 52 rods of laid out and established highways within the drainage area.		7.73
212			
Sioux Falls Township.	Two and onehalf miles of laid out and established highways within the drainage area.....		3.2

Name of Owner	Description	Acres	Proportion of Benefits
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.		.6
City of Sioux Falls	1⅛ miles of highways and dedicated streets within the drainage area		.9
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area		25.

Be It Further Resolved that Tuesday, the 5th day of May, 1908, at two o'clock P. M. at the office of the County Auditor of said County be and it is hereby fixed as the time and place for the equalization of such proportion of benefits, and that notice thereof be given, in accordance with the provisions of Sec. 6. of Chap. 134 of the Laws of 1907 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Weekly Argus-Leader, once in each week for two consecutive weekly issues, and one further publication in the Sioux Falls Daily Argus Leader, and by posting copies of such notice in at least three public places near the route of said Drainage Ditch, the said posting and the last of such

publications to be made at least 10 days prior to the time of said hearing.

Adopted April 11, 1908 THOS. McKINNON,
Chairman.

Attested:
C. E. Hill,
County Auditor.
(Seal)

213 Filed in the office of the Auditor of Minnehaha County, S. D. this 8th day of April, 1908.

C. E. HILL
County Auditor.

Plaintiff offered in evidence pages 53 to 61 inclusive of Ditch Record A, being the record of notice of hearing upon the equalization of benefits with reference to Ditch No. 1. In this notice of hearing the same persons are named and the same property is described as in the "resolution assessing benefits".

Plaintiff offered in evidence pages 260 to 268, inclusive, of Ditch Record A, the same being a record of the levying of the assessment for Drainage Ditch No. 1. In this assessment the same persons and the same property was assessed as is described in the "resolution assessing benefits." This record shows that the commissioners ascertained and determined the entire cost of Drainage Ditch No. 1 to be the sum of $46,600.10.

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214 Plaintiff offered in evidence pages 94 to 95 and a portion of page 96 of Ditch Record A, as follows:

April 10, 1908.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioners respectfully represent that they are all residents of the Township of Mapleton in said County, and that each of them is the owner of certain lands in said Township in the valley of the Big Sioux River as follows: The said Iver R. Peterson is the owner of the South Half of the South West Quarter of the North East Quarter of Section

Seventeen (17) and the South Half of the East Thirteen (13) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said Bernt Mekvold is the owner of the South-West Quarter of the North West Quarter of Section Seventeen (17) and the West Twenty-six and Two-Thirds (26 2/3) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said William O. Quincy is the owner of the West Half of the North West Quarter of Section Twenty (20); and that the said Iver I. Nelson is the owner of the East Half of the South West Quarter of Section Seventeen (17) and the North West Quarter of the South West Quarter of Section Seventeen (17), all in Mapleton Township, Minnehaha County, South Dakota, all of which lands will be affected by the drainage herein proposed;

Your petitioners further represent that it is necessary for the drainage of agricultural lands in said Big Sioux Valley from a point about four miles north of the south line of Sverdrup Township to a point about one and one-half miles north of the south line of Mapleton Township, that the proposed drainage be established;

Your petitioners further represent that the establishment of such drain will be conducive to the general health, convenience and welfare of the inhabitants of said territory, and that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in said valley, and will prevent great damage to the buildings and their contents, and will prevent great damage to the highways in said territory, and also to the railroad tracks and the rights of way of the Chicago, Milwaukee and St. Paul Railway Company in said territory, and will prevent damage and destruction of many bridges and their approaches in said territory;

Your petitioners further represent that the general purpose of said proposed drainage is, among other things, to prevent the annual or occasional flooding of land in said territory caused by high water in said river by providing a drain to carry off all of the water of said river above its normal stage from about the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the south line of Section Five (5) of Mapleton Township, and running thence southeasterly adjacent to the right of way of the Madison line of the Chicago, Milwaukee and St. Paul Railway Company to the west line of

the East Half of the North East Quarter of Section Eight (8) in Mapleton Township, running thence south about three miles to a point about forty (40) rods south of the north line of Section Twenty Nine (29) in Mapleton Township where the said line intersects Silver Creek, running thence southeasterly to the upper end of Drainage Ditch No. 1, as established by said Board;

Your petitioners further represent that, as a part of said plan of drainage, there should be constructed a dike along the south and southeasterly side of said Big Sioux River where the same flows through the North East Quarter of Section Thirty-two (32) in Sverdrup Township, such dike to be of the length of thirty (30) or forty (40) rods.

Your petitioners further represent that the territory likely to be affected thereby embraces Sections Sixteen (16), Seventeen (17), Eighteen (18), Twenty (20), Twenty-one (21), Twenty seven (27), Twenty Eight (28), Twenty Nine (29), Thirty-Two (32), Thirty Three (33) and Thirty Four (34) in Sverdrup Township, and Sections Three (3), Four (4) Five (5), Eight (8), Nine (9), Sixteen (16), Seventeen (17), Nineteen (19), Twenty (20), Twenty One (21), Twenty Eight (28), and Twenty Nine (29) in Mapleton Township.

Dated April 9, 1908

IVER R. PETERSON
IVER I. NELSON
BERNT MEKVOLD
W. O. QUINCY

Petitioners.

Filed in the office of the Auditor of Minnehaha County, S. D., this 10th day of April, 1908.

217 C. E. HILL

County Auditor

Plaintiff offered in evidence page 113 of Ditch Record A, as follows:

January 8, 1909.

Further Petition.

To the Honorable Board of County Commissioners, of Minnehaha County, South Dakota:

The undersigned land owners in the valley north of Sioux Falls respectfully request, pursuant to the trip of inspection

made by you on December 15, 1908, that in acting upon the petition of Iver R. Peterson and others for a drainage ditch in Mapleton Township you will cause the proposed drainage ditch to be extended further north and made a part of Ditch No. 1, also that as a part of said proposed drainage system, you will cause a ditch to be established on the west side of the Big Sioux River from a point above the Baltic dam southerly to a suitable place on the river in Section Eighteen (18) in Sverdrup Township, and that you will by a proper outlet on the east side of the river, provide for the taking care of the surplus water so dumped into the river at that point.

A. L. Berg
Ole J. Ustrud
G. T. Gunderson
O. G. Brende
John Aasen
P. M. Thompson
Ole O. Langness
H. G. Solem
T. A. Berven
Oluf Lyng
Mrs. Mary Lee
Mrs. Anne Larson by Agt.
K. Larson
J. H. Williamson
E. O. Fossum
John P. Risvold
Gunerius Thompson

Filed in the office of the Auditor of Minnehaha County,
218 S. D., this 8th day of January 1909.

C. E. HILL, County Auditor.

Plaintiff offered in evidence pages 121 to 123, inclusive, of Ditch Record A, as follows:

Resolution for Adjourned Hearing:

(Transcribed from Commissioners Record No. 6, Page 170-1-2-3)

On motion the following resolution was unanimously adopted:

Resolution:

Whereas, on April 10, 1908, Iver R. Peterson and others filed their petition with the County Auditor of Minnehaha County, South Dakota, for the establishment and construction of a certain drainage ditch in Mapleton Township in said County; and

Whereas, this Board did on June 12, 1908, adopt a resolution for the survey thereof; and

Whereas, Mr. S. Howe, County Surveyor, employed by this Board for making such survey, did on November 13, 1908, file his report thereof, together with maps and profiles, and

Whereas, this Board did on said last named date fix Friday, December 4, 1908, at the office of the County Auditor of said County as the time and place for the hearing of said petition, and did cause notice of said hearing to be given publication and posting, as required by law; and

219 Whereas, December 4, 1908, a petition was presented by A. L. Berg, and others for the extension of said ditch; and

Whereas, said matter has by successive adjournments been continued until April 9, 1909; and

Whereas, said engineer did on April 8, 1909, present his supplemental report of survey and plans and profiles; and

Whereas, this Board has inspected the route of said drainage ditch as described in said petition and as hereinafter described; and

Whereas, this Board deems it practicable, necessary and best that the route of said drainage ditch be varied from the route described in said petition and its northerly terminal points be materially changed; therefore

Be it Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the line of said drainage ditch be and it is hereby changed from the route described in said petition to run as follows: the same being substantially as petitioned for up to the point where the same crosses the Madison branch of the Chicago, Milwaukee and St. Paul Railway Company, viz:

First Section.

Commencing at a point ten hundred forty-five (1045) feet north and fifty-eight (58) feet west of the Southeast corner of Section twenty-nine (29) in Township One Hundred and Two (102) North, Range Forty-nine (49); running thence north five hundred forty seven (547) feet; thence north 23 west thirty three hundred eighteen (3318) feet to a point fifty eight (58) feet west of the quarter quarter line in the North East Quarter (NE¼) of Section Twenty Nine (29). in said Township; thence north parallel with, and fifty-eight (58) feet west of said quarter quarter line through Section

Twenty Nine (29), Twenty (20), Seventeen (17), and a
220 part of Section Eight (8) Twelve thousand nine hundred thirty five (12935) feet; thence north 50 East twenty seven hundred thirty two (2732) feet to a point thirty

three (33) feet west of the west line of the right of way of the Chicago, Milwaukee and St. Paul Railway Company in the North West Quarter of Section Nine (9) in said Township; thence northerly parallel with and thirty three (33) feet west of the said right of way line nineteen thousand three hundred, sixty eight [(19386)] feet to a connection with a high water channel of the Big Sioux River in the South East Quarter of Section Twenty (20) in Township One Hundred and Three (103) North, Range Forty Nine (49).

Second Section:

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103) North, Range Forty Nine (49); running thence north 33 west thirty one hundred and fifty five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line of Section Seven (7) and Six (6) in said Township, and in Section Thirty One (31) in Township One Hundred and Four (104) North, Range Forty Nine (49) to the center line running East and West through said Section Thirty One (31); thence northeasterly to the creek near the northeast corner of said Section Thirty One (31), the said line being the center line of said proposed drainage ditch; that the width of said drainage ditch be and it is hereby fixed at forty (40) feet at the bottom thereof with a side slope of one and one-half feet to one; and that the fall of said proposed drainage ditch be three (3) feet per mile from
221 north to south, and that the area required for right of way and dump space will be four (4) rods on each side of said line, except where it is adjacent to the right of way of the Chicago, Milwaukee and St. Paul Railway Company, and that the area required for right of way and dump space where said proposed line runs adjacent to the right of way of said Railway Company shall be two (2) rods on the easterly side of said line and six (6) rods on the westerly side of said line;

That in addition thereto the Big Sioux River be straightened in Section Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred Three (103) North, Range Forty Nine (49) in order to afford better means of communication between the lower end of Section Two (2) of said ditch and the upper end of Section One thereof;

Be It Further Resolved that this hearing be and it is hereby adjourned until Thursday May 6, 1909, at two o'clock P. M. at the office of the County Auditor of said County, and that no-

tice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by the Laws of 1909, the same to be signed by the Chairman of this Board and attested by the County Auditor by publishing the same once in each week for two consecutive weeks in the Sioux Falls Daily Argus-Leader, and by posting copies of said notice in at least three public places near the route of said proposed drainage ditch as varied and extended, such posting to be made at least two weeks prior to the time of said hearing.

Adopted April 9, 1909.

THE BOARD OF COUNTY COMMISSIONERS MINNEHAHA COUNTY, SOUTH DAKOTA.
By Thos. McKinnon, Chairman.

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222 Plaintiff offered and there were received in evidence pages 135 to 136 of Ditch Record A, as follows:

Resolution Establishing Drainage Ditch No. 2:

The matter of the petition of Iver R. Peterson and others for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on April 10, 1908, coming on to be heard by the Board of County Commissioners of said County at a regularly adjourned meeting on Thursday May 6, 1909, pursuant to notice heretofore given, and said Board having heard and considered said petition and all matters in support of the same and in opposition thereto; Now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said drainage ditch as extended and varied and as described and set forth in the resolution adopted by this Board on April 9, 1909, is conducive to the public health, convenience and welfare and is necessary and practicable for draining agricultural lands, and it is so found;

Be it Further Resolved that the said drainage ditch as described and set forth in the said resolution of April 9, 1909, be and it is hereby named and designated "Drainage Ditch No. 2";

Be it Further Resolved that the said Drainage Ditch No. 2 be and the same is hereby established;

Be it Further Resolved that in the construction of said drainage ditch the rights of flowage of Wm. G. Milne, the owner of the mill at or near Baltic, S. D., will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch, where the same joins with the creek near the northeast corner of Section Thirty One (31) in Dell Rapids Township that it will not diminish or interfere with such rights of flowage and that a head gate or other protection will be
223 established if necessary, to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

Be it Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same be made a special order for Friday May 7, 1909, at nine o'clock A. M.,

On motion, the Board adjourned to May 7, 1909 at 9 o'clock A. M.

Plaintiff offered and there were received in evidence pages 48 to 60 inclusive of Ditch Record B, as follows:

224 October 7, 1910.

The Board having had under consideration for several days the matter of the preliminary Assessment of Proportion of Benefits which was being prepared by J. H. Gates, Attorney with the assistance of Engineer Wagner and the same being completed, on motion the following resolution was adopted:

Resolution Fixing Proportion of Benefits
Drainage Ditch No. 2.

Whereas the Board of County Commissioners of Minnehaha County, South Dakota, has established the Drainage Ditch No. 2, and has fixed the damages arising therefrom and has been investigating and considering the proportion of benefits that will accrue to the lands, tracts and lots within the drainage area of said drainage ditch; and

Whereas in arriving at this determination of the proportion of benefits it has considered not only the benefits which will accrue directly by virtue of the construction of said drainage ditch, but also the indirect benefits by virtue of such drainage being an outlet for connecting drains that may hereafter be constructed; and

Whereas said Board is of the opinion that the drainage area of Drainage Ditch No. 1 is benefitted by the establishment and construction of Drainage Ditch No. 2, and that both of said drainage ditches are mutually interdependent, and should virtually be considered as one drainage system; and

Whereas in the determination of the proportion of benefits herein fixed and determined upon the several premises embraced within the drainage area of Drainage Ditch No. 1 the proportion of benefits as finally fixed and equalized in the matter of said Drainage Ditch No. 1 have been taken into consideration; and

225 Whereas the number of acres set opposite each tract hereinafter described represent the actual number of acres of land within said tract that are benefitted, and excluding therefrom land taken by said drainage ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said drainage ditch the area therefor taken by the drainage is excluded; and

Whereas in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat in the County Auditor's Subdivision of the particular quarter section in which the land is located, on file in the Register of Deeds' office of said County, and in the description of lands herein by reference to books and pages of deed records such references are to the deed records in the office of said Register of Deeds; and

Whereas, in the consideration of such proportion of benefits said board has assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section Twenty, in Township One Hundred Three North, Range Forty-nine, West Fifth P. M., owned by Martha R. Roberts, and containing ten acres, be benefitted "One", and taking said tract as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sioux Falls, Wayne, Mapleton, Sverdrup and Dell Rapids; the benefits to the County of Minnehaha; and the benefits to the several railroad companies hereinafter described, arising and accruing by the establishment and construction of Drainage Ditch No. 2, be, and they are hereby fixed and determined in the following proportions, viz:

226 (Here follows descriptions of lands in Sections 4, 5, 6, 7, 8, 9, 17, 18, 19, 30, and 31, in Township 101, Range 49; Sections 13, 24 and 25, in Township 101, Range 50; Sections 3, 4, 5, 8, 9, 16, 17, 19, 20, 21, 28 29, 31, 32, and 33, in Township 102, Range 49; Sections 5, 6, 7, 8, 9, 16, 17, 18, 20, 21, 27, 28, 29 32, 33, and 34, in Township 103, Range 49; Sections 29, 31, and 32, Township 104, Range 49; and of certain lots in the town of Renner; and of lots and blocks in the following additions to Sioux Falls, to-wit: Berwick; Brookings; Brooks; Bunkers; Central Park; Englewood; Harrison; Lakeview; Lincoln Park; McClellan's Second; Meredith's First; Meredith's Second; Millard Park; North Boulevard; North Park; North Park Second; Sioux Falls Improvement Co.; Summit; West Lawn; and West Park, with the names of the owners and the proportion of benefits assessed to each. The Northern States Power Company, the Sioux Falls Light & Power Company, the Great Northern Railway Company, and the Chicago, Rock Island & Pacific Railway Company are not named or mentioned, and no property now or ever owned by any of them is described or referred to. A large amount of property situated in a southerly direction from the ditch and its outlet, commonly called "the spillway," and now attempted to be assessed under the proceedings initiated by the filing of the petition of F. L. Blackman, and others, attached to and made a part of the answer herein, and which property is described in the "Drainage Ditch Notice" attached to and made a part of the bill of complaint herein is likewise not described in this exhibit. Following the description of lands, lots and blocks above referred to and omitted here for the purpose of diminishing the record, are the descriptions of railroad and certain other properties, and the conclusion of the exhibit, which are as follows:

227

Name	Description	Acres	Proportion of Benefits
City of Sioux Falls	One and one eighth miles of highways and dedicated streets within the drainage area.....		.090
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area		.320
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area		.060
Mapleton Township	Twelve miles and 52 rods of laid out and established highways within the drainage area		8.723

Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area		17.710
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area		1.936
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area		9.100
Chicago, St. Paul, Minneapolis & Omaha R. R. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50, West 5th P. M., within the drainage area (1.5 miles)	18	20.320
South Dakota Central Railway Co.	Right-of-way as laid out and located across Sections 4, 5 and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49 West; 5th p. m. within the drainage area (2 6 miles)	20.80	59.980
228			
Chicago, Milwaukee & St. Paul Railway Co.	Right-of-way as laid out and located across Sections 4 and 9, Township 101, Range 19, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29 and 33, Township 103, Range 49, and Section 32, Township 104, Range 49 West, 5th p. m. within the drainage area (the above being the Sioux Falls and Egan line); also across Sections 5, 8, and 9, Township 102, Range 49 West, 5th P. M., within the drainage area (being the Renner and Madison line) Total 14.5 miles	167.06	383.130

Be it Further Resolved that Thursday, the 3d day of November, 1910, at two o'clock P. M. at the office of the County Auditor of said County be, and it is hereby fixed as the time and place for the equalizing of said proportion of benefits, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909 of said State, such notice to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Daily Argus Leader once in each

week for two consecutive weeks, and by posting copies of said notice in at least three (3) public places near the route of said drainage ditch, said posting and the last publication of said notice to be made at least ten (10) days prior to the time of said hearing.

Adopted October 7th, 1910.

THOMAS McKINNON, Chairman.

Attest:

(Seal) Henry Howe, County Auditor.

229 Filed in the office of the Auditor of Minnehaha County, S. D., this 7th day of October 1910.

HENRY HOWE,
County Auditor.

Plaintiff offered and there were received in evidence pages 61 to 71, inclusive, of Ditch Record "B", being a record of the notice of hearing on the question of equalization of benefits of Ditch No. 2. This notice of hearing named the same persons and the same property specified in the resolution of the County Commissioners fixing the proportion of benefits of Ditch No. 2.

Plaintiff offered and there were received in evidence pages 153 to 165, inclusive, of Ditch Record "B", the same being a record of the assessment made by the County Commissioners for Drainage Ditch No. 2. This assessment named the same persons and the same property specified in the resolution fixing the proportion of benefits of Drainage Ditch No. 2 and the assessment was made as provided for in said resolution. This record shows that the Commissioners ascertained and determined the entire costs of Ditch No. 2 to be the sum of $81,106.19.

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230 It is stipulated that filed herein as a part of the answer of the defendants are correct copies of the following records of the Board of Commissioners of Minnehaha County, with reference to Drainage Ditch No. 1 and 2, to-wit: the petition of F. L. Blackman and others upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had, the order for filing said petition, the resolution for survey under said petition, the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman and others, the published notice of hear-

ing petition, (such notice not being attached to the answer, but having been filed after the filing of the answer with a stipulation that it might be considered as a part of the answer), and resolution establishing Drainage Ditch No. 1 and 2. Said exhibits were offered in evidence by plaintiff and received in evidence.

(The foregoing exhibits relating to Drainage Ditch No. 1 and 2 are printed herein as a portion of the answer of the defendants and are consequently not herewith reprinted.)

Plaintiff's exhibit "A" was identified by the witness F. E. Ward as one of the records of the office of the County Auditor of Minnehaha County, and was offered in evidence by plaintiff.

To the offer in evidence of plaintiff's exhibit "A" the defendants and intervening defendants objected as incompetent, irrelevant and immaterial to any issue in the case, the same not being pleaded in plaintiff's bill of complaint
231 and part of their case. For the further reason that the apportionment made and set forth in plaintiff's bill of complaint affirmatively appears to be an apportionment made during the year 1921. Plaintiff's exhibit "A" was received in evidence subject to objection and is as follows:

232 Filed
Dec 15 1921
At .....M
Jerry Carleton, Clerk

Plaintiffs A
Exhibit B. O. C.

Drainage Notice

To Whom It May Concern:

Notice is hereby given that Tuesday, April 25th, 1919, at Two o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, at the Court House in the City of Sioux Falls, in said County, have been fixed by the Board of County Commissioners of said County as the time and place for equalizing the proportion of benefits to the several lands, tracts, lots, roads, streets and railroad right-of-way embraced within the district of Drainage Ditch No. 1 and 2, and benefitted by the construction of said Drainage Ditch, and that the route of said Drainage Ditch No. 1 and 2 is as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast

corner of Section twenty-nine (29) Township One Hundred Two (102), Range Forty-nine (49), West of the 5th P. M., running thence south parallel to the adjacent highway two thousand and eighty-five (2085) feet to station one hundred and fourteen (114); also commencing at a point Six hundred and seventy-four (674) feet north, and about thirty-five (35) degrees west of said station number one hundred and fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south forty-five (45) degrees, east three thousand seven hundred (3700) feet to Station number zero (0), the same being on high water line, thence south fifty-nine (59) degrees and thirty-six (36) minutes, east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch Number 1 as now established and constructed.

233

Section Two.

Commencing at a point ten hundred and thirty-five (1035) feet north and fifty-eight (58) feet west of the southeast corner of Section twenty-nine (29), in Township One Hundred and Two (102), Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north five hundred and forty-seven (547) feet, thence north twenty-three (23) degrees, west Thirty-three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the Northeast Quarter of Section Twenty-nine (29), in said Township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17), and a part of Section Eight (8), Twelve thousand nine hundred and thirty-five (12,935) feet, thence north fifty (50) degrees east, twenty-seven hundred and thirty-two (2732) feet to a point thirty-three (33) feet west of the west lines of the right of way of the Chicago, Milwaukee & St. Paul Railway Co., in the Northwest Quarter of Section Nine (9), in said Township, thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with the high water channel of the Big Sioux River, in the southeast Quar-

ter of Section Twenty (20), in Township One Hundred and Three (103), north of Range Forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18), in Township One Hundred and Three (103), Range Forty-nine (49); running thence north thirty-three (33) degrees west
234 thirty one hundred fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8), in said Township; thence north parallel with and sixty (60) feet west of the quarter line in Section Seven (7) and Six (6) in said Township, and in Section Thirty-one (31), in Township One Hundred and Four (104), North of Range Forty-nine (49), to the center line running east and west through said Section Thirty-one (31); thence northeasterly to the creek near the northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River has been or is being straightened and the channel changes made as follows: Channel changes on Sections Five (5) and Seven (7), Township One Hundred and One (101), Range Forty-nine (49); Channel changes on Section Thirty-two (32), Twenty-nine (29), Twenty (20), Eighteen (18), Seventeen (17), Eight (8) and Five (5), Township One Hundred and Two (102), Range Forty-nine (49); and Channel changes on Sections Thirty-two (32), and Twenty-nine (29), Township One Hundred and three (103), Range Forty-nine (49); the same being in accordance with the lines of said Drainage Ditch as actually constructed and for which the said Board of County Commissioners has heretofore assessed condemnation damages; that maps and profiles of said Drainage Ditch are now on file in the office of the County Auditor of said County, to which reference is hereby made.

That there have been included within the drainage area of Drainage Ditch 1 and 2 the entire drainage area of Drainage Ditches No. 1 and No. 2 heretofore established and constructed, and additional territory contiguous thereto, which is benefitted by the establishment and construction of said Drainage Ditch No. 1 and 2, and that in the judgment
235 of said Board of County Commissioners all of said territory is interdependent, and is considered as one drainage system, that in the determination of the proportion of benefits fixed upon the lands and premises embraced within

said drainage area, the amounts of the assessments heretofore made in the matter of Drainage Ditch No. 1 and Drainage Ditch No. 2 have been taken into consideration.

That in the consideration and assessment of benefits, as hereinafter set forth, the said Board of County Commissioners have assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section 20, in Township 103, Range 49, West of the 5th P. M., owned by Martha R. Roberts, and containing ten acres, is benefitted "one"; also that Lot 1, in Block 22 of J. L. Phillips' Addition, owned by G. Keriakedes, containing a single lot, is benefitted "one", and that County Auditor's Tract 14 of the Southwest Quarter of Section 16, Township 101, Range 49, except the east 132 feet thereof, owned by Albert Larson and George E. Larson, is benefitted "one", and taking the said lands, tracts and lots as a unit, the proportion of benefits to each and all of the lands, tracts, lots, roads, streets and railroad right-of-way and the description of each tract of land affected by said drainage, and the names of the owners thereof, as they appear from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, at the date of said petition and at the date of filing said
236 petition, [and at the date of filing said petition], was fixed as follows:
237

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Fred Nelson	W½ of NE¼	4	101	49	57.00	6.897
State of South Dakota	E½ of NE¼ of NW¼	4	101	49	19.5	2.952
State of South Dakota	W½ of NE¼ of NW¼	4	101	49	19.5	2.952
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry. Co. and S. D. Central Ry.) that part of SW¼ Lying South and West of the center line of Drainage Ditch No. 1	4	101	49	12.33	1.863
State of South Dakota	(Except right-of-way of C. M. & St. P.. Ry) W½ of NW¼	4	101	49	70.6	10.684
Fred Nelson	SE¼ of NW¼	4	101	49	40.0	6.05
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry) that part of SW¼ lying North and East of the center line of Drainage Ditch No. 1	4	101	49	131.53	19.898

Mary C. Brace	NW¼ of SE¼	4	101	49	30.00	4.538
Mary Brix	Tract 1 of SE¼	4	101	49	3.50	0.532
Mary C. Brace	(Except Tracts 1 and 2) SW¼ of SE¼	4	101	49	8.00	1.21
Hans Ruvald	(Except right-of-way of S. D. Central Ry) NE¼ of NE¼	5	101	49	35.04	5.299
Olander Benson	NW¼ of NE¼	5	101	49	39.66	6.001
Sam Helm	SW¼ of NE¼	5	101	49	40.00	6.05
Hans Ruvald	(Except right-of-way of S. D. Ry) SE¼ of NE¼	5	101	49	34.45	5.215
A. C. Jensen	NE¼ of NW¼	5	101	49	36.22	5.481
D. A. Scott	NW¼ of NW¼	5	101	49	38.00	5.748
238						
F. H. Johnson	SW¼ of NW¼	5	101	49	38.00	5.750
Hans Ruvald	SE¼ of NW¼	5	101	49	38.00	5.750
Hans C. Ruvald	NE¼ of SW¼	5	101	49	39.50	5.977
Mary C. Brace	(Except Blocks 34, 35, 49, 50 and 61 of N. Boulevard Addition to Sioux Falls) S½ of SW¼	5	101	49	66.50	9.588

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
F. H. Johnson	NW¼ of SW¼	5	101	49	38.50	5.699
State of South Dakota	(Except right-of-way of S. D. Central Ry Co.) NE¼ of SE¼	5	101	49	34.45	5.215
Hans Ruvald	NW¼ of SE¼	5	101	49	40.00	6.05
Mary C. Brace	(Except Blocks 4, 6, 9, 13 and 29 of N. Boulevard Addition to Sioux Falls, and except right-of-way of S. D. Central Ry Co.) S½ of SE¼	5	101	49	62.66	9.474
D. A. Scott	N½ of SE¼	6	101	49	40.00	4.84
F. H. Johnson	S½ of NE¼	6	101	49	42.00	5.082
F. H. Johnson	N½ of SW¼	6	101	49	14.00	1.694
George E. Barkley	S½ of SW¼	6	101	49	40.00	4.84
F. H. Johnson	N½ of SE¼	6	101	49	73.00	8.803
George E. Berkley	SW¼ of SE¼	6	101	49	38.50	4.659

A. G. Erskine	Tract 1 of SE¼	6	101	49	23.00	2.783
Frances G. Carpenter	Tract 2 of SE¼	6	101	49	15.00	1.815
Frances G. Carpenter	NE¼ of NE¼	7	101	49	40.00	4.84
Frances G. Carpenter	SE¼ of NE¼	7	101	49	40.00	4.84
H. O. Gates & E. J. Sharon	W½ of NE¼	7	101	49	79.50	9.295
H. O. Gates & E. J. Sharon	E½ of NE¼	7	101	49	50.00	6.05
239						
F. H. Johnson	SW¼ of NW¼	7	101	49	5.00	0.805
E. J. Sharon & F. L. Blackman	The unplatted part of W½ of SE¼ and of E½ of SW¼ of (Except that tract lying North of Block 37 of Meredith's Second Addition to Sioux Falls, and South of center line of Mullberry St., extended West and East of center line of Harvard St., extended and West of center line of Hooker St. extended; also except that portion of Tract 1 lying between Monroe St., extended West and the center line of Manchester Street extended West	7	101	49	37.00	4.477

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
B. A. Burtch & Henry Brookhouse, Jr.	That part of Tract 1 of SW¼ lying N. of Block 37 Meredith's Second Addition to Sioux Falls, and S. of center line of Mullberry St. extended West and East of center line of Harvard St., extended and West of center line of Hooker St. extended.	7	101	49	1.50	1.815
Henry Brookhouse, Jr.	That part of Tract 1 of SW¼ lying between Monroe St. extended and West of center line of Manchester Street extended West,	7	101	49	1.50	0.182
Richard J. Ford	NW¼ of SW¼	7	101	49	18.00	2.178
J. A. Redfield	N½ of SW¼ of SW¼	7	101	49	15.00	1.815
J. A. Redfield	SE¼ of SW¼ of SW½	7	101	49	7.5	0.908

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Frances G. Carpenter	N½ of NE¼	8	101	49	80.0	9.68
Frances G. Carpenter	N½ of NW¼	8	101	49	80.0	9.68
C. E. McKinney	N½ of SW¼	8	101	49	80.0	9.68
E. B. Northrup	SW¼ of SW¼	8	101	49	40.0	4.84
Elmer S. Gilbert	SE¼ of NE¼ of SE¼	8	101	49	5.0	1.10
Frances G. Carpenter	(Except Block 40 of Central Park Add. to Sioux Falls) SW¼ of NW¼	8	101	49	37.50	4.537
Frances G. Carpenter	(Except Blocks 5, 8, 12, and 21 of Central Park Add. to Sioux Falls) SW¼ of NE¼	8	101	49	30.00	3.63
Frances G. Carpenter	NW¼ of NW¼ of SE¼ of NE¼	8	101	49	2.50	0.302
State of South Dakota	That part lying East of the right-of-way of the C. M. & St. P. Ry Co. of S½ of NW¼	9	101	49	14.5	1.755
Frances G. Carpenter	(Except Blocks 33, 48 and 49 of Central Park Add. to Sioux Falls) SE¼ of NW¼	8	101	49	32.50	3.933
Catherine W. Peck & Porter P. Peck	(Except Block 1 and Lots 10, 11 and 12 of Block 34 of Millard Park Add. to Sioux Falls) Tract 1 of NW¼	17	101	49	83.92	10.152

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Catherine W. Peck & Porter P. Peck	Tract 2 of NW¼	17	101	49	12.6	1.524
Catherine W. Peck & Porter P. Peck	Tract 4 of NW¼	17	101	49	0.3	0.036
Maria Winker	Tract 1 of SW¼	17	101	49	12.0	1.452
Francis D. Hoskins	Tract 2 of SW¼	17	101	49	1.85	0.205
Frances G. Carpenter	Tract 3 of SW¼	17	101	49	1.1	0.133

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Security & Guaranty Co.	(Except lots 1, 2, 3, 4, 5, and 6 of Block 3, Lincoln Park Add. to Sioux Falls) NE¼ of NE¼	18	101	49	37.25	4.513
Porter P. Peck	SE¼ of NE¼	18	101	49	35.00	4.235
August Gustafson	SW¼ of NE¼	18	101	49	40.00	4.84
August Gustafson	SE¼ of NW¼	18	101	49	40.00	4.84

W. H. Lyon	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SW¼	18	101	49	33.96	4.114
W. H. Lyon	SW¼ of NW¼	18	101	49	37.00	4.477
S. A. Gehrig	(Except right of way of C. M. & St. P. Ry. Co) NE¼ of SW¼	18	101	49	38.48	4.858
Marcus Russell	W½ of NW¼ of SE¼	18	101	49	30.00	2.42
Marcus Russell	SW¼ of NE¼ of NW¼ of SE¼	18	101	49	2.5	0.301
Marcus Russell	N½ of NE¼ of NW¼ of SE¼	18	101	49	5.0	0.805
Soo Valley Granite Co.	That part of NW¼ of NW¼, lying East of the Big Sioux River (Except Block 89 of Sioux Falls Imp. Co Add to Sioux Falls					0.805
S. Widmark	Tract 1 of NW¼	18	101	49	2.0	0.242
Soo Valley Granite Co.	That part of NW¼ of NW¼ lying West of Big Sioux River (Except Tract 1 and lots 1, 2, 3, 4, 12, 13, 14, 15, 16, 17, & 18 of Block 91 of Sioux Falls Imp. Co. Add. to Sioux Falls	18	101	49	14.00	1.694

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
George J. Morris	(Except right-of-way of C. St. P. M. & O. Ry. Co) East 10 acres of S½ of SW¼	18	101	49	9.37	1.137
German State Bank	(Except right-of-way of C. St. P. M. & O. Ry Co) W. 70 acres of S½ of SW¼	18	101	49	64.35	7.792
O. C. Bratrud	E½ of NE¼	19	101	49	9.5	1.149
Laura A. Darling	S½ of NE¼	19	101	49	2.0	0.242
Den Donahoe & W. M. Donahoe	(Except Block 13 of West Lawn Add. to Sioux Falls) E½ of NW¼	19	101	49	77.5	8.525
E. V. Rowley	W½ of NE¼ of NW¼ of NW¼	19	101	49	5.0	0.550
Ludwig Seubert	SE¼ of NE¼ of NW¼ of NW¼	19	101	49	2.5	0.275
Jean Obert	NE¼ of NE¼ of NW¼ of NW¼	19	101	49	2.5	0.275
Dan A. Donahoe	NW¼ of NW¼ of NW¼	19	101	49	9.0	0.990

Dan A. Donahoe	S½ of NW¼ of NW¼	19	101	49	19.0	2.090
Daniel A. Donahoe	SW¼ of NW¼	19	101	49	38.00	4.180
Amelia Bauch	(Except the N. 50 rods) Tract 1 of SW¼	19	101	49	14.5	1.595
W. H. Fullerton, Thomas Fullerton, Geo. J. Fullerton & Leopold Guertin	Tracts 2 & 3 of SW¼	19	101	49	7.45	0.825
Thomas F. Loughran & Louis Bauch	Tract 4 of SW¼	19	101	49	8.0	0.880
Mary R. Guertin	North 4 acres of Tract 5 of SW¼	19	101	49	4.0	0.440
J. H. Fernyhough	S 4 acres of Tract 5 of SW¼	19	101	49	4.0	0.440

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Daniel A. Donahoe Den Donahoe & Wm. Donahoe	Tract 8 of SW¼	19	101	49	0.75	0.082
Daniel A. Donahoe Den Donahoe and Wm. Donahoe	Tract 10 of SW¼	19	101	49	8.0	0.880
Stella I. Simpson	N½ of NW¼	30	101	49	18.0	1.980
Stella I. Simpson	SW¼ of NW¼	30	101	49	32.0	3.520
Harry A. Chetham	NW¼ of SW¼	30	101	49	20.0	2.200
J. T. Norris	SW¼ of SW¼	30	101	49	33.0	3.630

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Lottie Frank and Ethel F. Neister	(Except the right-of-way of C. St. P. & M. O. Ry. Co. and except the West 13 rods and 4 ft) E½ of NE¼	13	101	50	42.0	5.082
Lottie Frank and Ethel F. Neister	W½ of NE¼	13	101	50	30.0	3.630
Lottie Frank and Ethel F. Neister	W. 13 rods and 4 ft. of E½ of NE¼	13	101	50	7.5	0.908
Hayward Investment Co.	(Except right-of-way of C. St. P. M. & O. Ry Co) E½ of SW¼	13	101	50	30.9	3.729
W. H. Lyon	(Except right-of-way of C. St. P. M. & O. Ry Co) NE¼ of SE¼	13	101	50	32.53	3.933
Lottie Frank and Ethel F. Neister	(Except right-of-way of C. St. P. M. & O. Ry Co) NW¼ of SE¼	13	101	50	36.97	4.477
Louis Lissinger	S½ of SE¼	13	101	50	73.0	8.833

Charley Gibson	A tract beginning at the N/E. Corner of running thence W. 320 ft. thence S. 120 ft. thence S. 70 degrees E. 320 ft. thence N. 20 degrees E. 52 ft. thence North 180 ft. to beginning	24	101	50	1.78	0.217
244						
Louis P. Caldwell	(Except the tract last above described) NE¼ of NE¼	24	101	50	33.7	4.078
William Gage	NW¼ of NE¼	24	101	50	8.0	2.198
P. M. Smith	W½ of NW¼	3	102	49	20.7	1.773
John Sittig	E½ of NE¼	4	102	49	77.14	9.329
Ole E. Eggen	W½ of NE¼	4	102	49	78.49	9.492
Gurine Peterson	E½ of NW¼	4	102	49	78.04	11.527
Ole T. Ampaas	(Except right-of-way of C. H. & St. P. Ry Co.) W½ of NW¼	4	102	49	69.66	9.672
Ole T. Nessen	NE¼ of SW¼	4	102	49	40.00	5.95
Andrew P. Brende	SE¼ of SW¼	4	102	49	40.00	5.835

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Martin H. Oyen and Cleopatra H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) W½ of SW¼	4	102	49	72.00	9.272
Ole T. Nessen	SE¼	4	102	49	118.00	14.278
Ole Thompson Aspaas	E½ of NE¼	5	102	49	72.37	11.052
O. O. Gilseth	NW¼ of NE¼	5	102	49	37.4	4.934
O. O. Gilseth	W¾ of SW¼ of NE¼	5	102	49	29.0	3.828
O. O. Gilseth	NE¼ of NE¼ of SW¼ of NE¼	5	102	49	1.5	0.198
John Brekke	E½ of SE¼ of SW¼ of NE¼	5	102	49	5.0	0.66
John Brekke	SE¼ of SE¼ of SW¼ of NE¼	5	102	49	1.5	0.199
O. O. Gilseth	(Except right-of-way of C. M. & St. P. Ry Co.) NW¼	5	102	49	40.00	4.80
P. J. Merakergaard	(Except right-of-way of C. M. & St. P. Ry. Co) SW¼	5	102	49	73.4	8.048
245						
Martin H. Oyen and Cleopatra H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) SE¼	5	102	49	140.48	20.915
Erick O. Evjebak and Olaf Gilseth	Tract 1 of SE¼	5	102	49	9.32	2.186

Martin H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) E½ of NE¼	8	102	49	72.3	11.653
Martin H. Oyen	That part North and East of right-of-way of C. M. & St. P. Ry Co. of W½ of NE¼	8	102	49	2.0	0.264
Ole Gunderson	That part South and West of right-of-way of C. M. & St. P. Ry Co., of W½ of NE¼ (except the north 50 rods of that part West of river	8	102	49	65.4	9.537
J. L. Ingalls	The North 50 rods of that part West of River of W½ of NE¼	8	102	49	3.0	0.64
Ole Gunderson	(Except the South 50 rods of) NE¼ of NW¼	8	102	49	22.00	2.904

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Ole Gunderson	The South 30 rods of NE¼ of NW¼	8	102	49	22.00	2.904
Ole Gunderson	S½ of NW¼	8	102	49	38.00	5.475
Ole Gunderson	NE¼ of SW¼	8	102	49	40.00	5.85
Iver Nelson	(Except 2½ acres in square form in SE Corner) NW¼ of SW¼	8	102	49	17.5	2.310
M. O. Benrud	2½ acres in square form in SE corner of NW¼ of SW¼	8	102	49	2.5	0.33
Jonas Olsen	SW¼ of SW¼	8	102	49	30.00	3.96
Ole Gunderson	SE¼ of SW¼	8	102	49	39.00	5.735
246						
Nellie A. Walkins	(Except 1 acre in square form in NW corner) NE¼ of SE¼	8	102	49	38.16	5.575
School District No. 2	1 acre in square form in NW Corner) of NE¼ of SE¼	8	102	49	0.84	0.136
Ole Gunderson	W½ of SE¼	8	102	49	76.0	12.705
C. H. Renner	SE¼ of SE¼	8	102	49	38.0	8.156
Andrew P. Brende	N½ of NE¼	9	102	49	50.00	6.05
Alfred Christianson	S½ of NE¼	9	102	49	38.00	4.598
Ole T. Nessan	NE¼ of NW¼	9	102	49	32.00	4.752

Martin H. Oyen	That part West of the Southern Minn. R. R. right-of-way of W½ of NW¼ (except right-of-way of Madison Line of C. M. & St. P. Ry. Co.	9	102	49	41.4	5.565
Alfred Christianson	That part East of the Southern Minn. R. R. Right-of-way of W½ of NW¼	9	102	49	31.0	4.604
Andrew P. Brende	SE¼ of NW¼	9	102	49	40.00	5.313
Jonas Olsen	(Except the plat of Olsen's Add. to Renner) E½ of SW¼	9	102	49	71.85	9.24
C. H. Renner	(Except rights-of-way of C. M. & St. P. Ry Co. and except the town plat of Renner) W½ of SW¼	9	102	49	69.7	9.71
Christian Christianson	N½ of SE¼	9	102	49	20.00	2.42

247

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Jonas Olsen	S½ of SE¼	9	102	49	18.00	2.078
Jonas Olsen	NW¼ of NE¼	16	102	49	2.00	0.242
Barney Finnegan	SW¼ of NE¼	16	102	49	23.00	2.783
John Bliss	E½ of NW¼	16	102	49	75.00	9.075
Leonard Renner	(Except right-of-way of C. M. & St. P. Ry Co) W½ of NW¼	16	102	49	73.00	9.92
Michael P. Brende	NE¼ of SW¼	16	102	49	40.00	4.84
Mary P. Brende	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SW¼	16	102	49	36.9	5.02
Ole O. Velden	(Except right-of-way of C. M. & St. P. Ry. Co) SW¼ of SW¼	16	102	49	36.95	4.948
Ole O. Velden and Thomine O. Velden	SE¼ of SW¼	16	102	49	33.0	3.993
Mary P. Brende	NW¼ of SE¼	16	102	49	19.0	2.299
S. P. Brende	SW¼ of SE¼	16	102	49	25.0	3.025
F. I. Renner	E½ of NE¼	17	102	49	77.0	11.944
Gertie R. Peterson	NW¼ of NE¼	17	102	49	38.0	5.841
Gertie R. Peterson	N½ of SW¼ of NE¼	17	102	49	19.5	3.001
Iver R. Peterson	S½ of SW¼ of NE¼	17	102	49	19.5	3.001

Gertie R. Peterson	NE¼ of NW¼	17	102	49	39.0	5.733
Ingeberg Peterson	NW¼ of NW¼	17	102	49	18.0	2.376
Bernt Mekvold	SW¼ of SW¼	17	102	49	33.0	4.356
Bernt Mekvold	W 26 a/3 acres of SE¼ of NW¼	17	102	49	26.67	3.726
248						
Gertie R. Peterson	N½ of East 13 Acres of SE¼ of NW¼	17	102	49	6.5	0.105
Iver R. Peterson	S½ of East 13 acres of SE¼ of NW¼	17	102	49	6.5	0.105
C. C. Fleischer	E½ of SW¼	17	102	49	80.00	11.673
C. C. Fleischer	NW¼ of SW¼	17	102	49	37.0	4.884
T. P. Horton	E½ of SW¼ of SW¼	17	102	49	18.0	3.376
Nels I. Nelson	W½ of SW¼ of SW¼	17	102	49	20.0	2.84
Jonas Olsen	E½ of SE¼	17	102	49	78.00	12.092

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. J. Orstad	W½ of SE¼	17	102	49	78.00	12.732
W. O. Quincy	E½ of NE¼	19	102	49	3.00	0.396
Henry J. Schimmel	NE¼ of NE¼	20	102	49	39.00	6.318
Albert N. Allis	W½ of NE¼	20	102	49	78.00	12.049
O. S. Pendar	SE¼ of NE¼	20	102	49	39.00	6.318
Albert N. Allis	E½ of NW¼	20	102	49	76.00	11.207
W. O. Quincy	W½ of NW¼	20	102	49	74.00	9.768
R. J. Huston	N½ of SW¼	20	102	49	73.00	10.238
R. J. Huston	NW¼ of SE¼	20	102	49	39.00	6.025
Chas. E. Kaufman	S½ of SW¼	20	102	49	70.00	9.84
O. S. Pendar	E½ of SE¼	20	102	49	78.00	12.684
O. S. Pendar	SW¼ of SE¼	20	102	49	38.00	6.103
Ole O. Volden and Thomine O. Volden	NW¼ of NE¼	21	102	49	12.00	1.452
E. Larson	(Except right-of-way of C. M. & St. P. Ry. Co.) NW¼	21	102	49	151.85	19.473
Michael P. Brende	E½ of SW¼	21	102	49	39.5	4.785
Paul H. Brende and Martha O. Brende	(Except right-of-way of C. M. & St. P. Ry. Co.) NW¼ of SW¼	21	102	49	36.95	3.025

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
249						
O. S. Pendar	(Except right-of-way of C. M. & St. P. Ry. Co) SW¼ of SW¼	21	102	49	35.95	4.891
J. A. Erickson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼	28	102	49	142.25	18.890
Alfred Christensen	(Except right-of-way of C. M. & St. P. Ry Co.) SW¼	28	102	49	118.20	19.521
Chas. E. Kaufmann	NE¼	29	102	49	154.5	24.43
Chas. E. Kaufmann	NE¼ of NW¼	29	102	49	39.0	5.748
Carrie Erickson and John A. Erickson	W½ of NW¼	29	102	49	57.0	7.524
M. P. Brende and S. P. Brende	(Except tract 1) SE¼ of NW¼	29	102	49	2.5	0.320
M. P. Brende and S. P. Brende	Tract 1 of SW¼	29	102	49	36.0	5.052
Erick O. Eggen	(Except Tracts 1 and 2) NE¼ of SW¼	29	102	49	10.2	1.658
M. P. Brende and S. P. Brende	Tract 1 of SW¼	29	102	49	7.8	1.270
Ole O. Eggen	Tract 2 of SW¼	29	102	49	21.5	3.486
Carrie Erickson and John A. Erickson	(Except right-of-way of S. D. Central Ry Co) W½ of SW¼	29	102	49	38.62	6.259
Ellen Berg and Mary Schodjt	(Except right-of-way of S. D. Central Ry Co.) SE¼ of SW¼	29	102	49	36.49	5.911
Chas. E. Kaufman	NE¼ of SE¼	29	102	49	39.00	7.309
Mary Schodjt and Ole P. Schodjt	(Except ½ acre next below described) NW¼ of SE¼	29	102	49	36.5	6.681
School District No. 17	A tract in the Southeast corner (8 rods North and South by 10 rods East and West) NW¼ of SE¼	29	102	49	0.38	0.062
250						
Mary Schodjt and Ole P. Schodjt	SW¼ of SE¼	29	102	49	35.25	6.24
State of South Dakota	SE¼ of SE¼	29	102	49	35.5	6.786
G. E. Eggen, Guru E. Eggen, Ole E. Moen, Gurine E. Moen and Edward E. Moen	E½ of NE¼	31	102	49	5.0	0.584
K. O. Jellum	E½ of SE¼	31	102	49	43.0	5.106

State of South Dakota	E½ of NE¼	32	102	49	72.9	12.025
Mary Schojdt and Ole P. Schojdt	(Except right-of-way of S. D. Central Ry Co) NW¼ of NE¼	32	102	49	35.88	5.913
Joe H. Whitman	(Except Right-of-way of S. D. Central Ry Co.) SW¼ of NE¼	32	102	49	37.78	6.230
G. E. Eggen, Guru E. Eggen, Ole E. Moen Gurine E. Moen, and Edward E. Moen	(Except right-of-way of S. D. Central Ry Co) N½ of NW¼	32	102	49	66.85	10.929
G. E. Eggen, Guru E. Eggen, Ole E. Moen, Gurine E. Moen, and Edward E. Moen	SW¼ of NW¼	32	102	49	40.0	6.6

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
J. M. Whitman	That part West of River of N½ of SE¼ of NW¼	32	102	49	6.0	0.831
State of South Dakota	That part East of River of N¼ of SE¼ of NW¼	32	102	49	13.0	2.151
Ezra M. Shotwell	North 3 acres of S½ of SE¼ of NW¼	32	102	49	3.0	0.488
W. H. Lyon	South 5 acres of North 8 Acres of S½ of SE¼ of NW¼	32	102	49	5.0	0.488
Thomas Paulson	South 2 acres of N½ of S½ of SE¼ of NW¼	32	102	49	2.0	0.330
N. E. W. Brakke	S½ of S½ of SE¼ of NW¼	32	102	49	10.0	1.650
251						
K. O. Jellum	SW¼	32	102	49	152.0	25.08
State of South Dakota	NE¼ of SE¼	32	102	49	37.50	6.190
J. E. Colton	(Except right-of-way of S. D. Central Ry Co) NW¼ of SE¼	32	102	49	37.98	6.270
Thomas S. Nolan	(Except right-of-way of S. D. Central Ry Co.) SW¼ of SE¼	32	102	49	38.01	6.270
State of South Dakota	(Except right-of-way of S. D. Central Ry. Co.) SE¼ of SE¼	32	102	49	36.69	6.096
Francis A. Miller	(Except right-of-way of C. M. & St. P. Ry Co.) N½	33	102	49	110.2	14.531
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry. Co) N½ of SW¼	33	102	49	76.0	10.285

O. Benson	(Except right-of-way of C. M. & St. P. Ry Co) S½ of SW¼	33	102	49	72.0	10.140
O. Benson	W½ of SE¼	33	102	49	60.0	7.26
Ole O. Langness	(Except right-of-way of C. M. & St. P. Ry. Co.) NE¼ of NW¼	5	103	49	10.29	1.131
Baltic Creamery Co.	A tract 10½ rods West and East by 15 rods North and South in NE corner of NW¼ of NW¼	5	103	49	0.85	0.93
Olaf N. Lyng	(Except the tract last above described) NW¼ of NW¼	5	103	49	33.93	3.732

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
J. O. Langness	That part South of River of SW¼ of SW¼	5	103	49	8.0	0.88
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co) SE¼ of NW¼	5	103	49	3.0	0.330
252						
Sena C. Langness	NE¼ of SW¼	5	103	49	36.75	4.315
John Langness	Tract 1 of SW¼	5	103	40	11.00	1.33
A. J. Floren	Tract 2 of SW¼	5	103	49	6.00	0.726
Gunerius Thompson	Tract 3 of SW¼	5	103	49	3.57	0.392
Gunerius Thompson	Tract 4 of SW¼	5	103	49	1.0	0.11
Gunerius Thompson	Tract 5 of SW¼	5	103	49	34.43	4.165
Gunerius Thompson	(As shown in Book 5 of Plate Page 51) Lot 1 of Tract 6 of SW¼	5	103	49	28.41	3.125
Gunerius Thompson	(Except the tract last above described) Tract 6 of SW¼	5	103	49	2.84	0.312
Gunerius Thompson	Tract 7 of SW¼	5	103	49	27.0	2.97
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SE¼	5	103	49	1.50	0.182
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co.) North 3 acres of SW¼ of SE¼	5	103	49	1.0	0.121
J. O. Langness	(Except the North 3 acres and except the right-of-way of C. M. & St. P. Ry Co) SW¼ of SE¼	5	103	49	17.33	8.097

Mari Lee, Libbie Lang Carrie Lee, Etta M. Lee, Tilda Lee, Mabel O. Lee, and Thomas E. Lee	NE¼ of NE¼ and S½ of NE¼ and N½ of SE¼	6	103	49	38.81 69.83 75.82	4.827 9.106 9.876
John Williamson	NW¼ of NE¼	6	103	49	38.60	5.320
Even O. Fossum	NE¼ of NW¼	6	103	49	35.11	5.793
Knud Larson	W¼ of NW¼	6	103	49	43.00	6.958
Lina Hanson	N½ of N½ of SE¼ of NW¼	6	103	49	9.05	1.484
K. P. Sorklime	(As described in Book 53 of Deeds, page 434) Lot 1 of SE¼ of NW¼	6	103	49	17.84	2.911

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Gunerius Thompson	That part South of Lot 1 as last above described of SE¼ of NW¼	6	103	49	9.50	1.568
Gunerius Thompson	N½ of NE¼ of SW¼	6	103	49	18.08	2.985
Gunerius Thompson	N½ of NE¼ of SW¼	6	103	49	18.09	2.985
A. L. Berg	S½ of SW¼	6	103	49	59.75	9.302
Gunerius Thompson	SE¼ of SW¼	6	103	49	35.18	5.805
Gunerius Thompson	S½ of SE¼	6	103	49	77.82	10.164
Gunerius Thompson	N½ of NE¼	7	103	49	77.0	10.074
Julia Johnson	S½ of NE¼	7	103	49	78.32	10.247
Ole J. Ustrud and H. O. Ustrud	NE¼ of NW¼	7	103	49	38.18	5.705
Knut O. Larson	W½ of NW¼	7	103	49	59.75	9.302
Ole O. Ustrud and C. C. Sando	SE¼ of NW¼	7	103	49	36.18	5.970
Magnild Floren	NE¼ of SW¼	7	103	49	86.18	5.970
Ole O. Floren	W½ of SW¼	7	103	49	34.40	5.594
Ole O. Floren	SE¼ of SW¼	7	103	49	35.18	5.855
Julia Johnson	N½ of SE¼	7	103	49	78.32	10.247
John Thompson	SW¼ of SE¼	7	103	49	38.82	5.338
John P. Risvold	Tract 1 of SE¼	7	103	49	3.21	0.397
Anders S. Aas	Tract 2 of SE¼	7	103	49	15.50	2.035
Ingeberg Risvold	Tract 3 of SE¼	7	103	49	12.00	1.320
Peder P. Risvold	Tract 4 of SE¼	7	103	49	4.87	0.536
Sivert E. Kringen	(Except right-of-way of C. M. & St. P. Ry Co) N½ of NE¼	8	103	49	38.67	4.679

John P. Risvold	(Except right-of-way of C. M. & St. P. Ry Co.) SW¼ of NE¼	8	103	49	36.00	4.356
John P. Risvold	North 25 acres of SE¼ of NE¼	8	103	49	21.00	2.541
Peder P. Risvold	South 15 acres of SE¼ of NE¼	8	103	49	15.00	1.815

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. M. Christianson, Halvor Gunderson and Maria Langness	NE¼ of NW¼	8	103	49	35.50	3.905
Gunerius Thompson	As shown in Book 5 of Plats, page 51, Tract 1 of NW¼ of NW¼	8	103	49	6.70	0.737
Gunerius Thompson	(Except Tract 1 of last above described) NW¼ of NW¼	8	103	49	29.16	3.208
Annie M. Kringen	(As described in Book 26 of Deeds, page 507) SW 4½ acres of SW¼ of NW¼	8	103	49	4.5	0.495
John O. Langness	(Except the Tract last above described) SW¼ of NW¼	8	103	49	33.50	3.685
Jens Erickson	SE½ of NW¼	8	103	49	39.00	4.290
Jens Erickson	NE¼ of SW¼	8	103	49	39.00	4.290
Sara Vollan	NW¼ of SW¼	8	103	49	37.50	4.125
Anders P. Risvold	North 30 acres of SW¼ of SW¼	8	103	49	29.50	3.245
Peder P. Risvold	South 10 acres of SW¼ of SW¼	8	103	49	9.00	0.99
Anders P. Risvold	N½ of SE¼ of SW¼	8	103	49	19.50	2.145
Peder P. Risvold	S½ of SE¼ of SW¼	8	103	49	18.80	2.035
Peder P. Risvold	NE¼ of SE¼	8	103	49	40.00	3.960
Peder P. Risvold	The North 11 acres of that part East of right-of-way of C. M. & St. P. Ry. Co. of NW¼ of SE¼	8	103	49	11.00	1.210
Anders P. Risvold	(Except right-of-way of C. M. & St. P. Ry. Co. and except the N. 11 acres East of such right-of-way) NW¼ of SE¼	8	103	49	25.00	2.750

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Anders P. Risvold	(Except right-of-way of C. M. St. P. Ry Co) SW¼ of SE¼	8	103	49	35.00	3.850
Lars Paulson, G. P. Wilson and G. T. Nyhus	SE¼ of SE¼	8	103	49	39.00	3.861
Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Sara Vollan	SW¼ of NW¼	9	103	49	8.00	0.968
Sara Vollan	N½ of SW¼	9	103	49	47.90	4.421
Torger H. Nyhus	SW¼ of SW¼	9	103	49	39.00	3.861
Peder P. Risvold	SE¼ of SW¼	9	103	49	38.00	4.235
Ole Johnson	NW¼ of NE¼	16	103	49	37.10	4.040
Torger H. Nyhus	SW¼ of NE¼	16	103	49	38.00	3.762
Peder Risvold	NE¼ of NW¼	16	103	49	39.00	4.247
John Johnson	NW¼ of NW¼	16	103	49	39.00	3.470
Paul A. Risvold	S½ of NW¼	16	103	49	78.00	8.151
Gilbert G. Brende	N½ of SW¼	16	103	49	78.00	8.151
Gilbert G. Brende	SW¼ of SW¼	16	103	49	40.00	4.40
Gilbert G. Brende	SE¼ of SW¼	16	103	49	40.00	3.96
Ole G. Brende	W½ of SE¼	16	103	49	78.00	7.722
Ole G. Brende	SE¼ of SE¼	16	103	49	4.00	0.484
G. T. Nyhus	NE¼ of NE¼	17	103	49	39.00	4.290
Sara Vellan	(Except right-of-way of C. M. & St. P. Ry Co.) W½ of NE¼	17	103	49	70.00	7.700
Gilbert G. Brende and O. L. Brende	SE¼ of NE¼	17	103	49	39.00	4.290
Gilbert T. Gunderson	E.½ of N.W¼	17	103	49	77.00	8.470
Peter P. Risvold	N.W¼ of NW¼	17	103	49	37.00	4.070
Gilbert T. Gunderson	SW¼ of NW¼	17	103	49	40.00	4.400
G. T. Nyhus	Tract 1 of SW¼	17	103	49	7.40	1.018
Thomas O. Brende, Thorsten O. Brende, and Joseph O. Brende,	Tract 2 of SW¼	17	103	49	2.18	0.300

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Ingeberg Gunderson and Gilbert T. Gunderson	Tract 3 of SW¼	17	103	49	4.70	0.647

Ingeberg Gunderson and Gilbert T. Gunderson	Tract 4 of SW¼	17	103	49	1.00	0.138
Olaf B. Floren	Tract 5 of SW¼	17	103	49	4.80	0.66

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 6 of SW¼	17	103	49	2.04	0.281
Clara Schneider	Tract 7 of SW¼	17	103	49	1.34	0.185
Torger N. Nyhus	Tract 8 of SW¼	17	103	49	3.00	0.413
Sarah Vollan	Tract 9 of SW¼	17	103	49	2.96	0.407
E. G. Brende	Tract 10 of SW¼	17	103	49	3.00	0.413
Iver Paulson	Tract 11 of SW¼	17	103	49	1.03	0.142
E. G. Brende	Tract 12 of SW¼	17	103	49	2.00	0.275
G. T. Gunderson	Tract 13 of SW¼	17	103	49	21.56	2.965
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 14 of SW¼	17	103	49	18.00	2.477
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 15 of SW¼	17	103	49	28.80	3.960
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 16 of SW¼	17	103	49	35.72	3.929
Nidres Norwegian Evangelical Lutheran Congregation	Tract 17 of SW¼	17	103	49	8.60	0.946
Knud Thompson and Jacob Olson	Tract 18 of SW¼	17	103	49	1.83	0.252
Erick H. Oien	NE¼ of SE¼	17	103	49	39.00	4.290
Bortinus Pederson	(Except right-of-way of C. M. & St. P. Ry Co.) W½ of SE¼	17	103	49	70.65	7.772
Mali Johnson	SE¼ of SE¼	17	103	49	40.00	4.400
John O. Aasen	(Except Tracts 1 and 2) NE¼	18	103	49	126.79	17.709
257						
Peder P. Risvold	Tract 1 of NE¼	18	103	49	10.14	1.115
Ole J. Stordahl	Tract 2 of NE¼	18	103	49	1.40	0.154
Andrew Swenson, Aas	NW¼	18	103	49	51.65	8.523
Ole J. Ustrud	That part East of River of NE¼ of SE¼	18	103	49	11.67	1.805

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Martha R. Roberts	NE¼ of NE¼	20	103	49	40.00	4.400
B. G. Flamoe	(Except right-of-way of C. M. & St. P. Ry Co.) NW¼ of NE¼	20	103	49	34.50	3.795
Haagen O. Skatvold	(Except right-of-way of C. M. & St. P. Ry Co.) S½ of NE¼	20	103	49	70.20	9.653
Frederick Johnson and Jens Johnson and Torbjorn Olson	Tract 1 of NW¼	20	103	49	4.28	0.589
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. N. Thompson, Fred R. Thompson, Rueben V. Thompson, Mabel J. Thompson and Carl M. Thompson	(Except Tract 1 and except the Tract next Hereinafter described) NE¼ of NW¼	20	103	49	10.00	1.375
James J. Flamoe	A tract as described in Book 67 of Deeds, page 106, in NE¼ of NW¼	20	103	49	10.00	1.375
John J. Almie, Jr.	NW¼ of NW¼	20	103	49	3.33	0.456
Bernt J. Flamoe	SE¼ of NW¼	20	103	49	8.10	1.114
Peter Paulson	(Except right-of-way of C. M. & St. P. Ry Co.) E½ of SE¼	20	103	49	63.85	8.752
Haagen O. Skatvold	NW¼ of SE¼	20	103	49	15.00	2.063
Peter Paulson	(Except Tract 1) that part lying East of River of SW¼ of SE¼	20	103	49	13.00	1.788
258						
G. T. Nyhus	Tract 1 of SE¼	20	103	49	1.60	0.220
Mattha R. Roberta	North ½	21	103	49	251.75	26.687
Peter Paulson	W½ of SW¼	21	103	49	79.0	10.461
Erick G. Brende	E½ of SW¼	21	103	49	79.0	8.690
Erick G. Brende	SE¼	21	103	49	101.42	8.796
Martha Roberts, John H. Roberts and Thomas S. Roberts	E½ of SW¼ of SW¼	27	103	49	2.00	0.242
Erick O. Eggen and D. D. Russell	W½ of SW¼ of SW¼	27	103	49	17.75	1.764
G. T. Nyhus	(Except 5 acres next described) n½ of NE¼	28	103	49	29.75	6.911

E. G. Brende	5 acres being 10 rods N. and S. at East end, and no rods N. and S. at West end, extending across the North side of N½ of NE¼	28	103	49	3.00	0.363

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
G. T. Nyhus	S½ of NE¼	28	103	49	78.00	7.414
O. S. Thompson	(Except the East 19 acres) E½ of NW¼	28	103	49	60.24	7.449
G. T. Nyhus	East 19 acres of E½ of NW¼	28	103	49	18.76	2.089
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) W½ of NW¼	28	103	49	73.15	10.077
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) N½ of SW¼	28	103	49	70.90	9.405
O. S. Thompson	E.18½ acres of E½ of SW¼ of SW¼	28	103	49	17.80	2.452
Ole Peterson	W 1¾ acres of E½ of SW¼ of SW¼	28	103	49	1.70	2.343
Ole Peterson	(Except right-of-way of C. M. & St. P. Ry Co) W½ of of SW¼ of SW¼	28	103	49	12.95	1.837
Thomas S. Roberts	SE¼ of SW¼	28	103	49	39.00	5.225
259						
G. T. Nyhus	N., 3½ acres of N½ of SE¼	28	103	49	1.50	0.165
Erick O. Eggen	(Except the N 3½ acres) N½ of SE¼	28	103	49	76.50	7.153
Thomas S. Roberts	SW¼ of SE¼	28	103	49	39.00	4.29
Nils E. Eggen	SE¼ of SE¼	28	103	49	39.00	3.861
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. H. Thompson, Fred R. Thompson, Reuben V. Thompson, and Carl Thompson	Tract 1 of NE¼	29	103	49	30.00	4.188
Joseph G. Thompson	Tract 2 of NE¼	29	103	49	15.00	2.178
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) Tract 3 of NE¼	29	103	49	61.31	9.477
O. S. Thompson	N½ of SE¼	29	103	49	52.00	7.908
O. S. Thompson	N½ of SE¼	29	103	49	3.00	0.696

Ole Peterson	SE¼ of SE¼	29	103	49	29.00	4.374
Andrew J. Aasen	N½ of NE¼	32	103	49	67.20	9.399
Andrew J. Aasen	SW¼ of NE¼	32	103	49	37.00	4.477

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. Thompson, Fred R. Thompson, Mabel Thompson and Carl Thompson	N½ of SE¼ of NE¼	32	103	49	19.50	3.159
Joseph C. Thompson	S½ of SE¼ of NE¼	32	103	49	19.50	3.159
Andrew J. Aasen	E½ of NW¼	32	103	49	11.00	1.225
Thomas Hendrickson	E½ of SW¼	32	103	49	20.00	2.640
James L. Finnegan	N½ of SE¼	32	103	49	76.00	11.232
John Finnegan	SW¼ of SE¼	32	103	49	36.00	4.752
Margaret L. Finnegan	SE¼ of SE¼	32	103	49	37.20	5.534
260						
Martha R. Roberts, John H. Roberts and Thomas S. Roberts	NE¼ of NE¼	33	103	49	39.00	3.861
Thomas S. Roberts	NW¼ of NE¼	33	103	49	39.00	4.719
Gurine Peterson	S½ of NE¼	33	103	49	80.00	8.800
Thomas S. Roberts	NE¼ of NW¼	33	103	49	39.00	5.792
Andrew J. Aasen	(Except right-of-way of C. M. & St. P. Ry. Co) NW¼ of NW¼	33	103	49	32.10	4.631
Bertha Peterson, Alice C. Peterson, John O. Thompson, Wm. H. Thompson, Fred Thompson, Reuben V. Thompson, and Mabel Thompson and Carl Thompson	(Except right-of-way of C. M. & St. P. Ry Co) SW¼ of NW¼	33	103	49	33.00	4.967
Gurine Peterson	SE¼ of SW¼	33	103	49	40.00	5.94
Anne O. Haugen, Amanda E. Haugen and Jennie A. Haugen	E½ of SW¼	33	103	49	79.00	11.732
Joseph C. Thompson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SW¼	33	103	49	33.00	5.000
Thomas Hendrickson and B. B. Hendrickson	(Except right-of-way of C. M. & St. P. Ry Co.) SW¼ of SW¼	33	103	49	32.10	4.863

Gurine Peterson	N½ of SE¼	33	103	49	80.00	8.800
Gurine Peterson	SW¼ of SE¼	33	103	49	39.00	4.719

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Gurine Peterson	SE¼ of SE¼	33	103	49	39.00	3.861
Martha R. Roberts, John H. Roberts and Thomas S. Roberts	NW¼ of NW¼	34	103	49	20.75	2.061
Gurine Peterson	SW¼ of NW¼	34	103	49	21.00	2.079
261						
Gurine Peterson	W½ of SW¼	34	103	49	35.50	3.526
Lars Simonson	SW¼ of SW¼	29	104	49	6.67	0.784
C. R. Mattern	SE¼ of SW¼	29	104	49	12.67	1.394
John Bruaas	(Except right-of-way of C. M. & St. P. Ry Co) S½ of SE¼	29	104	49	14.00	1.540
Lars Simonson	E½ of NE¼	31	104	49	37.00	5.088
Hans Nelson	SW¼ of NE¼	31	104	49	20.00	2.888
Lars Simonson	SE¼ of NW¼	31	104	49	11.67	1.926
P. G. Thompson	NE¼ of SW¼	31	104	49	32.85	5.421
Ole L. Mule	S½ of SW¼	31	104	49	19.60	3.234
P. G. Thompson	SE¼ of SW¼	31	104	49	35.18	5.805
P. M. Thompson	NE¼ of SE¼	31	104	49	39.00	4.978
Julie L. Moe and Julie L. Hustoft	NW¼ of SE¼	31	104	49	39.82	5.476
Oluf N. Lyng	E½ of SW¼ of SE¼	31	104	49	19.50	2.682
P. G. Thompson	#½ of SW¼ of SE¼	31	104	49	19.32	2.657
Oluf N. Lyng	SE¼ of SE¼	31	104	49	38.00	4.717
John M. Bruaas	(Except the right-of-way of C. M. & St. P. Ry Co.) N½ of NE¼	32	104	49	38.00	3.300
Mali P. Langness	(Except right-of-way of C. M. & St. P. Ry Co) S½ of NE¼	32	104	49	50.00	5.500
Mali P. Langness	E½ of NW¼	32	104	49	53.00	5.968
Lars Simonson	W½ of NW¼	32	104	49	53.00	7.013
Mali P. Langness	N½ of SW¼	32	104	49	78.00	8.580
Randi A. Floren	SW¼ of SW¼	32	104	49	38.00	4.279

Columbia Creamery Co.	A tract as described in Book 59 of Deeds, Page 70, in SE¼ of SW¼	32	104	49	.11	0.012
262						

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Mrs. M. O. Nyhus	(Except the Tract last above described) SE¼ of SW¼	32	104	49	36.00	3.960
Mali P. Langness	(Except right-of-way of C. M. & St. P. Ry Co) N.W¼ of SE¼	32	104	49	1.73	0.120
A. J. Pettingill	The West 500 ft. of Tract 9 of SE¼	32	104	49	1.73	0.190
A. J. Pettingill	(Except that part in St. Oluf Mill Tract as shown in Book 5 of Plats, page 63) Tract 3 of SE¼	32	104	49	7.29	0.802
Wm. J. Milne	That St. Oluf Mill Tract as described in Book 5 of Plats, page 63, being part of Tracts 2, 3, and 9 of SE¼	32	104	49	4.37	.4607

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. L. Ferguson	SW¼ of NE¼	24	101	50	32.32	3.555
C. L. Ferguson	SE¼ of NE¼	24	101	50	38.50	4.235
John Johnson	SE¼ of NW¼	24	101	50	12.64	1.390
Chas. L. Ferguson	SE¼ of NW¼	24	101	50	12.64	1.320
Ed Clark	NE¼ of SW¼	24	101	50	5.30	0.583
M. L. Fusselman	SE¼ of SW¼	24	101	50	3.31	0.364
Geo. Parsons	NW¼ of NE¼	25	101	50	40.00	4.400
Geo. Parsons	NW¼ of NE¼	25	101	50	40.00	4.400
Harry A. Chetham	SW¼ of NE¼	25	101	50	40.00	1.400
Harry A. Chetham	SE¼ of NE¼	25	101	50	40.00	4.400
Geo. A. Parsons	NE¼ of NW¼	25	101	50	12.64	1.390
Harry A. Chetham	SE¼ of NW¼	25	101	50	12.30	1.353
Harry A. Chetham	NE¼ of SE¼	25	101	50	40.00	4.400
263						
Harry A. Chetham	NW¼ of SE¼	25	101	50	40.00	4.400
Harry A. Chetham	W½ of SW¼ of SE¼	25	101	50	20.00	2.200
Harry A. Chetham	SE¼ of SE¼	25	101	50	40.00	4.400

Johnson Bros. Land Co.	E½ of SW¼ of SE¼	25	101	50	20.00	2.200
Harry A. Chetham	NE¼ of SW¼	25	101	50	16.78	1.845
G. A. Castle	SE¼ of SW¼	25	101	50	8.23	0.905
Ludwig Seubert	NE¼ of NE¼	36	101	50	40.00	4.400
Ludwig Seubert	NW¼ of NE¼	36	101	50	36.47	4.011
Dennis & Dennis	SE¼ of NE¼	36	101	50	27.54	3.029
John DeBok	NW¼ of SW¼	31	101	49	30.05	3.305
Wm. H. Lyon	SW¼ of SW¼	31	101	49	4.86	0.534
John DeBok	SW¼ of NW¼	31	101	49	40.00	4.400
John DeBok	NW¼ of NW¼	31	101	49	38.23	4.205
Roger L. Dennis	Tract 1	31	101	49	6.63	0.729
Roger L. Dennis	Tract 2	31	101	49	2.03	0.223
Roger L. Dennis	Tract 3	31	101	49	13.31	1.467
Roger L. Dennis	Tract 4	31	101	49	15.54	1.709
Roger L. Dennis	Tract 5	31	101	49	30.47	3.351

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Roger L. Dennis	Tract 6	31	101	49	5.13	0.564
Roger L. Dennis	Tract 7	31	101	49	4.76	0.523
Roger L. Dennis	Tract 8	31	101	49	10.34	1.137
Roger L. Dennis	Tract 12	31	101	49	9.83	1.081
Roger L. Dennis	Tract 13	31	101	49	13.29	1.461
Roger L. Dennis	Tract 14	31	101	49	25.13	2.764
Roger L. Dennis	Tract 15	31	101	49	9.81	1.079
Roger L. Dennis	Tract 16	31	101	49	8.30	0.931
Roger L. Dennis	Tract 17	31	101	49	21.80	2.398
Roger L. Dennis	Tract 18	31	101	49	2.50	0.275
Roger L. Dennis	Tract 19	31	101	49	13.08	1.438
264						
Roger L. Dennis	Tract 20	31	101	49	17.03	1.873
Roger L. Dennis	Tract 21	31	101	49	12.03	1.323
Roger L. Dennis	Tract 22	31	101	49	10.02	1.102
Geo. Henderson	S½ of SW¼ of SW¼	32	101	49	16.80	1.848
Thos. Quigley	NW¼ of SW¼ and N½ of SW¼ of SW¼	32	101	49	36.76	2.573

Frank Corey and F. A. Ayers—	S½ of SE¼ of SW¼	32	101	49	12.40	1.364
Joe Seubert	N½ of SE¼ of SW¼ and NE¼ of SW¼	32	101	49	45.30	3.171
Pauline Zetlitz	Except Plat of Hazelville, SE¼	32	101	49	72.05	6.484
Norman O. Hamlin	Lot 2 of S½ of NE¼	32	101	49	28.00	2.520
Norman O. Hamlin	Lot 3 of S½ of NE¼	32	101	49	2.65	0.291
Arne Zetlitz	Lot 4 of S½ of NE¼	32	101	49	7.20	0.504
Wm. Jones	Lots 1, 2, 3 and 4 of Plat of Hazelville, SE¼	32	101	49	3.70	0.407
J. Walkins and C. S. McDonald	Lot 28 of Walkins & McDonald's Plat of W½ of NW¼	33	101	49	23.10	2.541
J. Walkins and C. S. McDonald	Lot 27 of Walkins & McDonald's Plat of W½ of NW¼	33	101	49	17.00	1.870
Chas. Eckert	E½ of NW¼	33	101	49	49.74	5.471

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Oscar Harpel	NW¼ of SW¼	33	101	49	17.35	1.388
G. B. Tuthill	All lying South of River in NE¼	33	101	49	16.22	1.784
265						
Julius Kuh	All lying North of River in NE¼	33	101	49	70.50	7.755
A. W. Tuthill	N½ of NW¼	34	101	49	24.36	2.679
Chas. Eckert	SW¼ of SW¼	27	101	49	15.58	1.713
Chas. Eckert	SE¼ of SW¼	27	101	49	24.60	2.904
Clark Coats Estate	NE¼ of SW¼	27	101	49	30.30	3.333
Clark Coats Estate	NW¼ of SE¼	27	101	49	20.90	2.299
Clark Coats Estate	SE¼ of NW¼	27	101	49	10.55	1.160
Clark Coats Estate	SW¼ of NE¼	27	101	49	27.63	3.039
Clark Coats Estate	NW¼ of NE¼	27	101	49	14.17	1.558
Clark Coats Estate	SW¼ of SE¼	22	101	49	28.58	3.143
Clark Coats Estate	NW¼ of SE¼	22	101	49	21.50	2.365
Clark Coats Estate	NE¼ of SW¼	22	101	49	8.50	0.935

Name of Owner	Description	Lot	Block	Proportion of Benefit
	Town of Renner			
Leonard Renner	Lots 1, 2, 3, 4, 5, 6, 7 and	8		0.094
	Olson's Addition to Renner			
Jonas Olson		1		0.012
H. W. Ross Lumber Co.	Lots 2, 3, and	4		0.033
Jonas Olson	Lots 5 to 13, inclusive			0.101
H. W. Ross Lumber Co.	Lots 14, 15, 16, 17, 18 and	19		0.062
Jonas Olson	Lots 20, 21, 22, 23 and	24		0.051
	Berwick Addition to Sioux Falls.			
Grant Lines	Lot 1 and	2	1	0.05
Grant Lines		3	1	0.025
Grant Lines		4	1	0.025
Grant Lines	Lots 5 and	6	1	0.05
Grant Lines	Lots 7, 8, 9, 10, 11 and	12	1	0.15
266				
Security Savings Bank	Lots 1, 2, 3 and	4	2	0.10
Security Savings Bank	Lots 5, 6, 7, 8, 9, 10, 11 and	12	2	0.20
Frank C. Frizzel	Lots 1 and	2	3	0.05
E. N. Frizzell	Lots 3, 4, 5 and	6	3	0.10
Grant Lines	Lots 7 and	8	3	0.05
E. N. Frizzell	Lots 9 and	10	3	0.05
F. C. Frizzell	Lots 11 and	12	3	0.05
A. D. Horton			4	0.20
Elwin N. Potter			5	0.225
Security Savings Bank			6	0.083
F. L. Blackman	Lots 1 and	2	7	0.05
F. L. Blackman	Lots 7 and	8	7	0.05
F. L. Blackman	Lots 11 and	12	7	0.05
F. C. Frizzell	Lots 1, 2, 3 and	4	8	0.10
J. N. Weston	Lots 7 and	8	8	0.05
Name of Owner	Description	Lot	Block	Proportion of Benefit
F. C. Frizzell	Lots 9 and	10	8	0.05
F. E. Payne		11	8	0.025
Security Savings Bank	Lots 1, 2, 3, 4, 5 and	6	9	0.15

Mathias Blumer		7	9	0.025
Security Savings Bank		8	9	0.025
Security Savings Bank	Lots 9, 10, 11 and	12	9	0.10
J. N. Weston	Lots 1 and	2	10	0.10
J. N. Weston	Lots 10, 11 and	12	10	0.075
State of South Dakota	East Half of		11	0.041
State of South Dakota	Lots 1, 2, 3, 4, 5, 6, 7, 8 and	9	12	0.225
State of South Dakota	Lots 10, 11 and	12	12	0.075
State of South Dakota	Lots 1, 2, 3, 4, 5 and	6	13	0.113
Elwin N. Potter	Lots 7, 8, 9, 10, 11 and	12	13	0.15
State of South Dakota			14	0.175
Security Savings Bank			15	0.30
267				
Grant Lines	Lots 1 and	2	16	0.05
Grant Lines		3	16	0.025
Grant Lines		4	16	0.025
Grant Lines		5	16	0.025
Grant Lines		6	16	0.025
Grant Lines	Lots 7, 8, 9, 10, 11 and	12	16	0.15
W. C. Archer	Lots 1 and	2	17	0.05
Security Savings Bank	Lots 3 and	4	17	0.05
Dorothy Golden	Lots 5 and	6	17	0.025
Dorothy Golden	Lots 7, 8, 9 and	10	7	0.05
W. C. Archer	Lots 11 and	12	17	0.025
Sophia Krull	Lots 1, 2 and	3	18	0.037
Sophia Krull		4	18	0.12
Sophia Krull	Lots 5 and	6	18	0.12
Sophia Krull	Lots 10 and	11	18	0.024
C. L. Norton		12	18	0.12
Name of Owner	Description	Lot	Block	Proportion of Benefit.
State of South Dakota			19	0.20
State of South Dakota			20	0.31
State of South Dakota	Lots 1, 2 and 3	4	21	0.105
State of South Dakota	Lots 7, 8, 9, 10, 11 and	12	21	0.15
State of South Dakota			22	0.041
Security Savings Bank	Lots 1, 2 and	3	24	0.075

Security Savings Bank		4	24	0.025
J. C. Boynton		5	24	0.025
L. J. Modde		6	24	0.025
M. W. Potter	Lots 7 and	8	24	0.05
Elwin N. Potter		9	24	0.025
Elwin N. Potter	Lots 10, 11 and	12	24	0.075
E. B. Mallet			25	0.02
State of South Dakota			27	0.033
State of South Dakota	Lots 1, 2 and	3	28	0.075
268				
State of South Dakota	Lots 4, 5, 6, 7 and	8	28	0.125
State of South Dakota			29	0.02
State of South Dakota			30	0.02
Security Savings Bank		2	31	0.012
Jas. Kennedy		3	31	0.025
Security Savings Bank		4	31	0.025
Security Savings Bank	Lots 5 and	6	31	0.05
Security Savings Bank	Lots 7 and	8	31	0.05

Brookings' Addition to Sioux Falls.

Wigant Ludewig	Lots 4, 5, 6, 7, 8, 9, 10, 12 and	13	5	0.325
Hans C. Ruvald	Lots 1, 2 and	3	11	0.075
Hans Ruvald	Lots 1 and	2	12	0.065
H. Ruvald	Lots 3, 4 and	5	12	0.015
Hans C. Ruvald		6	12	0.032

Brooks' Addition to Sioux Falls.

Grant Lines	Lots 14, 15, 16 and	17	1	0.075
Name of Owner	Description	Lot	Block	Proportion of Benefit

Bunker's Addition to Sioux Falls.

Hans Ruvald	Lots 1, 2, 3, 4, 5, 6 and	7	1	0.162
N. S. Johnson		8	1	0.02
Geo. C. Hull		9	1	0.02
Hans Ruvald	Lots 10, 11, 12, 13 and	14	1	0.10
Hans Ruvald		15	1	0.02
Hans Ruvald	Lots 16 and	17	1	0.04
Hans Ruvald	Lots 18, 19 and	20	1	0.06

Hans Ruvald		1	2	0.02
Hans Ruvald	Lots 2, 3, 4, 5, 6 and	7	2	0.06
Joseph Elott	Lots 8 and	9	2	0.02
Hans Ruvald		10	2	0.02
Hans Ruvald		11	2	0.02
O. C. Cadwell		12	2	0.02
269				
Hans Ruvald	Lots 13, 14, 15, 16, 17, 18, 19 and 20		2	0.15

Central Park Addition to Sioux Falls.

Chas. Dailey	Lots 1 and	2	1	0.04
Hans Ruvald	Lots 3 and	4	1	0.04
J. H. Fernyhough		5	1	0.02
F. T. Williams		6	1	0.02
Bessie Haas	Lots 7 and	8	1	0.04
J. H. Fernyhough	Lots 9 and	10	1	0.04
Benjamin F. Barnes	Lots 11, 12 and	13	1	0.06
J. H. Fernyhough	Lots 14, 15 and	16	1	0.06
John P. Shoemaker			2	0.30
Frances G. Carpenter			3	0.30
Henry D. Norris			4	0.30
Diantha A. Hurd			5	0.30
Henrietta Levinger			8	0.30
Diantha A. Hurd			12	0.30
Mariette Blomiley			13	0.30

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Frances G. Carpenter			14	0.30
Clara L. Hambright	Lots 1, 2, 3 and	4	15	0.08
Abe Davison and Sippie Davison	Lots 5, 6, 7 and	8	15	0.08
Michael Marousek	Lots 9, 10, 11 and	12	15	0.08
Clara L. Hambright	Lots 13, 14, 15 and	16	15	0.08
Frances G. Carpenter			16	0.30
Frances G. Carpenter			17	0.30
Anne E. Ploog			18	0.30
Frances G. Carpenter			19	0.30

Frances G. Carpenter and G. T. Greeley	Lots 1, 2, 3 and	4	20	0.08
Nora Connell	Lots 5, 6, and 7 and	8	20	0.08
F. G. Carpenter and G. T. Greeley	Lots 9, 10, 11, 12, 13, 14, 15 and	16	20	0.16
270				
W. R. Timpe and H. L. Schroeder	Lots 1, 2 and	3	21	0.06
F. L. Blackman		4	21	0.02
Mattie M. Hanson	Lots 5, 6, 7 and	8	21	0.08
F. L. Blackman	Lots 9 and	10	21	0.04
F. L. Blackman		11	21	0.02
F. L. Blackman		12	21	0.02
D. J. Carpenter		13	21	0.02
W. R. Timpe and H. L. Schroeder	Lots 14, 15 and	16	21	0.06
Mary C. Brace			30	0.30
F. L. Blackman			31	0.30
Frances G. Carpenter	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and	14	32	0.28
May Sanders and May B. Sanders	Lots 15 and	16	32	0.04
Earl H. Roster			33	0.30
Frances G. Carpenter			40	0.30
Frances G. Carpenter			48	0.30
George H. Brace			49	0.30

Name of Owner	Description	Lot	Block	Proportion of Benefit.
A. Gale, C. A. Greeley, C. C. Carpenter, and G. H. Brace	Outlet "A"			0.075
Geo. H. Brace and James Jameson, Trustees,	Outlet "B"			0.075
Geo. H. Brace and James Jameson, Trustees	Outlet "C"			0.075

Englewood Addition to Sioux Falls.

Marcus Russell		1	0.225
William Fuller		2	0.225
Marcus Russell		3	0.225
271			
Annie A. W. Nock		4	0.225

James B. Adams			12	0.225
Marcus Russell			13	0.225
Mark M. Powers			14	0.225
Marcus Russell			15	0.225
Marcus Russell			16	0.225
Marcus Russell			17	0.225
James B. Adams			18	0.225
F. I. Russell		1	19	0.015
F. I. Russell		2	19	0.015
M. T. Botsford	Lots 3 and	4	19	0.03
Addie B. Woodsworth	Lots 5, 6, 7 and	8	19	0.06
Marcus Russell	Lots 9, 10 and	11	19	0.045
Sarah Walker		12	19	0.015
Alice M. Steinbach		13	19	0.015
Lillie M. Darrow	Lots 14, 15 and	16	19	0.045
F. L. Blackman	Lots 1, 2, 3 and	4	20	0.06
F. I. Russell		5	20	0.015
Marcus Russell		6	20	0.015
F. I. Russell	Lots 7 and	8	20	0.03
Marcus Russell	Lots 9, 10, 11, 12, 13, 14, 15 and	16	20	0.12
F. I. Russell		1	21	0.015

Name of Owner	Description	Lot	Block	Proportion of Benefit.
S. D. Kennedy	Lots 2, 3, 4 and	5	21	0.06
F. I. Russell		6	21	0.015
M. J. Tinkham	Lots 7 and	8	21	0.03
F. I. Russell	Lots 9, 10, 11, 12, 13 14, 15 and	16	21	0.12
Marcus Russell			22	0.225
Marcus Russell			27	0.225
Marcus Russell			28	0.225
272				
Marcus Russell			29	0.225
Edward A. Benson and Charles E. Anderton,			30	0.225
Marcus Russell			31	0.225
Marcus Russell	Lots 1, 2, 3 and	4	32	0.06
F. I. Russell	Lots 5 and	6	32	0.03

James Martin	Lots 7 and	8	32	0.03
E. T. Newhall	Lots 9, 10 and	11	32	0.045
Joe Kirby		12	32	0.015
Marcus Russell	Lots 13, 14, 15 and	16	32	0.06

Harrison Addition to Sioux Falls.

A. P. Burtch	Lots 5, 6 and	7	16	0.075
Porter P. Peck			17	0.225
Porter P. Peck			18	0.225
O. C. Potter	Lots 1, 2 and	3	19	0.06
Oscar C. Potter	Lots 4, 5, 6, 7, 8, 9, 10, 11 and	12	19	0.18
Lester D. Sharon			20	0.225
G. H. Grebel			21	0.225
G. H. Grebel	Lots, 2, 3, 4, 5, 6, 7 and	8	22	0.14
W. L. Oaks			25	0.225
G. H. Grebel			26	0.225
G. H. Grebel			27	0.225
G. H. Grebel			28	0.225
G. H. Grebel			29	0.225

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Oscar C. Potter			30	0.225
Porter P. Peck			31	0.225
Porter P. Peck			32	0.225

273 Lincoln Park Addition to Sioux Falls.

P. P. Peck	Lots 1 and	2	3	0.20
P. P. Peck	Lots 3 and	4	3	0.20
P. P. Peck	Lots 5 and	6	3	0.20

McClellan's Second Addition to West Sioux Falls.

John McClellan Estate	Lots 1, 2, 3, 4, 5, 6, 7, 8, and	9	29	0.27
G. T. Blackman, Administrator of John McClellan Estate	Lots 17 and	18	29	0.06
M. O. Thompson Estate	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and	14	30	0.275
M. O. Thompson Estate		15	30	0.006

Meredith's First Addition to Sioux Falls.

F. L. Blackman			1	0.225

Herbert C. Everson and Hattie A. Everson			4	0.225
Chas. A. Scott	Lots 1, 2 and	3	8	0.06
R. E. Bach and Fred Diver	Lots 4, 5, and	6	8	0.06
Sam Smith		7	8	0.02
J. H. Fernyhough	Lots 8 and	9	8	0.04
R. E. Bach and Fred Diver	Lots 10, 11 and	12	8	0.06
Melvin J. Brooks			9	0.225
S. J. Stoneall			16	0.225
Mariette Blomiley			17	0.225
Soren Monson			18	0.225
Soren Monson			23	0.225
Marion Chase			24	0.225
Thos. Scanlon			25	0.225
Thos. Scanlon			26	0.225
W. H. Lyon			31	0.225

274

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Thos. Scanlon	Lots 1, 2, 3, 4, 5 and	6	32	0.12
Thos. Scanlon	Lots 7, 8, 9, 10, 11 and	12	32	0.12

Meredith's Second Addition to Sioux Falls.

E. J. Sharon			33	0.225
E. J. Sharon			34	0.18
Horatio A. Burtch			37	0.14
A. G. Erskine			38	0.225
A. G. Erskine	Lots 1, 2 and	3	39	0.06
A. G. Erskine	Lots 4, 5, 6, 7, 8 and	9	39	0.12
A. G. Erskine	Lots 10, 11 and	12	39	0.065
John E. Batheal			40	0.225
A. G. Erskine			43	0.225
Horatio A. Burtch			44	0.225
F. L. Blackman and E. J. Sharon			45	0.14
F. L. Blackman and E. J. Sharon			46	0.14

F. L. Blackman and E. J. Sharon			47	0.225
Horatio A. Burtch			48	0.115
W. H. Lyon			56	0.075
F. L. Blackman and E. J. Sharon			57	0.20
F. L. Blackman and E. J. Sharon			58	0.18
I. E. Kosier			59	0.06
Carrie Lundell			60	0.115
I. E. Kosier			74	0.18
E. R. Loucks	Lots 1 and	2	75	0.035
I. E. Kosier	Lots 4, 5, 6, 7, 8, 9, 10, 11 and	12	75	0.165

275 **Millard Park Addition to Sioux Falls.**

Porter P. Peck			1	0.135
Porter P. Peck	Lots 10, 11 and	12	34	0.035

North Boulevard Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Geo. H. Brace			4	0.225
Mary C. Brace			6	0.225
Mary C. Brace			9	0.225
Mary C. Brace			13	0.225
Mary C. Brace			29	0.225
Geo. H. Brace			34	0.225
Chas. Brigham, John C. Spofford and Geo. H. Brace			35	0.225
Mary C. Brace			49	0.225
Mary C. Brace			50	0.225
Mary C. Brace			61	0.225

North Park Addition to Sioux Falls.

Lilly E. Braley	Lots 1 and	2	1	0.04
James A. Guest	Lots 3, 4, 5 and	6	1	0.08
Hans Ruvald	Lots 7 and	8	1	0.04
Hans Ruvald	Lots 9 and	10	1	0.04
Hans Ruvald	Lots 1, 2, 3, 4, 5, 6 and	7	2	0.14
Hans Ruvald		8	2	0.02
John Kadinger	Lots 9, 10, 11 and	12	2	0.08

Hans Ruvald		13	2	0.02
Hans Ruvald	Lots 14, 15 and	16	2	0.06
Hans Ruvald		1	3	0.02
Hans Ruvald		2	3	0.02
276				
Hans Ruvald		3	3	0.02
Hans Ruvald	Lots 4, 5, and	6	3	0.06
H. Ruvald	Lots 7, 8 and	9	3	0.06
H. Ruvald		10	3	0.02
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	3	0.12
H. Ruvald			4	0.30
Emma J. Nelson	Lots 1 and	2	5	0.04
Name of Owner.	Description	Lot	Block	Proportion of Benefit.
Emma J. Nelson	Lots 3, 4, 5, 6, 7 and	8	5	0.12
Emma J. Nelson	Lots 9, 10, 11, 12, 13, 14, 15 and	16	5	0.16
Hans Ruvald	Lots 1, 2, 3, 4 and	5	6	0.10
John Frederickson, Peter Helland and Hans Ruvald		6	6	0.02
Hans Ruvald	Lots 7 and	8	6	0.04
Hans Ruvald	Lots 9 and	10	6	0.08
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	6	0.10
Henry Teimeier	Lots 1 and North Half of	2	7	0.03
F. W. Pieper	Lots 3 and South half of	2	7	0.03
F. W. Pieper	Lots 4 and	5	7	0.04
F. W. Pieper		6	7	0.02
F. W. Pieper	Lots 7 and	8	7	0.04
E. C. Lord		9	7	0.02
H. Ruvald	Lots 10 and	11	7	0.04
Hans Ruvald	Lots 12, 13, 14, 15 and	16	7	0.10
Hans Ruvald	Lots 1 and	2	8	0.04
Hans Ruvald	Lots 3, 4 and	5	8	0.06
H. Ruvald	Lots 6 and North Half of	7	8	0.03
277				
Hans Ruvald	Lots 8 and South Half of	7	8	0.03
Lena H. Bessler		1	10	0.02

F. H. Bessler		2	10	0.02
P. B. Hunt	Lots 3, 4 and	5	10	0.06
J. M. Warren	Lots 10, 11 and South Half of	12	10	0.05
Lena Bessler	Lots 13 and North Half of	12	10	0.03
Hans Ruvald	Lots 1 and	2	11	0.04
Louise Guest Estate	Lots 3 and	4	11	0.04
Hans Ruvald	Lots 5, 6 and	7	11	0.06
H. Ruvald		8	11	0.02
Peter P. Simson	Lots 1 and	2	12	0.04
Hans Ruvald		3	12	0.02
Name of Owner	Description	Lot	Block	Proportion of Benefit
H. Ruvald		4	12	0.04
Hans Ruvald	Lots 5, 6, and	7	12	0.06
H. Ruvald		8	12	0.02

North Park Second Addition to Sioux Falls.

Julia W. Anderson			1	0.30
Hans Ruvald			2	0.30
Hans Ruvald			3	0.40
Ira Cox			4	0.30
Hans Ruvald			5	0.30
Hans Ruvald			6	0.30
Theron S. Swain and Henry E. Shaw			7	0.30
Hans Ruvald			8	0.30
278				
Hans Ruvald			9	0.30
Hans Ruvald			10	0.30
Ira Cox			11	0.30
Julia W. Anderson	Lots 1 to 16, inclusive		12	0.30
Hans Ruvald	Lots 17 and	18	12	0.05
Julia W. Anderson	Lots 19, 20, 21, 22, 23 and 24		12	0.15
Hans Ruvald			13	0.30
Dan Hamway	Lots 1, 2 and	3	14	0.063
Thomas E. Powers	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12 and	13	14	0.275
Dan Hamway	Lots 14, 15 and	16	14	0.063
Hans Ruvald			15	0.40

Geo. J. Fullerton	Lots 1 and	2	16	0.05
S. Olney		3	16	0.02
S. Olney		4	16	0.02
S. Olney		5	16	0.02
H. Ruvald		6	16	0.02
H. Ruvald	Lots 7 and	8	16	0.04
Edward H. Story		9	16	0.02
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Hans Ruvald		10	16	0.02
Hans Ruvald		11	16	0.02
Hans Ruvald		12	16	0.02
Hans Ruvald		13	16	0.02
W. W. Ormiston		14	16	0.02
Hans Ruvald		15	16	0.02
Hans Ruvald		16	16	0.02
Hans Ruvald	Lots 1 and	2	17	0.04
Hans Ruvald	Lots 3, 4, 5, 6, 7 and	8	17	0.12
279				
Hans Ruvald	Lots 9 and	10	17	0.04
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	17	0.12
H. Ruvald	Lots 1 and	2	18	0.04
Hans Ruvald		3	18	0.02
Hans Ruvald		4	18	0.02
Hans Ruvald	Lots 5 and	6	18	0.04
S. E. White		7	18	0.02
Hans Ruvald	Lots 8, 9, 10, 11, 12 and	13	18	0.12
Hans Ruvald	Lots 14, 15 and	16	18	0.06
Hans Ruvald			20	0.30
H. Ruvald	Lots 1, 2 and	3	21	0.06
H. Ruvald		4	21	0.02
H. Ruvald		5	21	0.02
H. Ruvald		6	21	0.02
H. Ruvald	Lots 7 and	8	21	0.04
Hans Ruvald	Lots 9, 10, 11, 12, 13, 14, 15 and	16	21	0.16
Hans Ruvald	Lots ., 2, 3, 4, 5 and	6	22	0.12
H. Ruvald		7	22	0.02

Hans Ruvald		8	22	0.02
H. Ruvald	Lots 9 and	10	22	0.04
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	22	0.12
Name of Owner	Description	Lot	Block	Proportion of Benefit
Hans Ruvald			23	0.30
Wigant Ludewig			24	0.45

Sioux Falls Improvement Co's Addition to Sioux Falls.

S. E. Reinius			89	0.20
Soo Valley Granite Co.	Lots 1, 2, 3, and	4	91	0.046
Sarah Foster	Lots 12, 13 and	14	91	0.025
J. Reichard and J. W. Richard	Lots 15 and	16	91	0.02
280				
Moses Hawkins		17	91	0.012
James W. Bowles		18	91	0.012

Summit Addition to Sioux Falls.

Harry J. Brown		1	17	0.025
Soo Valley Investment & Construction Co.		2	17	0.025
Anna Hillner	Lots 23, 24, 25 and	26	17	0.10
F. L. Blackman		1	18	0.025
Margaret M. Matthews and Hannah L. Matthews		2	18	0.025
Alex Matthews		3	18	0.025
Bertha M. Ferguson		4	18	0.025
F. L. Blackman	Lots 5, 6 and	7	18	0.025
J. B. Fearon		8	18	0.025
J. H. Fernyhough		9	18	0.025
F. L. Blackman	Lots 16, 17, 18 and	19	18	0.10
A. W. Ibach		20	18	0.025
F. L. Blackman	Lots 21, 22, 23, 24, 25 and	26	18	0.15

West Park Addition to Sioux Falls.

David R. Rector	Lots 1 and	2	1	0.05
Augusta C. Fowler	Lots 14 and	15	1	0.05
Sioux Falls Trust Co.		16	1	0.025
Sioux Falls Trust Co.	Lots 17, 18, 19 and	20	1	0.10

Sioux Falls Trust Co.	Lots 1, 2, 3, and	4	2	0.075

Name of Owner	Description	Lot	Block	Proportion of Benefit
Sioux Falls Trust Co.	Lots 5, 6 and	7	2	0.075
Sioux Falls Trust Co.		8	2	0.025
Sioux Falls Trust Co.	Lots 9, 10, 11, 12 and	13	2	0.125
Sioux Falls Trust Co.		14	2	0.025
281				
Board of Education of the City of Sioux Falls	Lots 15, 16, 17 and	18	2	0.075
Sioux Falls Trust Co.	Lots 19 and	20	2	0.025
Sioux Falls Trust Co.	Lots 13 and	14	3	0.05
Sioux Falls Trust Co.	Lots 15 and	16	3	0.05

J. L. Phillips Addition to Sioux Falls.

Manchester Biscuit Co.	Lots 1, 2, 3, and	4	25	0.833
Chicago, Milwaukee & St. Paul Ry Co.,	Lots 5, 6, 7, 8 and	9	25	2.291
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 10, 11, 12, 13, 14, 15, 16, 17 and	18	24	3.094
Geo. B. Cone	Lots 1 and	2	24	0.480
F. M. Mills		3	24	0.229
W. I. Thompson and J. W. Wadden		4	24	0.229
Madison Mill & Grain Co.		5	24	0.229
W. I. Thompson		6	24	0.229
Rock Island Plow Co.	Lot 7 and North Half of	8	24	0.343
Luella A. Jones	Lot 9 and South Half of	8	24	0.343
W. K. Van Brunt	Lots 1, 2 and North Half of	3	23	0.859
Van Brunt-Overland Co.	South Half of Lot 3 and North Half of	4	23	0.480
Geo. H. Brace	South Half of Lot 4, and Lots 5 and	6	23	1.145
J. N. Weston		7	23	0.572
German Savings Bank		8	23	0.687
Joe Tosini	North Half of	9	23	0.480
Carl Lock	South Half of	9	23	0.572
G. Kiriakedes		1	22	1.145
Inez Van Eps		2	22	1.145

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Name of Owner	Description	Lot	Block	Proportion of Benefit.
Lacotah Building Co.	Lot 3 and north half of	4	22	1.719
Frank Angel	South half of	4	22	0.572
Inez C. Van Eps		5	22	1.145
Mary Zentel		6	22	1.145
E. B. Northrup		7	22	1.145
R. F. Pettigrew		8	22	1.145
M. C. Smith		9	22	1.145
H. A. Homan	Lot 17 and North Half of	16	21	6.874
E. L. Smith	Lot 15 and South half of	16	21	1.489
L. A. Kelley	Lots 13 and	14	21	1.375
J. W. Jones		12	21	0.480
W. Braley and Geo T. Blackman	West 100 ft. of Lots 10 and	11	21	0.480
J. W. Jones	East 50 feet of lots 10 and	11	21	0.229
J. P. Edmison	Undivided ½ lots 4, 5 and	6	26	3.437
E. L. Smith	Undivided ½ lots 4, 5, and	6	26	3.437
Chicago, Rock Island & Pacific Ry Co.	West 44 feet of Lots 7, 8 and	9	26	0.412
H. T. Parmley	East 42 feet of West 86 Feet of Lots 7, 8, and	9	26	0.412
Pete Ellingson and John Ellingson	East 42 Feet of West 128 Feet of Lots 7, 8 and	9	26	0.412
P. Ellingson	East 22 feet of lots 7, 8, and	9	26	0.229
Koenig Realty Co.	Lots 10, 11 and	12	15	0.685
G. T. Greeley	North Half of Lot	13	15	0.115
Josephine Levinger	South Half of Lot	13	15	0.115
E. J. Daniels		14	15	0.229

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C. C. Bratrud		15	15	0.229
G. T. Bratrud	North Half of	16	15	0.115
F. Hyde	South Half of	16	15	0.115
Inez C. Van Eps	Lots 17 and	18	15	0.480
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Chas. Look and W. H. Look	Lot 10 and South Half of	11	14	0.344
John Tossini	North Half of	11	14	0.115

Wm. Reynolds		12	14	0.229
John McKee	Lot 13 and South Half of	14	14	0.344
G. H. Perry Estate	North Half of Lot 14 and lot	15	14	0.344
Chas. S. Lund		16	14	0.229
Wm. Tate	South Half of	17	14	0.115
G. L. Nadel	North Half of	17	14	0.115
Beach Parshall Realty Co.		18	14	0.229
Robert R. Plane		10	13	0.229
L. Koplow	Lot 11 and South half of	12	13	0.344
W. I. Thompson	North Half of Lot 12 and South 117 Feet of	13	13	0.688
F. J. Solari and S. J. Solari	North 33 Feet of	13	13	0.688
F. J. Solari and S. J. Solari		14	13	0.229
Pat Shannon	South Half of	15	13	0.115
A. M. Whitman	North Half of	15	13	0.115
Geo. W. Egan	South Half of	16	13	0.115
C. O. Bailey	North Half of	16	13	0.115
Albert Anderson		17	13	0.229
Victor Anderson and Albert Anderson		18	13	0.229
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F. S. Emmerson Estate		1	21	0.344
Chas. Kaufmann	North Half of	2	21	0.172
G. T. Greeley	South Half of	2	21	0.172
E. L. Smith	North Half of	3	21	0.172
E. L. Smith	South Half of Lots 3 and Lot	4	21	0.515
E. B. Northrup		5	21	0.229
Will A. Beach	North Half of	6	21	0.114
A. K. Pay	South Half of	6	21	0.114

Name of Owner	Description	Lot	Block	Proportion of Benefit.
G. T. Greeley		6	21	0.229
S. K. Grigsby	South Half of	9	21	0.114
Wm. Carswell	North Half of	9	21	0.114

Burlington's Sub-Division of Lots 10 to 13. Block 26 of J. L. Phillips' Addition.

A. H. Stites	Lots 1, 2 and	3	26	2.750
Farley & Denton Co.		4	26	0.916
Brown Drug Co.	Lots 5, 6 and	7	26	2.750

Morningside Addition to Sioux Falls.

Howard Holden		1	3	0.022
Wm. Weslund	Lots 2 and	3	3	0.048
Caroline Langager		4	3	0.022
Laura A. Brown		5	3	0.022
David Vesper	Lots 8 and	9	3	0.048
F. I. Hardimon	Lots 10, 11, 12, 13 and	14	3	0.114

Gale's Addition to Sioux Falls.

Frank C. Hardimon	Lots 1, 2 and	3	25	0.343
Chicago, Rock Island & Pacific Ry. Co.	Lots 1, 2, 3, 4, 5 and	6	24	0.550
Anna Bakken	West 50 Feet of Lots 1 and	2	26	0.091
285				
Ludwig Seubert	East 100 feet of Lots 1 and	2	26	0.137

Morse's Addition to Sioux Falls.

Stephen Donahoe, Den Donahoe, Dan Donahoe, and Wm M. Donahoe	East Half of		1	0.480
Anna Barrett		7	1	0.069
Stephen Donahoe, Den Donahoe, Dan Donahoe and Wm. M. Donahoe	Lots 8, 9, 10 and	11	1	0.400

Millspaugh's Addition to Sioux Falls.

Chicago, Rock Island and Pacific Ry Co.	Lots 1 and	2	13	0.137
Girton-Adams Ice Co.	Lots 1, 2, 3, 4 and	5	14	0.412
P. O. Stiver	Lots 6, 7, 8, 9, 10, 11 and	12	14	0.641
Girton-Adams Ice Co.	Lots 13, 14, 15 and	16	14	0.321

Name of Owner	Description	Lot	Block	Proportion of Benefit.
P. O. Stiver	Lots 1 and	2	15	0.137
Girton-Adams Ice Co.	Lots 3, 4, 5 and	6	15	0.114

P. O. Stiver	Lots 8, 9, 10 and	11	15	0.366
Girton-Adams Ice Co.	Lots 12, 13, 14 and	15	15	0.344
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 16 and	17	15	0.183
Girton-Adams Ice Co.	Lots 10, 11 and	12	28	0.114
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 13, 14 and	15	28	0.275
P. O. Stiver	Lots 16, 17 and	18	28	0.175
P. O. Stiver	Lots 1, 2, 3, and	4	16	0.275
J. L. Brookings	Lots 13 and	14	16	0.137
P. O. Stiver	Lots 8, 9, 10, 11, 12, 13 and	14	27	0.412

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Daniels' Addition to Sioux Falls.

Susan Burke			4	0.480
Chicago, Milwaukee & St. Paul Ry. Co.			5	0.343
Girton-Adams Ice Co.	Blocks 12 and		13	0.916
Kittery Realty Co.	Blocks 10 and		11	1.031

Van Eps' Addition to Sioux Falls.

Joe Tosini	Lots 6, 7, 8, 9, 10, 11 and	12	2	0.229
Jos. Tosini	Lots 1, 2 and	3	1	0.137
Jos. Tosini	Lots 1, 2, 3, 4, and	5	2	0.229
Jos. Tosini	Lots 1, 2 and	3	3	0.069
Inez C. Van Eps	Lots 1, 2, 3, 4, 5, and	6	8	0.275
Inez C. Van Eps	Lots 10, 11 and	12	8	0.137
Inez C. Van Eps	Lots 1, 2, 3, 4, and	5	24	0.114
William Lackay		6	24	0.011
Inez C. Van Eps	Lots 1, 2, 3, 4, 5, 6, and	10	18	0.229
Inez C. Van Eps			19	0.069

Brookings & Edmunds' Addition to Sioux Falls.

Wm. H. Thomas	Lots 10, 11 and	12	31	0.685
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Parlin & Orendorf Plow Co.	Lot 13 and South Half of	14	31	0.344
O. S. Jones Seed Co.	North Half of Lot 14 and South Half of	15	31	0.229
R. A. Wyman	North Half of	15	31	0.115
Jewett Bros. & Jewett	Lots 16, 17 and	18	31	0.685

Braley's Addition to Sioux Falls.

W. Braley		1	1	0.25
W. Braley	Lots 9, 10, 11, 12 and	13	1	0.125
W. Braley			2	0.425
W. Braley			3	0.475
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W. Braley	Lots 1, 2, 3, 4, 5, 6, and	7	4	0.175
C. R. Lewis	Lots 8, 9 and	10	4	0.075
W. Braley	Lots 11, 12, 13, 14, 15, 16, 17, 18, 19 and	20	4	0.25
W. Braley	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and	10	5	0.25
W. Braley	Lots 11, 12, 13 and	14	5	0.175
W. Braley	Lots 1, 2 and	3	6	0.125
Geo. F. Boyle	South 88 Feet of	4	6	0.050
W. Braley	North 44 Feet of	4	6	0.025
W. Braley	Lots 5, 6, 7 and	8	6	0.175
W. Braley			7	0.35
W. Braley			8	0.375
Lois W. Jellies		1	9	0.075
W. Braley	Lots 2, 3, 4, 5 and	6	9	0.375
W. Braley			10	0.50
W. Braley			11	0.50
W. Braley			12	0.625
W. Braley	Lots 1, 2, 3 and	4	13	0.10
Anna Vaghn		5	13	0.025
W. Braley	Lots 6, 7, 8, 9, 10, 11 and	12	13	0.175
H. W. Bullard		13	13	0.025

Name of Owner	Description	Lot	Block	Proportion of Benefit.
W. Braley	Lots 14 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and	30	13	0.425
W. Braley	Lots 1 and	2	14	0.05
W. Braley	Lots 3 and	4	14	0.05
W. Braley	Lots 25, 26, 27, 28, 29 and	30	14	0.15
W. Braley	Lots 1 and	2	15	0.025
W. Braley	Lots 26, 27, 28, 29 and	30	15	0.125

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Silver Park Addition to Sioux Falls.

Great Western Investment Co.	Blocks 1, 2, 3, 4 and	5	1.375
Charles N. Hare		7	0.165
F. R. Webber		8	0.275
F. O. Lyford	Blocks 10 and	24	0.357
Great Western Investment Co.	Blocks 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and	23	3.575
N. B. Turner		25	0.275
E. A. Flanders	Blocks 26 and	27	0.550
Great Western Investment Co.	Blocks 28, 29, 30, 31, 32, 33, 34, 35 and	36	2.475
Annie E. Skinner	Blocks 37 and	42	0.550
A. G. Holmes		38	0.275
David B. Stewart	Blocks 39, 40, 41 and	42	1.10
Great Western Investment Co.		43	0.247
Great Western Investment Co.	Blocks 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63 and	64	5.500

Unplatted Lands Situated in Sections 16, 21, and 22, Township 101, Range 49, Within the City of Sioux Falls.

Equitable Realty Company's Sub-division of Tract 1 of the Northwest Quarter of Section 16.

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Dakota Iron Store	Lot 2			1.145
Dakota Iron Store	Lot 3			1.145
Dakota Iron Store	Lot 4			0.480
International Harvester Co.	Lot 1			0.916
Dakota Iron Store	Lots 8 and 9			0.480
Equitable Realty Co.	Lot 5			1.375

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Chicago, Milwaukee & St. Paul Ry. Co.	Lot 6			1.833
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 7			1.833
Equitable Realty Co.	Lot 10			2.290

Equitable Realty Company's Sub-Division of Northeast Quarter of Northwest Quarter of Section 16.

Equitable Realty Co.	Lot 1	0.480
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 2	0.685
W. F. Hesse	Lot 3	1.375
Chicago, Milwaukee & St. Paul Ry. Co.	Depot Grounds on Southwest Quarter of Northwest Quarter, Section 16	2.062
Chicago, Milwaukee & St. Paul Ry. Co.	Tract 3 of Northwest Quarter, Section 16	0.685
Chicago, Milwaukee & St. Paul Ry. Co.	Tract 4 of Northwest Quarter Section 16	0.915
Edward Ellis	Tract 5 of Northwest Quarter, Section 16	0.229
Larabee Mills Co.	Lot 5 of Sioux Falls Light & Power Co.'s Sub-Division of the Northeast Quarter of Northwest Quarter, Section 16	2.00
Northern States Power Co.	Lot 4 of Sioux Falls Light & Power Co's Sub-Division of the Northeast Quarter of Northwest Quarter, Section 16,	2.00
Larabee Mills Co.,	Lot A, Tract 12 of Northwest Quarter, Section 16,	0.29
Northern States Power Co.,	Tracts 6 and 7 of Northeast Quarter, Section 16,	2.583

Name of Owner	Description	Proportion of Benefit.
Watertown & Sioux Falls Ry. Co.	Benefit to Bridge and Trackage across Sioux River on Northwest Quarter, Section 16	4.583

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Guy Strahon	Tract 21 of Southwest Quarter Section 16 (Except W. 30 ft.)	0.687
A. S. Held and John Schetzel	West 30 Feet of Tract 21 of Southwest Quarter, Section 16,	0.480
F. H. Hollister	Tract 22 of Southwest Quarter, Section 16,	0.687
Emerson-Brantingham Implement Co.	Tract 23 of Southwest Quarter, Section 16	0.480
Mary C. Brace	Tract 24 of Southwest Quarter, Section 16	0.720
Etta Esta Boyce and A. B. Fairbanks	Tract 25 of SW¼ of Sec. 16	2.062

J. M. Freese	Tract 4 of Southwest Quarter, Section 16	2.750
Sioux Falls Gas Co.	Tract 3 of Southwest Quarter, Section 16	4.478
Chicago, Rock Island & Pacific Ry. Co.	Tract 29 of Southwest Quarter, Section 16	3.437
Chicago, Rock Island & Pacific Ry Co.	Tracts 1 and 2, Southwest Quarter, Section 16	3.437
J. H. Donahoe	Tracts 13 and 15, Southeast Quarter, Section 16.	5.155
Northern States Power Co.	Tracts 15, 16, and 20, Southwest Quarter, Section 16	5.840
Illinois Central Ry. Co.	Depot Grounds on Southwest Quarter, Section 16,	3.895
Chicago, Rock Island & Pacific Ry. Co.	Lots A and B. Sub-Division Tract 17, Southwest Quarter, Section 16	0.480
S. H. Hurst and T. McKinnon	Lot C, Sub-Division Tract 17, Southwest Quarter, Section 16.	0.480
T. McKinnon	Lot D, Sub-Division Tract 17, Southwest Quarter, Section 16	0.343
S. H. Hurst	Lot E, Sub-Division Tract 17, Southwest Quarter, Section 16	0.229
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Depot Grounds on Southwest Quarter, Section 16.	4.583
Great Northern Ry. Co.	Depot Grounds on Southwest Quarter, Section 16.	3.437
Farley-Loetscher Co.	Lots D and C of Franklin Investment Co's Sub-Division of Part of Tract 3 of Southwest Quarter, Section 16.	1.145

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Name of Owner	Description	Proportion of Benefit.
Franklin Investment Co.	Lots A and B of Franklin Investment Co's Sub-division of Part of Tract 3 of Southwest Quarter, Section 16.	1.145
H. R. Dennis	East 132 Feet of Tract 14 of Southwest Quarter, Section 16.	1.145
Albert Larson and Geo. E. Larson	Except East 132 Feet, Tract 14 of Southwest Quarter, Section 16.	6.874
A. C. Schoeneman	Tract 8 of Southwest Quarter, Section 16	8.593
J. W. Tuthill	North 50 Feet of Tract 9 of Southwest Quarter, Section 16.	0.572

John C. Felger	Except North 50 Feet, Tract 9 of Southwest Quarter, Section 16.	1.145
John W. Tuthill Lumber Co.	Tract 12, Southwest Quarter, Section 16.	0.343
John W. Tuthill Lumber Co.	Tract 13, Southwest Quarter, Section 16.	2.750
John W. Tuthill Lumber Co.	Tract 7, Southwest Quarter, Section 15.	2.062
B. W. Harding	Tract 6, Southwest Quarter, Section 16.	0.687
A. J. Jordan	Tract 5, Southwest Quarter, Section 16.	2.062
John W. Tuthill Lumber Co.	Tract 7, Southeast Quarter, Section 16.	0.916
M. Margulies	Tract 8, Southeast Quarter, Section 16.	0.229
M. Margulies	Tract 10, Southeast Quarter, Section 16.	2.290
W. H. Lyon	All that part of Tract 2 of Southeast Quarter of Section 16 lying West of Franklin Avenue	1.375
Board of Education of the City of Sioux Falls.	All of Franklin Investment Co's Sub-Division of No. 1 of Part of Tract 2 of Southeast Quarter, Section 16.	1.833

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J. H. Drake	Tract 1, Southeast Quarter, Section 16,	2.062
Girton-Adams Ice Co.	Tract 12, Southeast Quarter, Section 16.	2.290
Sioux Falls Gas Co.	Tract 3 of Northeast Quarter, Section 21.	1.375
E. H. Hyde	Tract 12 of Northeast Quarter, Section 21	0.916
Girton-Adams Ice Co.	Tract 4 of Northwest Quarter, Section 22.	0.572
Joe Tosini	Tract 2, of Northwest Quarter, Section 22.	1.375
Inez C. Van Eps.	Tract 1 of Northwest Quarter, Section 22.	2.062
Ed Bell.	Tract 1 of Northeast Quarter Section 22.	0.229

Name of Owner	Description	Proportion of Benefit.
City of Sioux Falls	Parks, Water System, Highways and dedicated streets within the drainage area.	111.11
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area.	0.384
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.	0.072
Mapleton Township	Twelve miles and fifty-two rods of laidout and established highways within the drainage area.	10.468
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area.	21.252
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area.	2.323
Minnehaha County	Benefits arising from and to the safety and preservation of bridges within the drainage area.	55.555
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Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50 West of the 5th P. M., within the drainage area (1.5 miles)	15.263
Watertown & Sioux Falls Ry. Co.	Right-of-way as laid out and located across Sections 4, 5, and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49, West of the 5th P. M., within the drainage area (2.60 miles),	
Chicago, Milwaukee & St. Paul Ry. Co.	Right-of-way as laid and located across Sections 4 and 9, Township 101, Range 49, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29, and 33, Township 103, Range 49, and Section 32, Township 104, Range 49, West of the 5th P. M., within the drainage area, (the above being the Sioux Falls and Egan line), also across	

Sections 5, 8 and 9, Township 103, Range 49, West of the 5th P. M., within the drainage area, (being the Renner and Madison line), total 14.5 miles 147.533

All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed, as stated, and the said determination of said Board made final.

Dated March 8, 1919.

A. G. RISTY
294 Chairman of the Board of County Commissioners of Minnehaha County, South Dakota.

Attest:
E. H. Shenkle
County Auditor
(Seal)

Filed in the office of the Auditor of Minnehaha County, S. D. this 8 day of March, 1919.

E. H. SKENKLE
County Auditor.

It is stipulated that attached to the bill of complaint herein is a true copy of the drainage ditch notice of hearing upon the question of equalization of apportionment of benefits of Drainage Ditch No. 1 and 2 on the 1st day of August, 1921, caused to be published by the Board of County Commissioners of Minnehaha County, South Dakota, said Drainage Ditch Notice being Marked "Exhibit C".

Exhibit "C" attached to the bill of complaint is offered in evidence by plaintiff and received in evidence.

(Exhibit "C" being printed herein as an exhibit to the bill of complaint, is not at this place reprinted.)

(Cross-Examination of witness F. E. Ward)

The proportion of benefits of Drainage Ditch No. 1 and 2 was not equalized upon the notice returnable April 25th, 1919, upon that date or at any other time. The proceeding was abandoned on account of errors in the published notice.

A. G. RISTY called and sworn as a witness for the plaintiff testified as follows:

(Direct Examination)

My name is A. G. Risty; I am one of the defendants in this action and am and for nine years have been a member of the Board of County Commissioners of Minnehaha County, South Dakota; for about seven years I have been Chairman of the Board; in the spring of 1919 the County Commissioners passed a resolution apportioning the benefits for Drainage Ditch No. 1 and 2; notice of hearing upon the proposed equalization of such benefits was published; the plaintiff's Exhibit "A" is the notice I refer to; I was a member of the Board at the time of making that apportionment of benefits.

295 Q. Please state to the Court, Mr. Risty, in what manner and upon what basis you determined, in the resolution referred to, the proportion of benefits to the Chicago, Minneapolis, St. Paul & Omaha Railway?

Objected to by defendants as incompetent, irrelevant and immaterial, the record now showing that the exhibit referred to by counsel in his question, that the proceedings therein were abandoned and are not the proceedings upon which the present actions were instituted, or the present controversy before the court.

Counsel for plaintiff: I state to the Court this is offered solely for the purpose of showing to the court the attempted application by the County Commissioners of the law which we are questioning.

The evidence received subject to objection.

A. Well, in all those cases we tried to take into consideration the right of way, the value of the line as compared with adjacent lands and the benefits that might be derived from this drainage proposition as to the maintenance of the track and the bridges and so on.

In determining the apportionment of benefits as stated in Exhibit "A" to the Chicago, St. Paul, Minneapolis & Omaha Railway, 1.5 miles; to the Watertown & Sioux Falls Railway Company, 2.60 miles; and to the Chicago, Milwaukee & St. Paul Railway Company 14.5 miles; I don't think we computed on a mileage basis; we may have had that number of miles in mind, but we tried all the while to base it on a certain unit, as I remember it.

Q. Just how, Mr. Risty, did you compare the alleged benefits to the three railway companies mentioned, with the
296 unit of agricultural lands to which you have just referred?

A. How we determined the units for the railroads?

Q. No. How you compared the alleged benefit to the railroads with the unit you have referred to.

A. Well, we arrived at—I don't remember what value we passed on that unit at that time (referring to the agricultural unit). We had the value fixed of the agricultural unit and the proportion of benefit that this drainage would be to that unit; when we came to the railroad question and other properties we took into consideration the benefits that they would derive and I might say we capitalized that—how much the average annual benefit would be to those properties, we might say to a certain piece of railroad, and having that amount fixed, we took the benefit that this unit of farm land was supposed to have and divided the benefits of the railroads—for instance we will say the unit of the farm land was $100; we would make the proportion of the benefit 25% or $20; then when we came to place a unit on other property after having exercised our judgment and made our investigation as to what those benefits might be, we arrived at a certain amount; we divided that by 25, the benefit of the farm unit and that gave us the number of units that we would assess up to that property or railroad, you might say if you wish; I am now testifying with reference to the procedure in 1919; we employed about the same procedure all the time.

Q. Mr. Risty, I call your attention to the fact that the units tentatively assessed to each railroad company in the drainage notice Exhibit "A" bears the same proportion to the mileage of said railway company in each case; with that in mind will you state to the court whether or not that attempted assessment was made by you upon a mileage basis?

A. The mileage basis—if it is the same number of
297 miles or if it is the same per mile for each company, then we must have estimated that the benefit was about the same and that [give] the same number of units per mile.

In our attempted fixing of proportion of benefits which is in question in this lawsuit I don't think we used the mileage basis but I don't remember positively.

With reference to drainage Ditch No. 1 and 2 no warrants to any great amount have been issued since the time of fixing this proportion of benefits in the spring of 1919; it might possibly be that the cleaning

of the ditch was not paid at that time; I don't remember that would be the kind of work that has been paid for since if it wasn't paid for before that; we have done some work around the foot of the spillway and so on since the publication of this notice in April, 1919, but I don't remember what it cost.

Q. In what manner, Mr. Risty, did you determine the benefit to the unit of agricultural land in 1919?

A. We made an estimate of what that land was worth according to our judgment and how much more it would be worth after it had the benefit of this drainage ditch, fair value, I don't remember we had any other basis to go on other than our own judgment as to the value of the land before the drainage and after the drainage.

We arrived at our determination with reference to the benefit of 111.11 units to the parks, water system, highways, and dedicated streets of the City of Sioux Falls without the drainage area in April, 1919, in just the same way as I stated to you that we arrived at the benefit to the railroads
298 and so on; what in our judgment we thought was the benefits; we fixed the amount that in our judgment we thought was right and proper and divided by the benefit to the agricultural unit to get the number of units in regard to this other property; we based that judgment upon the fact that some of us, most of us, are farmers or were farmers and we all know the price of land—was selling it at that time; with reference to parks, water system, highways, and streets of the City of Sioux Falls we based our determination upon the same facts as we used in regard to all other property; we estimated according to our judgment and our investigation what these properties had cost and what benefit they were to the public, what loss they would be at in case they were annually overflowed; to some extent we used the cost of the parks of the City of Sioux Falls; the cost of the water system of the City of Sioux Falls was talked of; we made our determination on the estimate of the cost and the benefit that those properties would derive; we never had a hearing; it might be more and it might be less we didn't get far enough to hear the other side; we made an estimate of the damages that might accrue in case the highways and streets of Sioux Falls were overflowed; we based that estimate on our best judgment; suppose you have a building down along the Sioux here and have it overflow; the basement filled with water; your own estimate on what damage it would be to you and it would vary probably a great deal from mine; neither one might be correct. It is doubtful whether you and

I would agree. I have stated the manner in which we compared the benefits to the parks and water system, streets and highways of the City of Sioux Falls with the agricultural unit; we took the public highway that would be annual-
299 ly overflowed; we had in mind as road builders what damages that would be to that road; in our judgment we fixed the damages to be what we thought were right and the number of units on that piece of property; then we proceeded as in all other cases, divided by the benefit to our original unit; to get the number of units we first attempted to determine what the benefit was and then divided it to get the proportion; it is possibly a fact that the unit as used by us in the measurements in the spring of 1919 represented approximately $80.00 or $85.00 in cost; we used at 10A. unit; I am not certain whether the unit was supposed to have been benefitted $80.00 to $85.00 or $7.00 to $8.00 per acre, that might be it, I don't remember.

Q. I now call your attention, Mr. Risty, to the drainage notice providing for hearing on the 1st day of August, 1921, upon the equalization of benefits of drainage ditch No. 1 and 2 and call your attention to the benefits to roads, railroads, etc. and ask you to state to the court in what manner and upon what basis you arrived at your determination with reference to the proportion of benefits to the Chicago, Rock Island & Pacific [Rr]., the Chicago St. Paul, Minneapolis & Omaha Ry., the Great Northern Ry., the Chicago, Milwaukee & St. Paul Ry., the City of Sioux Falls, and the Northern States Power Co., referring particularly to the benefits to the Hydro-Electric plant and water rights of the Northern States Power Co.

Mr. Bartlett: "That is objected to as incompetent, irrelevant and immaterial, not within the issues that can be tried by this Court in this collateral action, the same being a legislative matter and not subject to inquiry in this Court, it not having been alleged in plaintiff's bill of complaint herein that the Commissioners acted fraudulently or arbitrarily."

300 The Court: "Received, subject to objection."

A. As to the railroads and other property mentioned in this question we arrived in the manner stated before; we took into consideration the value of the right-of-way compared the right-of-way with adjacent lands and what protection from this water would benefit them and the savings it would be in upkeep of the railroad track, bridges, etc; in regard to the Hydro-Electric Co. plant we took into consideration the overflow and high water that would clog up their

turbines and put them out of working order for some time, and we had in mind the great overflow of 1881 when it swept out the lumber yards down there and took out the mill at the foot of the falls, and in our estimation after having taken all those things into consideration which I wouldn't mention all now, we arrived at the conclusion that this water, the drainage proposition was of immense value to the Water Power Co. and we figured on that with a good deal of care and then I think we arrived at the amount of $50,000.00; I would not say positively that was the amount; we compared the benefits which we arrived at to the Northern States Power Co. with the benefit to our 1A tract of agricultural land as I have stated before; the benefit to that unit we said was $25.00; when we had estimated the benefits to the water power company was $50,000.00 we wanted to find out how many units that it represented and we divided it by 25 and that gave us the number of units that would be assessable to the water power company; I suppose there was no material increase in value of the railroad companies' rights-of-way and other property I have mentioned by the making of these two apportionments of benefit unless it might be increase in value with the value of other property increased at
301 that time, but the expenses to be paid were more; there were probably in the neighborhood of $250,000.00 of ditch warrants outstanding at the time we made this apportionment of benefits in 1919; I know there has been some issued since but I don't know how much; in estimating the benefits to various railroad companies in our last apportionment of benefits, we had about the same ideas as we did in 1919; we did not use the mileage basis or farm basis or street basis anywhere; we used the units.

Q. Just how did you use the units, that is what I am trying to find out?

A. When we find out what amount we have to raise—when we come to levy the assessment, the proportional benefits will be assessed to each unit—one unit may be 100%, another is 150% and some only 10%, others 25%; they won't all be alike, of course they are not benefitted alike; in arriving at our determination in 1921 of the last apportionment of benefits and the number of units of the benefit to the Chicago, Rock Island & Pacific [Rr.] Co. we took into consideration the damages that might be done to the railroad tracks with high water to the grades; and in regard to the bridges, bridges could be built smaller; wooden bridges generally have a duration of about ten years and if they could get along with small-

er bridges or make grades instead of [tressel] works which would be a benefit to the company; we inquired minutely into those things but as I say haven't heard the other side; we might be away off; the hearing was not allowed and we didn't get any basis from you folks on that question; we determined that the benefit to the track of the Rock Island Ry. from the ditch was a certain specified amount in dollars and cents; I wouldn't say that we put those amounts on record; that is the way we arrived at our units; we took into consideration in determining this benefit the fact that the Rock Island
302 might build a shorter bridge somewhere and that was part of the basis of our assessment of benefits; after arriving at the amount of dollars and cents benefit we proportioned it by dividing by the value of the unit; in determining the proportion of benefits to the Chicago, St. Paul, Minneapolis, & Omaha, the Great Northern, the Chicago, Milwaukee & St. Paul Railroad Companies we followed the same procedure; the basis for our determination of the benefits with reference to the highways, streets, water supply, water plant, Sherman Park and Phillips Park in the City of Sioux Falls was as I have stated to you before; it may seem [arbitrarily] but in regard to county highways for instance, we knew pretty well what it would take to keep them in good passable condition in seasons when there was any overflow and in seasons when there was no overflow; in regard to the streets and basements that have been flooded each year I made an estimate as to how much it would damage a basement if filled with water; same way to the streets, same way to the parks; If you had ever had a hearing those things would all have been adjusted. I wouldn't say absolutely that we did in 1921 the same as we did in 1919 with reference to the city; we had the same idea in mind when we gave it reconsiderations and wherever we saw we could improve, we did it to make a more equitable proportion; in my judgment and in the judgment of the commissioners the last proposition is better than the first one; I don't want to say we absolutely followed the methods of the first instance or we followed any particular practice in the last instance; it may be we did and possibly we didn't; in arriving at the determination that the benefit to the Hydro-Electric Co. plant of the Northern States Power Co. was about $50,000.00, we based our determination upon the following facts; in the first place we have a stream that tends to give a steady flow of water around the bend so that it will not go over the spillway; in one certain place about 3 miles northwest from
303 town outside of the ditch proper, the river broke through and would eventually have cut across the bot-

tom and into the spillway and we dammed that up; then we took into consideration the high water backing up and filling up the gorge below their plant so that at certain times the water power would not be serviceable and that it would cost them fuel and other items to a great extent and then primarily, any water which overflowed would be apt to sweep out everything around that electric plant if they should have an overflow like 1881.

Q. You say there was danger of some ditch cutting through and diverting the water out of the river?

A. Yes sir.

Q. State whether or not that was the Ditch No. 1 or ditches Nos. 1 and 2 which were constructed by the Board of County Commissioners, the records of which have been placed in evidence here.

A. Those ditches were established and built before my time on the Board and that might possibly have been that it was cutting into Ditch No. 1 and making that immense excavation, but I would not say. But it was necessary to have it dammed up according to the orders of the hydro-electric engineer; the ditch I refer to must have been probably the terminus of ditch No. 1; the engineer gave orders it had to be dammed up absolutely.

Q. In just what manner did you arrive at the fact that this alleged benefit to the Northern States Power Company amounted in dollars and cents to approximately $50,000.00?

A. After taking those things into consideration, that was our best judgment. We might have itemized it and added it up; I don't remember that; but according to our best judgment that would be reasonable assessment upon the water power company.

We based that judgment upon these benefits I have
304 stated to you; giving them a uniform flow of water in dry seasons and protecting them from overflow when we had an overflow season; I have stated practically everything that was taken into consideration in determining that the Northern States Power Co. was benefitted $50,000.00. if I remember right.

Q. I call your attention, Mr. Risty, to the alleged benefit in your apportionment of 1921 to the Chicago, Milwaukee & St. Paul Railway; benefits to right-of-way, tracks, embankments, bridges and grades across sections 4, 9, 16, 21, 22, Township 101 Range 49, and across sections 4, 9, 16, 21, 28, 33 Township 102 Range 49, and across sections 5, 8, 17, 20, 28, 29, 33 in Township 103, Range 49, and ask you to tell the court what you took into consideration in determining that the Chi-

cago, Milwaukee & St. Paul Ry. Co. was benefitted 1678.9 units.

A. We took into consideration what it would damage the tracks—what the damage would be if those tracks washed out and the expense to rebuild them, and with the assistance of a competent railroad engineer we arrived at those figures that we have given there.

We assumed that except for this spillway these tracks of the Chicago, Milwaukee & St. Paul Railway would wash out and be under water for a certain period; I have seen the Milwaukee road under water 8 or 10 days at a time when they had to run their trains around to Pipestone on other railroads; I don't remember what proportion of its tracks we assumed would wash out; the distance used is about equal to the lands that overflow; those lands that overflowed and had the tracks on; of course it would overflow the tracks; I don't remember how many miles we estimated that to be; we tried to figure it out and our engineer worked it out and that was the number of miles; the tracks were on land subject to overflow, that is what determined the distance; with reference to the bridges of the Chicago, Milwaukee & St. Paul Railway in arriving at this benefit—I don't remember whether there is any more bridges on the Milwaukee; yes, there is two; we took
305 into consideration that by diverting the great volume of water from the river into these ditches, their bridges would be less subject to destruction by the ice gorges and by high water and that they could be made smaller when they come to build new ones because they would not have such high waters; the water would be divided between the river and the ditches; in arriving at that feature of the benefit in dollars and cents we figured out with our engineer what it would cost to build and maintain bridges of the size they have now and what it might cost to build them smaller and their
306 relief when they were subject to overflow and ice gorges; these were the elements we had in mind.

After the filing of the Blackman petition in 1916 when it was decided that the spillway was to be repaired we employed engineers to go ahead and investigate that and it took about a year and a half before all of the preliminaries were taken care of so that we went to actual excavation on the structure; we employed a competent engineer and he laid the plans and we let the contract to a contracting company here, they were to have a percentage for their work; they proceeded to sink that shaft and make the channel of the spilling basin; to put it all in shape that it is at the present time; on the river we

straightened a number of bends, made cuts across bends and straightened out the river to facilitate the flow of the water; I think Ditch No. 2 was cleaned about as far as Renner; then the time arrived that the ditch warrants did not sell any longer and we had no means to complete the work; there always were control gates at the head of Ditch No. 2; we made no change at the head of Ditch No. 2 after the filing of the Blackman petition if you call the end of it up there near Baltic where the ditch begins; it crosses the river at one certain place up there and if you have reference to where this lower part is started, there we built a small dam of willows
307 and earth to keep the water from coming out of the ditch entirely and doing damage that way; the route of the ditch was left the same as the route of Ditch No. 1 and Ditch No. 2, the old ditches; no changes was made in the initial point or terminal points of either ditch.

(Cross-Examination).

Prior to the attempt to fix the proportion of benefits in 1919, no topographical survey was made or thorough investigation upon which to base the assessments or fix the benefit. In order to save money we thought the old survey would answer; in making the proportional benefits we took the old figures and old survey to avoid expense; we didn't get far enough to make any assessment on any particular tract of land; the Board abandoned that attempt to fix the proportion of benefits because of an error in adopting three units instead of one; after that time the Board caused a full topographical survey to be made by Chenoweth & Rettinghouse of this city and a thorough investigation of the benefits that would accrue to the various properties within the drainage area; Mr. Rettinghouse reported and explained to us the conditions which he found generally throughout the drainage area and the property that was benefitted; in making that report he stated to us the various elements that he considered as benefits and submitted to us the facts upon which he based his conclusions; Mr. Rettinghouse as our engineer made the computation with reference to this apportionment of benefits and the plans and we talked it over and he was practically the one that planned how it should be done; he done all the figuring and the computations; before we adopted the resolution of June 10, 1921, we had been fully advised as to the topographical situation and the elements that went into the fixing the proportion of benefits against each of the various pieces of property that we deemed to be benefitted; the board made a personal investi-

gation of all the property within the drainage area and
308 determined the benefits before we adopted this resolution; we selected as a unit an acre of land about three miles north of town in the district between the river and the ditch and visited that unit in company with Mr. Rettinghouse; we determined that in our judgment that unit was benefitted by the improvement 25%; in reaching that conclusion it seems to me we valued the unit without the drainage at $100 and with the drainage at $125.00; it being our judgment that the real benefit to that unit was the sum of $25.00; after determining the value of this unit we proceeded to equalize and fix the proportion of benefits among the other property; the engineer accompanied us and had with him various figures and maps he had made showing these tracts, we referred to the map right along as we traveled; the Board proceeded to investigate the whole territory proposed to be assessed on this basis investigating first upon the east side of the river and then on the west side and then around the bend clear in through town; we looked over the railroad situation and other properties including the power plant, city streets, parks, and water system that in our judgment were affected; my judgment and the judgment of the board coincided almost entirely with the report of the engineer, Mr. Rettinghouse, with reference to these various proportions of benefit; after having made our investigation and having had the elements of benefit explained to us by the engineer, the board exercised its judgment and concluded that these properties were actually benefitted relatively or approximately as the engineer had reported them, we considered as a basis for making assessments on these various properties the acreage of the right-of-way within the drainage area; with reference to the Great Northern Railroad property, Mr. Rettinghouse gave us the facts as to the area within the various territories; he pointed out to us that certain bridges would be benefited by
reason of it, that certain bridges might be shortened
309 by reason of having the water by-passed through the ditch; all of these facts together with the betterment or saving in maintenance on the roadbed were considered by the Board in determining and fixing the proportion of benefit as against the Great Northern Railroad; in like manner the engineer explained the amount of acreage of right of way of the Chicago, Rock Island & Pacific within the drainage area would be protected and benefitted the same as the adjacent farm lands; he pointed out that there was a certain length of its track that would be affected in having its maintenance cheapened by the drainage and that certain of its bridges

might be shortened and were protected by reason of this drainage ditch by-passing the portion of the water that would come down the river; those amounts were all taken into consideration and passed upon by the Board in determining the amount of benefit our judgment indicated the Chicago, Rock Island & Pacific received; the Chicago, Milwaukee & St. Paul Railway extends almost the full length of this ditch and adjacent to it; in some places the track is right along the ditch and in other places it runs pretty close to the ditch all the way; it might possibly be 80 rods away where the ditch crosses the river at Renner; he explained the amount that this railroad benefitted upon the same proportion that the farm lands adjacent thereto; that the embankments, tracks and roadbeds were benfitted in the same manner by being made more substantial and requiring less upkeep; that there was a certain number of bridges that could be shortened and a certain bridge might be abandoned by reason of by-passing this water; these matters were all taken into consideration by the Board in determining the amount of benefit that we fixed against the railroad for its proportion and the amount of benefit was figured out by Mr. Rettinghouse for us in the manner in which I have testified on the basis of maintenance
310 and upkeep; the Chicago, Minneapolis & Omaha Railway extends directly across the project in two places and Mr. Rettinghouse explained to us that its right of way would benefit the same as adjacent land and that its roadbed was benefitted by being more easily maintained; that there were a certain number of bridges over the Sioux River and adjacent thereto that were protected by the drainage; that a certain number of trestles might be shortened or abandoned and that by reason of these benefits the railroad company was actually benefitted a certain amount and it was in our judgment; we took all these matters into consideration and exercised our judgment in determining the amount to be fixed as against these various properties.

Mr. Rettinghouse, as our advisor, explained to us the number of miles or blocks of streets in the city of Sioux Falls that were within the drainage area and would be benefitted by being protected and drained by this drainage; also the benefits that would accrue to the two city parks and to the Sioux Falls water system and the elements of such benefit; the Board took all these elements into consideration in exercising its judgment and determining the amount of proportional benefits which it fixed against the city of Sioux Falls.

At the same time, Mr. Rettinghouse explained to the Board and the Board considered the elements of benefit which would

accrue to the Northern States Power Co. by reason of the drainage; we went through that very thoroughly; the facts that the dam was put in adjacent to the river near Schjodts, about three miles north of the city of Sioux Falls and that the controlling works in the nature of wiers were put in at Thompson's about ten miles north of the city were considered as elements of benefit to the Northern States Power Co. by reason of holding the water in the river and permitting to flow down and over its power plant; to by-pass the flood water or a portion thereof through the ditch and save the
311 retarding effect of permitting that flood water to pass over the dams of the power company and pile upon and retard the whole power produced at the power plant also was considered an element of benefit; all of these matters were taken into consideration by the Board in determining the amount of benefit that should be fixed against the Northern States Power Co. The construction of this drainage project, several river cut-off channels, were put in up the river north of Sioux Falls, and in determining the Northern States Power Co. benefit the Board took into consideration the effect and influence of these cut-offs in hastening the flow of the flood water down the stream and shortening the time of floodage upon the power plant. All of these matters were taken into consideration by the board in exercising its judgment of the amount that should be fixed, in the first instance as against the Northern States Power Company.

The work that the Board did upon this drainage project consisted of constructing the spillway, cleaning and widening and deepening the ditch between here and Renner, diking the ditch and putting in the dam at Schojdts and controlling works at the Thompson Bridge, and putting in these numerous river cut-offs.

The Court: Where is the Thompson Bridge?

A. Up where the ditch ends and turns into the river, and crosses the river and goes up on the other side.

The Court: How far is the Thompson Bridge from Sioux Falls?

A. About 12 or 14 miles.

The Court: How far is Renner from Sioux Falls?

A. 8 miles.

Q. Do you know the approximate present width of the ditch as it extends from Sioux Falls to Renner, or
312 thereabouts?

A. No, I don't. That would be a mere guess.
Q. Isn't it in the neighborhood of 80 to 100 feet?
A. It probably is as far North as Renner.

Where we diked the ditch had taken the channel of the creek; there hadn't been dirt enough taken out to make a dike and when the floods came it backed up on the farm lands to the west of it; we diked there probably five or six feet high; and protecting those farm lands from overflow from the ditch after that; the dam at Schojdts covered the break in the bank of the river about 150 feet wide and had the effect of keeping the water from the river from flowing in the bayou that is tapped by the ditch.

After the attempted assessment made in 1919, some work was still to be done in cleaning a portion of the ditch from Renner to the railroad tracks; settlement for this work had not been fully made.

Q. And this dam at Schjodt's that has finally been made to stand was not in at that time?
A. No, it was not.
Q. And some repair work has been done on the spillway since that time, has it not?
A. Yes, the control work at the bridge at Thompson's was put in since that time, but at the initial point of the ditch we haven't made any change.

Exhibit "1" is a copy of a map of the territory affected by drainage ditch No. 1 and 2 submitted by Mr. Rettinghouse to the Board as a part of his report.

We had a map similar to this upon which the percentages were marked before us when we made the inspection of the drainage area before making the apportionment of benefits, on June 10th last.

Exhibit "I" offered in evidence by defendants and received in evidence.

313 Q. Mr. Risty, in applying and using this unit as explained by Mr. Rettinghouse to you, and as followed by the Board in fixing these apportionments of benefits of the various properties affected, you stated that you determined what the actual benefit to the unit selected was, and that its value was twenty-five dollars? A. Yes sir.
Q. Did you use that value of twenty-five dollars as the actual benefit to the unit in determining the apportionment of benefits which each of the various classes of lands aside from farm land should be assessed in this drainage proceedings?

A. We did. This was in regard to farm lands.

Q. And your engineer figured out the total benefit to each of these various pieces of property and divided that benefit by twenty-five, the value of the unit, to determine the number of units to be fixed against these various pieces of property?

A. Yes, that is the way we determined the number of units.

Q. That applies generally to all of the plaintiffs in these actions? A. Yes sir.

Q. Your understanding is that in determining the amount of the assessment upon this basis, that the total number of units are added together to determine the number of units, and the total cost of the ditch is computed and the total cost is divided by the number of units to get the actual assessed valuation of a unit? A. Yes sir.

F. W. WARD recalled on behalf of plaintiffs testified as follows:

The plaintiff's Exhibits "B" and "C" are part of the files and records of my office.

Exhibit "B" was offered in evidence by plaintiff and received in evidence. It is the resolution of the County
314 Commissioners of Minnehaha County fixing the proportion of benefits on drainage ditch No. 1 and 2, dated June 10th, 1921; it is not printed here because it describes the same property, names and same persons, and fixes the same units as are described, named and fixed in Exhibit "C" printed as a part of the bill of complaint herein.

Exhibit "C" was offered in evidence by plaintiff and received in evidence. It is the same as Exhibit "C" printed herein as a part of the bill of complaint and for that reason is not reprinted here.

H. E. BARLOW, called and sworn on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am civil engineer of the Chicago, St. Paul, Minneapolis & Omaha Railway; the Sioux Falls-Mitchell branch of the Omaha enters the City of Sioux Falls from the west, crossing the big Sioux River and the bottoms approximately three miles west of the city. The line then swings somewhat to the south and enters the city on the southeastern corner again

crossing the Big Sioux River and through the station grounds runs approximately north and south; the spillway is a couple of miles north of the line of the Omaha; in the west portion of the City of Sioux Falls there is a spur track known as the west side spur, which branches off from the main line a short distance west of the westerly course of the Big Sioux River, and runs approximately north and south for a distance of about a mile; the Omaha railroad has no agricultural lands in the City of Sioux Falls other than its right of way and depot grounds or in the drainage district involved in this controversy; all of its property consists of its railroad right-of-way, station grounds and appurtenances and is used exclusively for railroad purposes.

315 I know Mr. Rettinghouse, the engineer of the County Commissioners in this drainage ditch matter; I called upon him at his office in Sioux Falls and had an extended conversation with him during which he very kindly outlined the method by which he had arrived at the amount of benefits; this conversation was in February or March last; the information was given me by Mr. Rettinghouse but not in confidence; the method he used in arriving at the total benefits deals primarily with the question of bridges; at the point where the Omaha crosses the bottoms west of town, we have in addition to a hundred foot steel span over the main channel, an approach bridge approximately 233 feet long, and two other bridges east of the main river bridge, one 126 ft. and one somewhat shorter; in addition to these bridges we have a small one span pile bridge considerably west of these bridges which takes care of local drainage only and is not concerned in this question; Mr. Rettinghouse has figured that by reason of the diversion of a certain amount of flood waters of the Big Sioux River by means of the spillway constructed by the County authorities, the Omaha Railway would be justified in filling in certain of these approaches, particularly our bridges known as 129 and 130, aggregating 239 feet in length; those are the bridges a mile east of the main bridge over the river west of town about three miles out; he has figured that it would cost to rebuild these bridges about $25 a foot or $5975; he has assumed that it will be necessary to rebuild these wooden structures about once in ten years; he has therefore figured that the average annual expenditure would be one-tenth of $5975; he has capitalized this amount at 7% arriving at $8536; then he has deducted the cost of filling these bridges and the riprap necessary to protect the dam; he has used this at $2000, which deducted from the $8536

makes a net of $6536 benefit on account of filling bridges
316 129 and 130; in a similar manner he has figured that we could fill the approaches to the two steel spans we have here in town, where the amount of pile bridging is 166 ft. going through the same proposition and capitalizing the annual expenditures and deducting the cost of filling he has arrived at $2930; these bridges which we have here in town are what are known as through bridges; the supports are above the track, and Mr. Rettinghouse has figured that if the Omaha Company thought it desirable it might rebuild those bridges and substitute the deck built character construction which is a cheaper type construction, and by using shorter girders and necessitating two additional piers, this type of construction could be used, and he has planned that to reproduce these bridges as through structures would cost $45,500 and with the deck plate girder type would cost $25,500, making a difference of $20,000; then there is one other item which relates to the maintenance of the roadbed of the mile and ¾ length of track we have west of town in the district; this track has an embankment varying from 3 to 4 ft. to 10 or 12 ft; he has figured that on account of the diversion of a part of the flood waters, the embankment would be less, consequently the amount of labor that would have to be expended in keeping up the track would be less by an amount equal to $100 per year; he has capitalized this $100 at 7% arriving at $1400; in summarizing all of these items he arrived at the total benefit of $30,866; now the assessment of the Omaha is fixed at 839.45 units; if 1 unit is approximately $9.50, the total assessment would be $7975; the total amount of benefit divided by the total number of units would make an average value of about $36 for the unit; he has assessed us at approximately 25.8% of the total benefits; figuring the one unit as $9.50.

The situation at the west crossing is that we cross the valley approximately at right angles; the valley is quite wide
317 at this point; the track is on an embankment and has these 4 openings; three of them are at a distance of about ¼ of a mile; the land north of the track on the upstream side is cultivated to a considerable extent, not in the immediate vicinity of the bridges, but a short distance each way from the river the land is cultivated; in a time of normal high water this land is flooded and on account of the likelihood of holding this water an unnecessary length of time on this bottom land if we don't have considerable opening there through our embankment and taking into consideration the danger to the roadbed that might result if we closed

the opening, it is my opinion that we would be unjustified in reducing the size of our openings or the length of them; in my opinion there are absolutely no benefits resulting to those bridges west of the city or to the railroad west of this city by virtue of this drainage ditch construction.

Referring to the bridge west of the depot in the City of Sioux Falls and taking up the question of the substitution of the belt girders for the trestles; the fact of the matter was that the Omaha Company has no intention of making any changes in these bridges; the bridges are amply strong for the locomotives we are now running or which we anticipate we will run in the future; there is absolutely no reason for disturbing the bridges at all; furthermore, if we should decide ever to substitute the plate girders we could do so and still have the light iron at about the high water of 1881.

There is one other point that has not been covered and that is in regard to filling the pile approaches; there are short approaches at each end; the west approach is 62 or 63 feet; and the east approach is 103 ft; we have felt that we could fill both of these approaches whenever we got around to it and could at any time; as a matter of fact it would involve considerable expense and we have felt it would
318 be better economy to maintain that type of approach; as to the filling of those approaches the drainage ditch construction has no effect one way or the other.

I have figured up the acreage the right-of-way of the Omaha Railroad in the drainage district amounts to; we have 22 acres on the main line, 21.2 of which is on the west bottom and 5.89 acres on the west side spur previously described; these figures, include .8 of an acre in the vicinity of the bridge out here in the city and includes all the right-of-way within the drainage district sought to be assessed.

319 (Cross-Examination)

I have been in the business of civil engineering something over 22 years and have occupied my present position since the first of March 1920; it is a fact that water in flood seasons permitted to stand along side of the embankment which supports the tracks of the railway has a tendency to weaken that embankment and it necessarily requires a greater outlay of money to keep the bank in solid form; as a general proposition the more water standing there the more effect it has.

Q. Do you know when these bridges were built west of town?

A. I think our records disclose that they were built about 1880 or 1879, along in there.

Q. Then these extra full bridges were built at a time when all water was coming down the river?

A. Yes sir; the engineer building the bridges would naturally have in view that they would take care of all the water that came down the river; if the evidence should disclose in this case that from 1/3 to ½ of the water that comes down the river was diverted and does not pass under this bridge, it would not be the reasonable conclusion that at least part of the bridge could be done away with; I don't know how much water stood out there last year north of those bridges on the uphill side of those embankments; I don't know how much water there was the year before or the year before that.

Q. You do not know any of the data, but you are willing to swear you got no benefit, notwithstanding the fact
320 that you do not know how much water stood there?

A. Yes, I am willing to say that.

I think it had no effect whatever; if only ½ of the water came down the river last year that previously went under the bridges there would have been no benefit to our embankment in the solidity of the same and in the cost of the maintenance of it; it would make no difference how much water comes down the river unless it should go over the track and begin to wash the bottom out; I stated as a general proposition that when the embankment stood in water it had a tendency to weaken it and make a higher cost of maintenance; this fact is not true at this place and our embankment would stand all amounts of water; there is a peculiar reason why it should.

It is not a fact that we cannot run over that bridge the same class or weight of engines that bring our trains from St. Paul and Minneapolis to Sioux Falls; that bridge would not have to be changed if we wanted to run the same class or weight of engines to Mitchell; my company has not put in any different trestles since this spillway has been constructed; I have been in Sioux Falls several times; I think I was here in 1919; I think I was here in 1917 or 1918, and went over the ditch matter at that time; our former chief engineer had at one time under consideration the question of the shortening of the bridge just east of here; my understanding is that the spillway is designed for 2000 second feet and could take an overload of 500 more, making a total of 2500.

321 (Redirect Examination)

The special reasons why water standing by this railroad embankment did not affect it is that this particular em-

bankment is very wide and deep and very heavily overgrown with vegetation and sod; in the vicinity of the river course where any washing has ever taken place are thoroughly protected by rip-rap; for this reason I believe that water standing along this particular embankment would have no effect on it in so far as the labor that would have to be expended in maintaining the track is concerned; that is the answer that I would make to the claim of benefits made by Mr. Rettinghouse in regard to saving $100 a year maintenance; my understanding is there has been no decrease in the force employed on the section since the construction of the spillway in 1918 and that would be the determining factor as to saving in maintenance account.

The reason why trains the same as come from St. Paul to Sioux Falls cannot be run to Mitchell is that we have other bridges between here and Mitchell which would not permit of the running of heavier locomotives; the bridge in Sioux Falls is restricted in our time card; we do not permit our heavier engines to go over it at the present time; as a matter of fact there is no reason why the heavy engines that operate down here cannot go over this particular bridge although it is restricted in our time card; there is no reason why the heavier engines should run any further than Sioux Falls if they cannot go clear through to Mitchell; Mr. Rettinghouse the engineer of the drainage district, was the former chief engineer of the Omaha road who had under consideration the question of changing the bridge at Sioux Falls.

C. GEELAND, called and sworn on behalf of the plaintiffs, testified as follows:

322 (Direct Examination)

I am road master of the Chicago, St. Paul, Minneapolis & Omaha Railway from Worthington to Mitchell and from Luverne to Doone, and I have been since August 15, 1905; prior to becoming roadmaster, I was section foreman and extra gang foreman; I was section foreman at Montrose; I started working for the Omaha in April, '80, and was employed by that road during 1881; I remember the flood waters of 1881; I was in Sioux Falls when the water was the highest; I am familiar with that portion of the Omaha Railroad in the City of Sioux Falls and west of the City comprised in the area sought to be assessed for the construction of drainage in this drainage district No. 1 and 2, and have been familiar with it since 1908; there is very little noticeable difference in the

water conditions along that line of the Omaha railroad subsequent to the construction of the new spillway in 1918; I realize that more water has come down and stood on the bottoms, but it spread out such a wide territory across the bottoms that it didn't raise it very much; I wouldn't say that there has been more water on the bottoms west of the city and north of the Omaha Railway track since the construction of the spillway than there was before, but to my knowledge there is fully as much; I have seen the water conditions each year beginning with 1918 and have visited that part of the line and know how much water there was; the water that has collected in the field north of the track does not seem to have had any bad effect, that is, it doesn't seem to make any more particular work across that bottom; I can't say it has a bad effect one way or the other either before or after the construction of the spillway; the construction of the spillway and other works in Drainage Ditch No. 1 and 2 has made no apparent difference
323 one way or the other as to the flood waters of the river and as to the line of railroad of the Omaha west of the city and east of the river; I can't say that there is any particular noticeable difference in regard to the water conditions at the bridge in the city of Sioux Falls before and after the construction of the new spillway; I am familiar with the course of the river through the City of Sioux Falls and have seen it each year since I have been roadmaster; so far as effects the maintenance and operation of the railroad, the difference is very little; in fact as far as the operation of the railroad is concerned, it doesn't affect the river being a little high or low west of the depot; it never has had any effect before or after the construction of the spillway with the exception of one year, that was 1881; that was the year there was an ice gorge formed in the southeastern part of the city; that gorge held the water back and when the ice gorge broke there was a flood which flooded the track about the location of the present station; the Omaha has never been troubled with water at its station or at its bridge west of the station since 1881.

(Cross-Examination)

I have been familiar with this particular part of the river between here and Montrose since 1880; in my travels back and forth over this road from year to year I have never set any permanent structure to indicate the course of the water at any particular year; when I say that the water is the same now as 5 or 10 years ago, that is the best of my judgment; in 1881 it washed out the whole line; in 1907 the waves had cut down

into the bank and there was some riprap put there for fear it might wash; the water caused us additional expense and maintenance that year; if the water should pile up in the same way as it did in 1907, it would not be necessary to put riprap in again.

324 Q. You say the [heighth] of this water has been practically the same every spring? Were you advised of the fact that from one-third to one-half of the water coming down the valley had been diverted from your railroad?

A. Yes sir.

Q. Still the [heighth] of the water remains about the same each spring as to your railroad track?

A. Not the same every spring.

The [heighth] of the water as to the railroad track varies with each season but is relatively the same; if there should be an increase of 30% to 50% of the amount of water coming down the Sioux River the effect upon the track would be very little, if any; it would not require any more riprap and would stand up just as well as it does now; we would not need any greater flood bridges than we have now; we did need them in 1881 but it was then fixed out there to take care of the flood water we have kept the same amount of lineal feet of flood bridges since 1881 to take care of the flood waters even since the spillway has been put in.

(Redirect Examination)

The riprap which was put in in 1907 was put in on the west spur which is possibly 400 ft. west of the main channel; it was on that branch or spur which runs north of the main line and the water has never since made any trouble; no other riprap has been put in.

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325 B. A. WAITE, called as a witness on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am B. A. Waite of Des Moines, Iowa; am assistant Engineer of the Chicago, Rock Island and Pacific Railway. I have been Assistant Engineer of the Dakota division coming into Sioux Falls frequently. I became connected with the line that runs into Sioux Falls in 1907; from then down to the present time I have been on this division, five or six years, and while I was working in Chicago and in Davenport I worked on this territory part of the time. Am a Civil Engi-

neer, practicing that profession since 1892. Am familiar with the right of way and the bridges and railroad tracks of the Rock Island Railroad within this drainage district. I have here a map showing the property owned by the Chicago, Rock Island & Pacific Railway within the City limits of Sioux Falls, marked Rock Island Exhibit "1". That is a correct blue print representing the right of way, the property owned by the Rock Island Railroad within the City limits of the City of Sioux Falls. The red pencil mark outlines the property owned by the Rock Island Railway.

Rock Island Exhibit "1" is offered in evidence by the plaintiffs and received.

I have computed the number of acres of property owned by the Rock Island Railroad within Drainage Districts No. 1 and 2, and as far as I can tell it is about thirty acres (30) or a little less. There are two bridges on the Rock Island across the Big Sioux River, one two miles east of town and one just north of the depot. The Rock Island comes into Sioux Falls from the southeast, crossing the river the first time two miles southeast of the City. It then comes up the west side of the river into Sioux Falls. It then crosses the river again within the City limits at the foot of 9th Street; that is a spur
326 known as the Bismark spur. The trains do not cross this bridge. The Rock Island station is on the west side of the river on 10th Street. The Rock Island Railway Company has no property within this Drainage District that is used for agriculture and none of it has even been so used. All of its property is used for railroad purposes, location of side tracks, industrial tracks, station grounds, roundhouse grounds and right of way of the main line. The Rock Island has no more property within the City of Sioux Falls or within this drainage area than is necessary for railroad purposes. The first half mile of the track from the east bridge toward the City is about eight feet above the average water of the Big Sioux River and is practically level with the adjoining ground near all the rest of the distance, and inside of the City limits it is above the level of the river about fifteen to twenty feet. That is true throughout the course of the line, except at the east end over the bottom where it is about eight feet above the river. Neither the track nor the embankment of the Rock Island has ever been reached by high water within my knowledge, and neither the track nor the right of way has ever been affected by high water from the Big Sioux River since I have known it. I have here a blue print of a cross sec-

tion of the bridge about two miles southeast of town marked Rock Island Exhibit "2". I have checked the measurements over at this time and it is correct. There is in the center of this bridge a true span made of steel and then it has piled approaches. The approach on the east end is ninety-seven feet (97) and on the west end one hundred ninety feet (190), making a total bridge, including approaches, of four hundred nineteen feet (419). From the top of the tie to the bottom of the river is twenty feet.

Rock Island Exhibit "2" is offered in evidence and received.

327 I also have a cross section of the Bridge at 9th Street inside the City of Sioux Falls marked Rock Island Exhibit "3". This shows the construction of the bridge, with the exception of the pile portion, which has been re-built since that plat was made. The plat was made in 1913 and part of the piling on the east end has been filled in since then. It was filled in gradually, took several years from 1913 to 1915 and the land on either side of the bridge was filled in as we filled in the approach. The shore line has been filled out on either side of the approach so the approach was of no use there.

The exhibit is offered and received in evidence.

In regard to the bridge southeast of town, we have never had any trouble with that bridge from high water to my knowledge, either before or after the building of the spillway. As an engineer I would not dare to fill in any of the bridge or any of the approaches at the present time, because at the present the waterway is no more than would be required according to our way of figuring the waterway required. We figure the drainage area on Dunn's tables and a certain proportion of that is the waterway required according to the area drained, and under such computation we have no more waterway under this bridge than is required for the area drained. The approaches to this bridge have not been in any way affected by the building of the spillway and the spillway has had had no effect upon the bridge that I know of.

In regard to the bridge in the city at 9th Street, I understand it is proposed by Mr. Rittenhouse to eliminate one section of that bridge, that is the south or east one hundred ten feet (110) steel span truss. The bridge now is three hundred seven (307) feet long. If that span was taken out the bridge would be one hundred ninety-seven (197) feet long. I

328 would not dare to cut that bridge down to one hundred ninety-seven feet. The bridge as it is now is about the same length as the other railroad bridges on this stream. I believe that they have two one hundred foot (100) spans, and if we eliminate one hundred ten (110) feet this bridge would be shorter than the other bridges. This bridge on 9th Street was raised by the Rock Island before I came here. This span that is contemplated to be eliminated by the drainage engineer is filled in about half way. There is no water under it at the present time, the current is under the other end of the bridge. This was caused by the building out of approaches and driveways, pushing out the shore line. The spillway has nothing to do with the filling of this river on either side. It has been caused by the buildings being extended towards the river. There is at the present time a garage known as the Homan Garage directly west of this span in the bridge and extending out at least half of the length of the approach, so that a line from the warehouse on the east side of the bridge to the corner of the garage would strike the middle of this span. I would not consider that it was reasonable engineering to eliminate any of this bridge. Since I have known this property the water of the Big Sioux River has never been over any of the track in any place, and I have known it since 1907.

(Cross-Examination).

It is twenty feet (20) from the rails on the bridge two miles south of town to the bottom of the river. This bridge was built in 1886. Either this bridge or replacements of it. Since 1907 it has been in the same condition. I have never compared this with the Great Northern Bridge down the river. I have never observed this bridge at extreme high water. From the area of the waterway required I would say that none of the approaches to this bridge could be filled in. I asked Mr. Kittenhouse in regard to the waters shed in this drain-
329 age area, and I think he said it was 4500 square miles. This was the whole watershed. I do not know the slope of the land from north to south per mile. I do not know the velocity of the water, but from our rules we could not reduce the length of the bridge. The steel span in the center is 127 feet with pile approaches. These piles are treated and should last 20 to 30 years. We do not know just how long creosote piling will last.

I said that one of the approaches to the bridge within the City had been filled in gradually along about 1914. It has not caused us any trouble since then. Where the filling is there was formerly a trestlework. Under the present condition of

the river since 1914 it has not been necessary to have as much approach to the bridge as when it was constructed. The shore line that I spoke about from the Homan Garage to the warehouse, that is in a bend in the river. I do not know the difference in elevation of the two bridges and I do not know the velocity of the water at either one of them.

Q. And still upon this information that you don't seem to possess as to the fundamentals as to how much water this river carries, the slope of the land, or the difference in the [heighth] of the land, you still wish to be understood that it would not be safe, in your judgment, to shorten these bridges?

A. Yes sir.

I do not know what would be the effect on the bridge here in town if the amount of water flowing down the river should be increased thirty to fifty per cent. I think the one east of town would be all right, but I am not sure about the one here in town. The high water has never reached our embankment that I know of. I do not believe that the water has ever crossed our right of way. I do not remember of it. I have not been here very often for the last year, once be-
330 fore in the last six months, but have been here before. My headquarters are at Des Moines. I have been here at high water periods. I could not tell you just what year, but I have been connected with this end of the railroad intermittently. I could not remember the year that they had high water when I was here.

(Redirect Examination.)

In regard to the filling in of the piling on the bridge in the City known as the Bismark Spur, the land adjacent had been built out to the end of the piling so there was nothing but dead water that stood under it. The water could not flow under the piling on account of the land having been filled in on each side.

C. E. DEAN Called as Witness on Behalf of the Plaintiffs Testified as Follows:

(Direct Examination.)

I live in St. Paul and am a bridge foreman on the Chicago, Rock Island & Pacific. I am a bridge foreman upon the division running into Sioux Falls. I began work here in the fall of 1893 and left this division in 1913, so that from 1893 down to 1913 I have known this railroad running into the City of Sioux Falls, with the exception of the years 1905, and 1906,

when I was with another railway. From 1893 to 1897 I was a bridgeman. From 1897 to 1905 I was bridge foreman, and from 1907 to 1912 I was master carpenter on this division. I was familiar with the two bridges on the Rock Island within this drainage district at the time I was here and down to 1913. I remember when the bridge across the Big Sioux at the foot of 9th Street in the City of Sioux Falls was raised. It was raised about four feet on the two spans, but the old approaches were left alone. That was just before or about the time of the breakup of the ice in the spring. We contemplated a flood. The report came that there was an ice gorge
331 up the river, we expected it to break loose and have heavy water. It had been a hard winter and the ice was heavy, but it did not materialize. We had no trouble from it. The bridge was lowered a little after that, but not put back where it was originally. I think the permanent raise was about two and one-half feet and the ends dropped down to their original position. During the time that I was on the division we never had any trouble with the bridge southeast of town. I was here in 1907 when the spillway was put in, was master carpenter. I never have noticed any perceptible change in the condition of the water flowing under these two bridges before or after the building of the spillway. I have no record of high water marks myself. The building of the drainage ditch and the spillway has never benefitted these bridges in any way that I know of. From an engineering standpoint I cannot say but from a practical standpoint I would not fill in either of these bridges at the present time. I base my opinion upon the fact that the engineers as a rule do not give enough waterway. I have taken many an opening —for instance—four foot opening I put in once on the engineer's orders and afterwards had to be a seventy foot opening. During the time that I have known the Rock Island property within the City of Sioux Falls the railroad track has never been under water. The water has never been up on the embankments at any place to my knowledge.

(Cross-Examination.)

I was here in the high water of 1911. There was no damage that I know of. I have not been here at any other time of high water except in 1897. I have never made any definite measurements of the water in the river. I do not know the amount of watershed that the river and the ditch drain, I do not know the elevation of the land from our right of way north and I do not know how fast the water flows. I do not know the amount of water that comes down the river, or that

comes down the drainage ditch. If the water was in-
332 creased fifty per cent I do not believe the bridges would stand it. The present bridges represent the same length of span that was here in 1893. Only the spans have all been renewed. There have been piers put in. The piles we are using now are creosoted piles. Piles not creosoted last about ten or twelve years, and this is true of hard wood culverts.

S. O. PERKINS, called as a witness on behalf of the plaintiffs Testified as Follows:

(Direct Examination.)

I am an inspector on the Rock Island Railroad. I have been connected with the bridge and building department as bridge foreman and master carpenter. I was master carpenter on the division running into Sioux Falls from January 1, 1913, to June 1, 1920. During that time I was familiar with the two bridges on the Rock Island in the City of Sioux Falls. During that time there never was any high water that damaged or threatened to damage these two bridges in any way. The water has never been upon the embankment of the right of way of the Rock Island at any time to my knowledge. I have worked upon these bridges more or less. As a bridge man I would not think it safe or advisable as a railroading proposition to fill in any part of these two bridges. From my experience I have been obliged to put in several larger openings at different points where we have had similar openings. We have had to increase the length of the openings on account of high water, and I would not think it safe to close up any of these openings.

333 (Cross-Examination)

I do not know the number of acres of watershed drained by this ditch or by the Big Sioux River or the elevation of the land or the excessive or average rainfall for a year in this drainage district, and I do not know the capacity of the spillway to take care of the water from the ditch, but I want the court to understand that these spans could not be safely shortened. That is based upon the fact that several times I have had to make openings larger and that is the foundation of my testimony.

A. F. PILCHER Called as a Witness on Behalf of the Plaintiffs testified as follows:

(Direct Examination).

I am general agent of the Rock Island Railroad at Sioux Falls. Have been here since June, 1890. I was the agent of the Rock Island until 1914 and since then the general agent. I have been familiar with the property of the Rock Island within this drainage district for thirty-one years. The Rock Island has no property within this drainage district that has ever been used for agriculture and none of it is used for agriculture at the present time. It is all used for railroad purposes, roundhouses, stations and railway tracks. It has no land that is not necessary for railroad purposes at the present time. The right of way and the rails upon the track in the city are about 20 feet above the water in the Big Sioux River at ordinary times. Two miles south of town, at what is known as the Cherry Creek bridge, they are about eight feet above the water. The right of way has never had any water standing on it in the Big Sioux River since I have known it, that is since 1890. None of the roadbed of the railway has ever been washed by the Sioux River. There has never been any difficulty with the bridge southeast of town in handling floods. In regard to the bridge at the foot of 9th Street in the City, in 1897 there were rumors that an ice gorge had formed and as a precautionary measure we raised this bridge at the foot of 9th Street but we found out it was not necessary. The high water did not develop. The Big Sioux River has never been out of its banks here in the City of Sioux Falls since 1890.

(Cross-Examination).

I live in Sioux Falls and worked for the Rock Island Railroad Company in 1916, 1917 and 1918 and at that time knew about this new ditch going in. I saw the publications in the newspapers. I knew it was being constructed. I went over to the spillway and saw it in the course of construction. I know of no reason why the land of the Chicago, Rock
334 Island & Pacific Railway Company could not be used for agricultural purposes if not covered with the railroad tracks. It has agricultural land as a basis.

C. M. BASSETT called and sworn on behalf of the plaintiff testified as follows:

335 (Direct Examination)

My name is C. M. Bassett; I live in Sioux City; I have been a civil engineer 24 years; I am assistant engineer of the

Great Northern Railway Company; I have been in its engineering department 9 years; at the present time I have jurisdiction of the entire Sioux City Division, including all of Minnehaha County, South Dakota; I have been in charge of that Division since the spring of 1916; during that period of time I have made frequent trips to Sioux Falls, and over the lines throughout Minnehaha County; for two years 1916-17 I was in Sioux Falls practically all the time; since then I have been here practically every week. I am familiar with what is known as drainage ditch Number 1 and 2, and the spillway; I am also assistant engineer of the Watertown and Sioux Falls Railroad Company; its line is located along the ditch for about 3½ miles; every spring I have been to the spillway; then I have been over the entire line of the ditch and looked at the various head-works and retaining dams; the line of the Great Northern enters the city of Sioux Falls from a northeasterly direction at a point about a mile and a half from the mouth of the spillway; that is the nearest point on the line of the Great Northern to the mouth of the spillway; the course of the line of the Great Northern as it goes through the city of Sioux Falls and around south of the City and down through Section 31 is as follows: We enter in a northeasterly direction and then through town we go practically north and south and then we swing southeasterly towards Yankton; Exhibit 1 is a plat I prepared or caused to be prepared, showing the location of the line of the Great Northern over the area referred to and the general location of a portion of drainage ditch Number 1 and 2 and the location of the bridges along the line of the Great Northern within the area referred to; the plan is drawn to scale, 1 mile to the inch.

Plaintiff offered and there was received in evidence, Great Northern Exhibit 1. It is as follows:

337 The acreage of the right of way and station grounds of the Great Northern Railway within the area in question, Sections 16, -27 and 31, Township 101, Range 49, is 27.14; the acreage of the station grounds included in that is 6.09; tract 11 consisting of approximately one and one half acres is not included within the 27 and a fraction acres; tract 11 lies at the north end of our bridge 146 and on the west side of the main line; it is between the Omaha and Great Northern rights of way and the Milwaukee is on the north; it is just south of Tenth Street; it would be on the Eleventh Street if it were extended out; it is an irregular tract; it was originally purchased for station grounds and is part of the station grounds of the Great Northern; it is bounded on the east by our grade; on the north, the Great Northern and Milwaukee connection; on the west the Omaha grade and on the south the river; the tracts of the various railway companies bounding it I would say are about ten feet above the natural surface of the ground; tract 11 has never been used for agricultural purposes; I would not consider it agricultural land; it is not accessible; it is bounded by the river and three railroad rights of way on there is no road into it; no one could get into it to farm it; it is not feasible for that purpose. I am familiar in a general way with the channel and banks of the Big Sioux River from a point near our bridge in the city of Sioux Falls; the North bridge down to and through Section 31; to the south of town the banks of the river are well defined; there is a deep channel there and the river is confined to that channel, through town there is a greater chance; the channel is wider and the banks are 338 not so steep; as you go further north the channel again deepens and it is confined, the valley is narrowed considerably south of town; I am acquainted with Mr. Rettinghouse; I had a conversation with him in reference to the manner or basis upon which he based his opinion and report to the Board of County Commissioners with reference to the alleged benefit to the right of way, bridges, tracks and embankments of the Great Northern Railway from Drainage ditch No. 1 and 2 and the spillway in question; the first conversation with him was in early spring of this year; the last one was about ten days ago, I think it was last week; during the first conversation Mr. Rettinghouse stated that he had figured we could shorten our bridge and had figured out the cost of renewing those and the cost of filling and made deductions and based his figure on that amount capitalized at

seven per cent, and divided by twenty-five per cent, was what our assessment came to—the number of units.

"Q. In your conversation approximately ten days ago, did he go more into detail with reference to the subject?

A. Yes sir.

Q. State the substance of that conversation.

Objected to as not binding upon the defendant commissioners.

Overruled.

A. We have two bridges within the area, and he stated bridge 150-7 that that bridge was about the right size, and bridge 146-0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures, and figured on the amount saved by the shortening of the bridge.

339 Counsel.

At this time, if the Court please, the defendants object and ask that the question be stricken, and objects to the testimony of this witness on behalf of the plaintiff company, and to the proposition of whether or not the plaintiffs are benefitted or not, or the extent thereof, by the drainage project, for the reason the same is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction in the said matter in these proceedings, and proceeded with the construction and repair of the ditch in question. For the further reason that this Court has no original jurisdiction of a bill in equity to reject or control proceedings of the Board of County Commissioners of Minnehaha County in the construction or reconstruction and repair of this ditch. And that the plaintiffs have a plain adequate and complete remedy at law, by appeal from the equalization arising from the proceedings taken by the Board of County Commissioners. For the further reason, it calls for evidence of a fact, the determination of which is in the exclusive jurisdiction of the Board of County Commissioners, and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action, and with no allegation or proof of fraud or arbitrary action on the part of

that tribunal. Is not within the issues of the case and not a proper subject of inquiry in these collateral proceedings, and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these proceedings attacking the question of whether or not they are or are not benefitted by the ditch proceedings?

340 The Court: Yes, the motion is denied. The testimony is received subject to objection.

Mr. Rettinghouse made no statement to me with reference to any other element of benefit to the Great Northern Railroad than the shortening of the north bridge within the city limits; basing my answer upon my knowledge of drainage ditch No. 1 and 2, the spillway, the location and construction of the tracks, bridges and embankments of the Great Northern Railroad Company, and my knowledge of the waters in the Big Sioux River; in my opinion no benefit result to such right of way tracks, bridges, embankments or station grounds from drainage ditch No. 1 and 2 including the spillway; no part of the right of way, tracks or bridges within the area in question to my knowledge have ever been flooded by the waters of the Big Sioux River; we have a plan drawn up for a new steel bridge at bridge 146 which provides for shortening of fifty feet of that bridge and putting in deck girders which are much lower and nearer the water; we considered that owing to the fact that we are lowering the steel we would have to provide practically the same opening we have there now; in planning to shorten the bridge fifty feet we did not take into consideration the existence of the drainage ditch; the present height of the track on this bridge above what I understand to be the high water mark of the Big Sioux River, according to our best record is eleven feet; if I were planning to construct new the bridges in question on the Great Northern, or to rebuild them, in determining the sizes of the openings from an engineering standpoint, I would not take into consideration the existence of drainage ditch No. 1 and 2, because my observation has been that before when the spillway went out in 1916, and the water conditions have been just the same; I consider there is great danger as the spillway is constructed now of its going out, and there is danger that they will have to close the ditch and turn the water back into the original channel; I would not take it into consideration even if the ditch and spillway were working at capacity; I don't think

it takes enough water out of the river to make any
341 material difference; I would plan new openings without considering the ditch and considering the highest possible water in the river; I would consider it bad engineering to plan otherwise.

I observed the flood waters that entered the ditch coming out of the ditch north of Sioux Falls and re-entering the Big Sioux River; on the Watertown and Sioux Falls we are flooded every year just south of the city pumping plant at the top of the hill; the water comes out of the ditch and goes over our track; it has every year I have been here; we have probably over six inches over the top of our track; the water stands in there, sometimes for probably ten days on the Watertown and Sioux Falls line.

The length of the north bridge is 615 feet; I do not think it would be good engineering or safe for us to shorten that bridge more than fifty feet under any conditions; as I have stated, for some period of time we have contemplated the construction of a new bridge and of a different type, and shortening it fifty feet; as constructed at present the bridges are supported by a truss above, and in contemplating the new construction we had in mind what we called a deck girder, and that support is below the rail which makes a difference; our plan will be to lower it five or six feet due to the use of deck type girders instead of the truss now used; in planning this new bridge we did not take into consideration the possible effect of the drainage ditch.

(Cross-Examination)

When we lower five or six feet, the girders I have mentioned which are in the nature of I beams probably five feet thick, will still be underneath the track; the elevation of the track would remain the same as the bridge work is all underneath the track; from my observation I say that during the last five years the water from the south bridge and north to the termination of our line in the city has remained
342 about the same; during this same time the water has been high enough up around the penitentiary where the Watertown track goes to flood its tracks some inches of water every year; the water that came over the Watertown & Sioux Falls came out of the ditch; I have been told and know approximately the amount of watershed in this drainage project; I couldn't say off hand how much it is; I haven't the figures with me; I do not know how much water really falls in the watershed when we have high water here; I know

generally the topography of the country north of Sioux Falls through which this water is collected and conveyed by the river and ditch south; I have been pretty well all over it; I do not know the number of cubic feet of water the river carries per second when it is banked full at flood time, nor the whole capacity of the ditch and spillway; I was up there when they were building the spillway in 1917 and have been watching it; I didn't like the construction; I saw them repairing the ditch on north and throwing up embankments on either side; I am still of the opinion that the spillway isn't what it should be; I have seen it every year since then; I know of no reason why if the tracks were not upon the right of way and station grounds, those premises could not be used for agricultural purposes, except our station grounds which are right on top of rock; Section 31 and 27 could be used; Tract 11 I don't think has any soil to amount to anything on it; the bridge south of town is 304 feet long and takes care of the water; the bridge in town is 615; since I have been on the division there has been no new bridge put in; these bridges have been constructed for some years and before the spillway project was put in; I judge that they were put in to take care of the water that came down the Sioux River at the time; the water has come out of the ditch every year since the spillway was put in; north of the city at level siding
343 the water has come out of the ditch over the tracks of the Watertown & Sioux Falls Company right at the city pumping plant; it comes through the dikes in the ditch.

(Redirect Examination).

Along the right of way south of town we have an embankment about 1800 feet long; bridge 150-7; it is about 16 feet deep; side slopes approximately one and one half to one, approximately fifteen feet high; the toe is protected in some places with rip rap, and it is now overgrown with grass and weeds; that embankment is so constructed as to withstand any possible flood condition in this neighborhood.

THOMAS SIMPSON, called and sworn on behalf of the plaintiff, testified as follows:

344 (Direct Examination)

My name is Thomas Simpson; I have lived in Sioux Falls twenty-seven years; I am general agent of the Great Northern Railway Company at Sioux Falls, and have been its agent for twenty-seven years; I am familiar with the line of the Great

Northern included within the area in question here in Section 16, 27 and 31; during such twenty-seven year period no part of the tracks, bridges or right of way of the Great Northern Railway within that area has been flooded; we have had no trouble during that period of time from high water; the station of the Great Northern is east of the river; I have lived on the west side of the river twenty-seven years; the depot has been located where it is now approximately fifteen years; during that time I have crossed the Big Sioux River several times a day and I have not observed any appreciable difference in the flow of the Big Sioux River before and after the construction of the spillway.

(Cross-Examination).

During the time referred to in my testimony the height of the river has fluctuated, but there has been no floods; the height during flood periods has been at about the same level; I do not know how much water the spillway takes care of or how much the river banks carry; I heard about it when they put in the spillway.

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345 ANDREW NELSON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination).

I am section foreman for the Chicago, Milwaukee & St. Paul Railway between Baltic and Renner. Renner is six miles and Baltic fourteen miles north of Sioux Falls. I have been section foreman there twenty-seven years and was foreman in 1916. There is a place on my section where the drainage ditch is just outside of the right of way. I think they diked it there four feet just outside of the right of way. From a point four miles south of Baltic the ditch is on the west side of the railway, and from that point down to Renner it runs close to the track. The Ditch runs between the railroad and the river and the ditch and the river are both on the west side of the track. In 1916 at a point four miles south of Baltic the dam went out of the river and the river let the water in the ditch. The ditch couldn't carry the water and it went over the bank and washed the dike out, and a few miles further south it washed the track and let all the water out over the farms around. It flooded the farms around there and washed back on the track. This water came from the ditch. The ditch is constructed with a dike and the water broke through that dike. Before the water came out of the ditch

there was no water east of the track. The water came into the ditch and went out of the ditch and washed all the track out and flooded the ground. The water in the ditch came from the river. I did not have any trouble with the water in 1919 and 1920. It came out of the ditch at several places, but not enough in those two years to hurt the track. In 1919 and 1920
346 the water came out and went up to the track and the ditch was full of water. It came to the bottom of the railroad track but didn't cut in much or wash. At the time the water came through and flowed up to the top of the bridge there was no water east of the railroad track. There was no flood water between the ditch and the river until the water ran out of the ditch. It ran out of the ditch and filled up between the river and the ditch too. It went over the dike on the west side of the ditch. The origin of that water was the river. In 1916 the water remained on the [—] that were overflowed about ten days or two weeks. In 1919 and 1920 it stayed over two weeks. It stayed a little longer in 1920 than in 1916. The point at which the ditch protects the track is about a half mile south of the Thompson bridge. The ditch comes to the right of way at the Thompson bridge and runs nearly four miles down the track. The water comes in the ditch where that bridge is built. There has always been a bridge there. They built a cement bridge there a year ago. It is a highway bridge. At the point where I said it washed out we had to put in [riff raff]. We had to build a bridge there temporarily and afterwards we filled it with [riff raff] and it is [riff raff] now.

(Cross-Examination).

The water will wash the track out the way the bridge is put in there. The water in 1916 washed out part of the track but not at the place where the bridge is. That was the year the old spillway went out and there was high water that year. I have no idea of the amount of rain or water that was carried by the river or the ditch in 1916, 1919 or 1920. In 1897 the track was washed out south of Renner. In 1916 the water did not cover the abutting lands before it went through the track; then it covered all over the east side after it got through the track, but it did not cover half as much ground as it did in 1897; if the dikes were raised a foot or two they would keep more water in than they do now; our track was not injured in 1920.

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347 NELS OLESON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am section foreman for the Chicago, Milwaukee & St. Paul Railway Company. I started in 1887 as a laborer. The most of the time I have been employed as section foreman I worked in the yard five miles south of Sioux Falls. I have been continuously living here and working for the railroad company since. 1887 I have not noticed any injury to railroad property or to railroad property covered by waters from the Sioux River south of here during that time, and none in Sioux Falls. I do not know of any water doing any damage on J. L. Phillips' Addition and on the Millspaugh's Addition near the roundhouse, or east of the roundhouse, or north of the ice house. I do not know of any flood waters doing any damage to railroad property since I have been here. There are five tracks in the new yard in what they call Daniels' Addition and Millspaugh's Addition in the vicinity of the ice house east of the depot. I do not know of any damage being done there. There has been no interference with any of these tracks by the waters of the Sioux River since I have been here. There has never been any difficulty or damage on account of the flood waters at the roundhouse property.

(Cross-Examination).

The ice generally comes down in the spring and goes over on the east side and over the rocks there. There is a current through the east side of the channel of the river and it lifts the ice right around the roundhouse. The water comes close to the roundhouse but never does any harm. It does not come out to the banks by the ice house very much. I never saw water standing in the ditch alongside the track on the ice house side.

"Q. You don't know, Mr. Oleson, whether or not the amount of water that has been gathered into the Sioux
348 River and the ditch above Sioux Falls in the past five or ten years has increased or not, do you?

A. I couldn't tell you about that.

Q. And so if there is twice as much water coming down this valley as previously came down, you couldn't say that was true or not?

A. If the water raised five or ten feet I could tell.

Q. You don't know the actual amount of water?

A. No, I don't know nothing about that."

WILLIAM SHEA Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am general road master of the Chicago, Milwaukee & St. Paul Railway Company, and have been such about four years. Prior to that time I was district general road master and division road master. I have been in these divisions for the railroad since 1890. Prior to that time I was track laborer and section foreman and construction foreman. We have many miles of railroad built across river bottoms and creek bottoms where we have to maintain grades that will guaranty us that we can operate our railroad during high water. The Chicago, Milwaukee & St. Paul have many lines upon which heavy traffic is carried upon which they have tracks to maintain under such a situation. I have been over the line between here and Baltic and have noticed the material of which the grade is constructed. From what has been my experience and observation I would state that adjacent water standing alongside of and extending against the grades has no effect upon the maintenance of the grades or the stability of the track upon it, for the reason that we used our track embankment in many cases as the bulkhead to our reservoirs of water for engine supply. We do not hesitate to use our track bank for that purpose. We have many of them on our railroad and we do not notice that we have any bad results from it.

349 No additional expense of up-keep is occasioned by that situation on embankments twenty years old or over. We prepare our property for the purpose we are going to use it for by building up a track bank. In this particular instance, it would cost from $800 to $1,000 an acre for us to build up the track bank and make the line serviceable for our purpose, which in this case is about what that cost up there. I do not believe the farmers ever went to any expense worth mentioning in that community to prepare their properties that way. I didn't notice anything of the kind. The overflow upon this embankment or alongside the embankment would have no effect whatever upon the railroad bridge. If the flood remained two or three, or five days, upon the adjoining agricultural land I think it would ruin their crops.

350 (Cross-Examination)

It would cost $800 to $1,000 per acre to prepare our right of way for railroad purposes, and if the embankments would wash out it would cost something like that to replace it. It has not been our experience in washouts that the damage to the right of way of the railroad would be greater than it would be to the farm land. When the water goes over it gen-

erally breaks through the embankment and cuts out a short piece, or whatever is necessary to carry the overflow of water from one side of the track to the other. After the water would get over our track it would not take our entire roadbed out, just break through and make openings similar to the kind we have in other places known as arches. It would not necessarily take out our entire embankment. Yes, when this embankment is taken out and is washed away it does hold up our traffic and cuts off our income during that time just the same as the farmers. It costs about twenty-five dollars a cubic yard to put the dirt back in the washout.

I am familiar with this branch of the railroad running north and going through the drainage district. I pass over it and inspect it in different ways three or four times a year. We have had no washouts for the last four years, other than that the water got up on the track in 1919 and 1920. This [—] didn't come over the track but it got very close to it. We possibly delayed our traffic. I came over on this line in 1918.

WILLIAM E. WOODS Called and Sworn on Behalf of the Plaintiff Testified as Follows:

351 (Direct Examination)

I am assistant district engineer of the Chicago, Milwaukee & St. Paul Railway and have been in the employ of that company about thirty years in the engineering department. I am familiar with the lines of the Chicago, Milwaukee & St. Paul Railway described in the notice of assessment published in the Daily Argus Leader dated July 13, 1921. None of the land of the railway company is used for agricultural purposes. The width of the right of way is usually one hundred feet, being 50 feet on each side of the center line of the main track. We have a little piece of right of way in Sioux Falls 50 feet wide, being 25 feet on each side of center line. There is approximately 198 acres of right of way in the drainage district, none of which is agricultural land. I am acquainted with the lands described as Lots 13, 14 and 15, of Block 28 of Millspaugh's Addition to Sioux Falls. That property is near the ice house property south and east of the town. It is used for new yard tracks. The main line lies between the trackage of this yard and the river. These tracks are lower than the main tracks. The main track was built in 1879. It has never been disturbed by high water. It remains in the same position as when originally constructed. Block 9 of Daniel's Addition to Sioux Falls is just east of Millspaugh's Addition and

us used in the same manner. Lots 5, 6, 7, 8 and 9 in Block 25 of J. L. Phillips' Addition to Sioux Falls is used for roundhouse and ice tracks and turning table. This property is situated on the west bank of the Sioux River about 18 or 20 feet above the surface of the water.

352 (Cross-Examination)

The Chicago, Milwaukee & St. Paul Railway Company have 198 acres altogether in the drainage district. That includes what is known as the right of way of the north branch and also includes same going south. A very small portion of that 198 acres is taken up by the roundhouse grounds and the yard out near the ice house. The most of it is right of way. If there were no railroad through the most of it it could I presume be used for agricultural purposes.

A. G. HOLT, called and sworn on behalf of the plaintiff testified as follows:

(Direct Examination)

I am assistant chief engineer of the Chicago, Milwaukee & St. Paul Railway Company and have held that position about eight years. I am a civil engineer by profession and have been connected with the railroad company in a professional capacity about thirty years. I am familiar with and have made a study of the matter of locating lines of road. In turning the line of road from one point to another the character of the country generally determines or controls the location of the line. In locating a line of road through the Sioux Valley an engineer would necessarily have in mind as one of the elements the cost of construction. He would have in mind the height of embankment to be constructed and maintained on account of flood waters. That would be an important feature. In making a location it is a part of the duty of the locating engineer to find out the height of the flood waters of the various streams he crosses. The grade line is usually established with reference to the high water. The engineer gets as much information as he can in regard to the elevation that the high water reaches in the valley. He gets the information partially from the people who live there and partly from his observation of high water marks as they are shown on trees and washes in the sides of the valley. He then deter-

353 mines largely the height of the grade from past experience as indicated by the information he has received. In determining the openings and bridges the engineer makes what is called a ravine section. That is a chart showing the

elevation of the valley. Then on this chart he shows the elevation of the high water and from that he computes the size of the bridges and the openings, that will be required to carry that water. There are certain rules adopted by railway companies upon which these computations are made, and they are made as an engineering proposition. I have recently examined the territory put into the drainage district. In locating a new line of railroad through the Sioux Valley occupying the place where the Milwaukee railroad now has its track you would have to take into consideration the fact that the drainage ditch was there. You would have to provide a bridge to span it. In providing the openings in bridges and other provisions in the line for overflow of water I would not make any deductions on account of that ditch, because I would figure that at the time of the flood the entire valley would be covered with water and this ditch would be simply a wrinkle in the valley. When the flood waters were the highest they would cover the ditch up.

(Cross-Examination)

I do not know the amount of cubic feet of water the river carries per second. I do not know the cubic feet per second the ditch carries, yet I think the ditch is a wrinkle. In computing the spaces I have testified about which I would make for a bridge, I do not think the speed of the water in passing a given point would make any difference if you had a high water mark that was dependable. If subsequent to the time I had that high water mark something was done to increase the speed of the water in passing a certain point I would have to take that into consideration.

It is stipulated that the mileage of the Great Northern within the drainage district in question, to-wit: Sec-
354 tions 27, 16 and 31, is 3.04 miles.

It is stipulated that the mileage of the Rock Island Railroad within Minnehaha County is 4.3 miles and within the district sought to be assessed 3.5 miles.

THOMAS HARDIMON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination)

I have lived in the City of Sioux Falls since April, 1879. I am a member of the City Commission and am in charge of the roads, streets and highways of the City. I have been a City

Commissioner of the City of Sioux Falls for nine years last October. Since 1879 my occupation has been constructing and road work a great deal of the time. Some of the time I have done bridge work on railroads. I was in Sioux Falls in 1881 at the time of the big flood. There was an ice gorge out on the south side right over where the bridge runs on the Coats farm. When it came through the City it took all the bridges but one and swept up the mills and lumber yard on the east side. The only thing left on the east side was the Omaha railroad bridge. With the exception of that flood which was caused by the ice gorge there has never been any high water since I have been here that has done any damage to the property of the City. The Coats farm is about two miles southeast of here. I think the west line of the farm is in the neighborhood of Eleventh or Twelfth Avenue. It is probably eighteen miles from the spillway following the course of the river around. I am familiar with the topography of the channel of the river from Sherman Park down through the City. As you leave Sherman Park the most of the shore line is fairly level on one side. On the other side it is higher and goes up further from the river. For several miles there is a high plain on the right hand side as you go down the river. The banks on the left side are fairly high too in places.

355 From the time you leave Sherman Park until you get down below where the ice gorge formed in 1881 you have a very decided embankment on each side of the river. The river through the territory I have mentioned is much narrower than it is up above Sherman Park. The ice gorge at the Coats farm held all of the water that collected there, except what ran in the channel until the ice gave way. It gorged different places there. It kept creeping along there for probably two or three days before it came down here. The waters did not spread out on either bank of the river. There was no gorge close to the neighborhood where the Milwaukee roundhouse is now in 1881.

I was here when the Great Northern bridge was built that crosses the river about Seventh Avenue and worked on that bridge. During the past nine years my duties in regard to city property have been overseeing it and attending to it, and also attending to the bridges across the river through the City and matters of that kind. From the experience which I have had during a residence of over forty years here I should say the results would be very unsafe of narrowing the bridges and lowering them in case of extra high water. This would be on account of the volume of water, and in case of ice gorges

would leave it too narrow underneath. If a flood took one it would probably take all of them and form a gorge.

The east side of Sioux Falls is thickly built up with business places, wholesale places and residences, lumber yards, and institutions of that kind. The City pumping station and the City electric light station are situated half or three quarters of a mile north of First Street. The pumping station is south and west of the spillway. The electric light and water plant is south and west of the pumping station. The spillway runs to the north and east of our property. The water
356 plant and the electric light plant are a little north and west of the Penitentiary. I observed conditions of the water around the electric light and water stations during the years 1919 and 1920. I was up there on different occasions when there was any danger or any prospect of water. My official duties required me to be there and investigate those things from time to time. The water around the City electric light plant and pumping station was greater in 1920 than it was any year prior to that excepting 1881. I do not remember so much about it in 1919. We were up there quite a number of times in 1920. When we went in there the water was over the tracks of the two railroads there and there was also a flood down almost to Russell Street and from there down to Covell's Lake. The high water subsequent to 1881 has done no damage to speak of that I know to the City property in the City of Sioux Falls. The water went over Minnesota Avenue in 1920 but not enough to amount to anything. It took a few loads of cinders to patch it up. I never saw the water on the West Sioux Falls road, with the exception of 1881, any higher than it was in 1920. Each street there is two and one-half or three feet above natural ground. In 1920 it went up to just about where it could go over. Then the bridge there carried it down to Covell's Street bridge and it flowed away. Phillip's Park runs along the east bank of Covell's Lake and goes up very abruptly to the east, all except a little piece down at the First Street bridge. There is a little corner there that is a little low, but the balance of it runs up to the east and slopes quite sharply. It has some fruit trees and some other trees on it and has been terraced up in the shape of a park. It is quite broken and is not agricultural land and is not used for agricultural purposes.

357 Sherman Park is very low and all timber and is in where the river bends around considerable. The west side runs quite flat but the east side goes up very abruptly. No part of Sherman Park is agricultural land. Sherman Park

overflows pretty nearly every year. The bed of the stream forms a circle in the Park for probably three quarters of a mile. I do not know that the spillway and these ditches have ever been of any benefit to city property. It is pretty hard to state whether or not the spillway materially [effects] the flow of the water through the City, because when the water is high it overflows a lot which comes down in the spillway and almost directly east of the pumping station. Then it comes out through a little ravine and into Covell's Lake and finally into the river.

The City has a park known as Lien's Park near where the spillway empties into the river. It has practically put the park out of commission. The water practically keeps it covered and washed out considerable. There has been an attempt to rip rap or dam it up, but it has been of no avail. That condition did not exist prior to the establishing of the spillway.

In the City pumping station and electric light plant there are five wells, four of them are 25 to 50 feet in diameter. The last one is U shaped and is 16 feet. The furtherest one west is close to a mile west of the station. The City has a piece of ground that surrounds the well directly north of the pumping station. As I remember, there are about twelve acres in it. It is planted to young willow trees. Well No. 1 is located on this tract and well No. 2 is right close to it and directly west. Then follow each well after that up to No. 5. It is probably 30 or 40 rods running east and west at right angles west of the road. The tract is enough as the population of the City
increases from year to year for the establishment of
358 additional wells as the needs of the people require.
All of the property other than I have described, that is the three parks, the City pumping station and the electric light station, that is included in the assessment is the streets.

(Cross Examination)

There was high water in 1920.

"Q. Did you not testify in the case of Gilseth vs. County Commissioners, that if this ditch had not been reconstructed
and the river had been permitted to take its then course
359 over the bluff it would have destroyed the waterworks
of the City? A. It might."

The water was high twice that year; in the first place when the spring rains came and the snow went off, and then along

about the first of June there was a heavy rain in the neighborhood of Flandreau that reached us a few days afterwards.

"Q. And the water was so high that year that it contaminated the city wells and it was necessary for your department to place certain notices in the city papers, in which you informed the patrons of the water company that they should boil all water before using it?

A. The commissioner of water might have done that. Never anything of that kind came before the Board that I know anything about.

Q. As a matter of fact the water did come into the wells in 1920, surface water?

A. I don't know. I would not want to say one way or the other." The city owns a plat of land known as Sherman Park within the drainage area, it is owned and kept by the city for park purposes; it is practically overflowed every spring; I do not recall whether it was overflowed in the spring of 1921; I was not there that spring; the water does not need to get up but a little ways because the land is very low; the river forms the letter S just around it. Pos-
360 sibly anything that tends to divert a portion of the water that comes down the Sioux Valley and keeps it out of the river as it goes through Sherman Park would be a benefit to that park; there is none of the Covell's Lake Park, excepting a little piece of ground just by First Street Bridge, that would be overflowed; I do not think the water would cover one whole lot; we have 125 miles of street, and some of them cost more for up-keep and some of them cost less; I think the up-keep would be somewhere in the neighborhood of $100 per mile; in 1920 during the high water, the water came up on the [wides] of the West Sioux Falls road, but didn't cross it; the roadway is much higher than the surrounding ground;

"Q. That is true when Sherman Park floods, isn't it. The refuse from the river [funs] up on the banks and is left there, and a very healthy crop of mosquitos is produced?

A. There is a very good reason for that. Sherman Park is filled with little ravines and is very much shaded. It is much better now than it was because many of the trees have been cut out.

Q. Directing your attention to the Park again, those conditions are true every time that it floods, that it causes an unsanitary condition there?

A. I presume it does to a certain extent."

We have abandoned Lien's Park on account of the water, which has practically cut out the park; it has been kept open,

and there are some picnics held there, but it is practically abandoned; it is a little north and east of the Penitentiary, and just a little west of the spillway.

361 In my judgment it would be unsafe to change the lengths of the railroad bridges and other bridges across the Sioux River in town. The Omaha bridge is some wider than the Eighth Street bridge, I think. They have filled some of the trestles of the Omaha. It is not so wide as it was before. As the Eighth Street bridge now stands, I think it has always served its purpose of letting all of the water of the river pass underneath it. I do not know the amount of water that comes down the Sioux Valley. I know that the elevation of the land north of the spillway is about two and one-half to three feet to the mile from Thompson's bridge down to where it enters the present spillway. The amount of water shed varies very much. It would be pretty hard to tell the amount thereof.

(Re-direct Examination).

The channel of the Big Sioux River that passes through the city has been infringed on very much in the past twenty-five years; Since I came here in 1879—the river covered much more territory then than it does now and was very flat. When we got a heavy rain the stream flowed out and later would narrow down to a smaller stream again. During the years 1919 and 1920 the water in the river has been the highest that I can recall, and especially up around the city water plant and electric light plant, than at any time prior to that, since 1881; there has been no damage by high water to the city property since 1881; the Cascade Mill dam was built I think in, 1878; they were finishing it in the spring I came here.

F. E. SPELLERBERG, called and sworn as a witness testified as follows:

(Direct Examination.)

I am and have been since March 1916, superintendent of parks of the city of Sioux Falls; only a very small part of one end of Covell or Phillips park and about half of Sherman Park and about half of Lien Park are affected by

362 high water; Lien Park is situated a little east of the spillway; since the spillway was put in, the Board has taken out practically all the improvements at Lien Park that could be used at other parks and merely cut the grass and keep it available for use at such times as people can go in there when it is dry enough; we took out the improvements

because we could use them at other places and they were practically abandoned and of no use at Lien Park on account of flooded conditions from the river overflow from the spillway; the city has practically abandoned Lien Park as a park since the spillway was built; prior to the building of the spillway the city had started in to improve it; the spillway empties into the river above Lien Park and then flows down past it.

The high water does not affect Phillips Park to amount to anything; it overflows a small area at one end where the ditch overflows and comes down to Covell Lake; Phillips Park is practically all high ground bordering on Covell Lake with the exception of a small flat area at one end; it is rough land and cannot be used for agricultural purposes.

The lands of Sherman Park cannot be used for agricultural purposes; that park has overflowed every year except one since I have been here; it did not overflow in 1921; with the exception of that year it has overflowed every year for five years; in 1919 the overflowed condition started in the latter part of May and continued for two weeks into June and then dried up for a short time; the park was [useable] on the 20th of June and then overflowed once more in the middle of July; in 1920, we had practically no use of the lower part practically all season, the lower part of the park is on
363 the west side of the river; in the years 1919 and 1920 the river came up the highest it has been to my knowledge and the overflowed conditions continued longer those years than in any prior year.

(Cross-Examination).

"Q. The length of those periods would indicate to your mind that there was more water came down the Sioux Valley those years, would it not?

A. I am not sure I am competent to judge.

Q. You would naturally arrive at that conclusion?

A. I might.

Q. Anything that would tend to divert that water would be to the advantage—If a certain amount of water came down the Sioux Valley and you could keep part of it or divert it from Sherman Park, it would shorten the period that Sherman Park would be covered with water would it not?

A. I would sooner not answer that. I don't know that I am competent.

Q. Say yes or no.

The Court: I don't think he can".

There are 52 or 53 acres in Sherman Park; only about 20 or 25 acres are on the lower level; if the land was not occupied for park purposes, it would not make a good pasture as there is not enough grass there; the land around there is used for pasture, but it is higher; the land north of the park is used somewhat for cultivated crops and they are taking their chances on it; the acre and a half or two acres at Phillips Park could be tilled or turned into pasture or produce hay after a fashion; they would have to wait until after the
364 flood had come down; it makes a late crop proposition.

O. S. THOMPSON, called and sworn as witness testified as follows:

(Direct Examination)

I reside in Sverdrup Township and was born there in 1875 and have resided there ever since; about 10 miles north of Sioux Falls; I own 503 acres in the Big Sioux River Valley where I live; within the drainage district there is close to 300 acres; I have farmed my land since 1897 and was residing there when ditch No. 2 and also ditch No. 1 was constructed; I think ditch No. 1 was constructed in 1909 and ditch No. 2 was constructed the following year; ditch No. 2 starts about 1 mile northwest of Baltic; it starts right in the river at a point about 15 miles north of the spillway near the penitentiary; from the point where ditch No. 2 starts to where it joins ditch No. 1 is about 11 1/2 miles; the length of ditch No. 1 is 3 1/2 miles; the width of ditch No. 1 at the top is about 90 feet; the top width of ditch No. 2 is 45 to 50 feet; it is possible that at the very north end it is down to forty feet; the average depth of ditch No. 2 is about 6 feet and of ditch No. 1 about 6 feet; the present spillway was finished in 1918; the old spillway was washed out in 1916; the present spillway is a little less than 12 feet in diameter; the intake of the spillway is the lower end of ditch No. 1 and is rip rapped, then there are two gates leading into a hole that goes down through the ground about 40 feet; the shaft is perpendicular for about 40 feet; at the lower end of it a channel is run out towards the river towards the east sloping downwards so that it comes out just above the river level on the lower end; there was nothing that prevented all of the water that was gathered by these ditches No. 1 and No. 2 at

the outlet or spillway to prevent all of the water going over the hill; since the new spillway was put in, I have lost more crops than I did before it was put in and after the
365 construction of ditches No. 1 and No. 2 my losses have been considerably more since the new spillway was put in than they were before it was put in and after the ditches were constructed.

Defendants were thereupon given permission by the Court to make the witness their witness for the purpose of identifying certain exhibits and he thereupon testified in behalf of defendants as follows:

Defendants' Exhibit 2 is a petition to the County Board asking for the establishment of what is known as Covell Lake cut-off. The first signature attached thereto is mine. I signed that, and I had that presented to the County Board for the purposes set forth in the petition. I own land in the vicinity of Drainage Ditch No. 1 & 2 that is affected by that ditch. I evidently furnished the bond designated as Defendant's Exhibit 3.

Defendants' Exhibits 2 and 3 were offered and received in evidence as part of defendants' case.

FRED H. REED, Called on Behalf of the Plaintiffs and Sworn Testified as follows:

(Direct Examination.)

(It is stipulated that Northern States Power Company is the successor in interest of the Sioux Falls Light & Power Company in and to the property involved in this action.)

My name is Fred H. Reed; I have lived in Sioux Falls
366 since 1899; my occupation before coming to Sioux Falls was farming; since coming to Sioux Falls I have been looking after farms, real estate and other properties; I was the Secretary of the Sioux Falls Light & Power Co., and of the Sioux Falls Improvement and Development Co's interest in certain properties in the vicinity of the Queen Bee Mill at one time; I had charge for Mr. E. W. Coughran and various of his associates of properties in the vicinity of the present hydro-electric plant of the Northern States Power Co. for a long period of years and since about 1900; my office is in the Lacotah Building between 8th and 9th streets and between Phillips Avenue and the Big Sioux River on the east side of Phillips Avenue and the west bank of the

river in Sioux Falls; it is in the rear of the building facing the river; at the time I came to Sioux Falls there were three dams across the river in the vicinity of the present power plant; the Cascade or upper dam, the Queen Bee dam, and what was known as the Bennett dam; the Cascade dam is the dam below 8th Street and is still in existence; the Sioux Falls Light and Power Co. was organized in 1907 and constructed the present hydro-electric plant of the Northern States Power Co., completing it in 1908; prior to the construction of that plant the Sioux Falls Light & Power Co., acquired in the spring of 1907 and operated the Cascade mill property; I first became associated with the property which is now the property of the Northern States Power Co. and the Queen Bee Mill property and the other ground in this immediate vicinity in 1900; I am familiar with the nature and character of the present real property interests of the
367 Northern States Power Co. including tracts 6 and 7 of the County Auditors subdivision of the Northeast of Section 16, township 101, Range 49, Lots B and C of Sioux Falls Light & Power Co's subdivision, tract 2 of the County Auditor's subdivision of the Northwest Quarter of said section 16, and also the property upon which the hydro-electric plant is now located; I don't know that there is any soil on that real property; it is rock, granite, come to the surface; that is true with reference to all of that tract of land in there; in my opinion it would not be possible for any part of that land to be used for agricultural purposes; the hydro-electric plant of the Sioux Falls Light & Power Co. now the Northern States Power Co., was operated partially under my supervision as one of its officers; I was familiar with its construction at that time; at the time of its construction the question of constructing it in such manner as to withstand all flood conditions of the Big Sioux River and prevent any damage to the property or its water power from flood conditions was [discusses] and taken into consideration; the hydro-electric plant was so designed under the instruction of our company as to guard against such flood conditions and was so constructed; at that time our engineers had data with reference to the flood waters of the Big Sioux River; no part of that property down there now owned by the Northern States Power Co. has been flooded since 1900; I have observed it every year since then; the largest flood that I recall; I think was prior to the year of 1907, the time the ditch was first constructed; at the time no part of this property was
368 flooded; the hydro-electric plant of the Northern States Power Co., is east and some south of the spillway of

ditch No. 1 and 2 and north of the Cascade dam and the city of Dell Rapids is north of the spillway; I think the hydro-electric plant is about 1/2 mile from the mouth of the spillway; the foundation or lower part of the hydro-electric plant is made right in the solid rock; the rock was blasted out for a distance of something over 30 feet deep; that part would be solid ground and the part from the granite on up with cement, concrete; for the first story it is in granite; the dam was so constructed as to take care of the flood waters; I have observed from my office window the condition of the river at various times during all these years; I have not observed any appreciable difference in the volume of water flowing down the Big Sioux River since the construction of the spillway; the Lacotah building property is never flooded and the water never got into the basement.

(Cross Examination)

At the time I was connected with the company I was familiar with all the Northern States Power Co. equipment and machinery and with the three dams; the dam which the Northern States Power Co. now has is the same dam the original company put in; that was Queen Bee property at one time; the Bennett dam was below the Queen Bee property; it is not there now; it was about 16 feet in height and I think has all been blasted out; when the dam was taken out I think the tail race of the Northern States Power Co. was lowered; I suppose on a level with the river below the dam,
probably 16 feet; that would help the water get away
369 from the wheels of the plant and produce more power;
I think the Sioux Falls Light & Power Co. had a seven foot flume; I don't know whether the Northern States Power Co. has changed the flume or not; the property north from the dam to the present hydro-electric plant of the Northern States Power Co. is mostly granite.

O. A. ROFELTY Called on Behalf of the Plaintiff and Sworn testified as follows:

(Direct Examination)

My name is O. A. Rofelty; I live in Sioux Falls, South Dakota; I am Manager of the Northern States Power Co. and have general charge of its business and the operation of its property including this district; I have been in that position since November 27, 1918; the plant consists of Hydro and steam plants for the generation of electric power; that is

essential; it is quite necessary for us to have the steam plant to supply the demands for electricity in the city of Sioux Falls; the water plant has not sufficient capacity; in the past, during the year 1921, there has never been a day but when we kept the steam plant going all the time, not even an hour, day or night; it was necessary to do that in order to serve our customers; we operate the two plants together as one unit for generating and selling electricity when we have any water; it does not make a particle of difference in the operating expense of this plant such as labor and help whether the steam plant is required to produce a larger or smaller part of the load; I am familiar with all the ground or land owned by the Northern States Power Co. down there; I would describe it as a large pile of stone; it is not level; it is
370 piles of stone here and there, a topsy turvy condition; the stone is what they call a red granite; there is not any soil on any of the Power Company's property there sufficient to be used for cultivation of crops of any kind.

(Cross Examination)

The capacity of our steam plant is about 5000 kilowatts; the rated capacity of our water plant, I believe, is 1400 to 1500 kilowatts; if the water is low or for any other reason we can't put the water over our turbines and have to produce this current with steam, it costs more money; what current we make by steam costs more than what we would make by water; there are times in the year when the water is not sufficient to produce any current; I have been manager down there since November 27, 1918; the company has not lowered the tail race since I have been there; we only cleaned it out; we never intend to lower it; I understand that our company succeeded to all the rights of the Sioux Falls Light & Power Co; Defendants' Exhibt "6" looks to me like a fair representation of the river and the location of our plant upon the river; I am unable to say positively whether the drop of our water from the top of our flash boards at our dam down the tail race was substantially as represented by this map or about 55 to 60 feet, but I think so; I think the size of our flume is about 7 feet; Exhibit "7" looks like a fairly good picture of our hydro-electric plant where the water enters the same by our flume, going through the turbines and discharging it into the tail race; I do not know of the lowering of the bottom of the driving tube or the tube carrying the water from the turbines into the tail race; the only thing we did was to clean out the loose dirt and stone that had fallen into it; we concreted that block of stone on the east

side of the river in 1920; we did that for the purpose
371 of keeping the flood waters from carrying down the loose rocks that had gathered up there; the gorge you have mentioned north of our power house was full of water in 1919 and 1920; at the time of high water our tail race was up more than when the water is low; that is natural; the water outside was not as high as our lower power room; the water to the north of our building was not higher than the openings into our tail race; the water at that time did not get high enough to cover the solid granite wall on top of which our company has thrown its loose stone; it was still out of the water; I do not know how deep the water was in the tail race, that is pretty hard to say because it is just a matter of guess; I imagine we have about 25 feet of cement in there; that runs down to almost the level of the falls between those two walls; I do not think the tail race extends over fourteen feet below the concrete; in 1919 the water went about 3 or 4 feet on the rocks which are now covered by cement, during that time our hydro-electric plant could and did run at full blast.

"Q. Do you know the height of the gorge of your tail race?

A. No, I could not answer that.

Q. About forty feet?

A. That is a pretty good guess I should say.

(Redirect Examination)

I should say the difference in cost per kilowatt an hour between generating electric current by steam and water power is possibly 2 mills per kilowatt.

J. WILLIAM LINK, called as a witness on behalf of plaintiff and sworn testified as follows:

372 (Direct Examination)

My name is J. William Link; I reside in Chicago; I am a hydro-electric engineer employed at the present time by the Byllsby Engineering & Managing Corporation; next February I will have been in its employ 12 years; my first experience in hydro-electric work was with the Missouri River Commission; I was with them for five years on the Missouri River Work; subsequent to that I was for five years on the Metropolitan Water Works in Boston; following that I was with the Niagara Falls Power Company for 4 years; I think it was; and then with the former resident engineer of that

company, who opened an office for himself and I took charge of his office for him for a year or 18 months; I then was
373 with the City of Columbus, Ohio, for two years; following that I was with the Long Soo Development Company of the St. Lawrence River for two years, and with the Passaic Valley Sewage Disposal Commission for three months; I then came with Byllsby & Co., and I have been with them ever since; I should say the experience I have outlined covers pretty well the field of hydro-electric engineering; I have had a good deal of experience in the designing and construction or superintendence of construction of hydro-electric plants and water plants, particularly plants for the generation of electric current; I have had experience in the installation and inspection of water wheels and water machinery; I have not had experience in the designing of water wheels; that is a specialty; I have installed that kind of work and written specifications for them and designed what kind of wheels should be installed, etc; since I have been with Byllsby interests I have had complete charge of their hydro-electric plants in the different parts of the country; these plants are scattered pretty well over the country; we have 5 plants in Minnesota in the vicinity of the twin cities and southwest of there; we have two plants in Wisconsin; we have two plants in California; a plant in Oregon and a plant in Montana, and the plant here in Sioux Falls; I think that covers the water power plants pretty well; I have examined the drainage ditch and its course; I have made a study of the hydro-electric plant in this city operated by the Northern States Power Co.; that was constructed before my connection with the Byllsby interests; the Byllsby interests constructed that plant before they acquired it, for other parties, the plant referred to being the hydro-electric plant in question here; I would call the construction of the plant very massive; I have investigated the stability of the dam, its capacity to withstand flood waters, and after examining the whole
374 plant, I should say that it is particularly well designed and constructed to withstand floods or anything of that nature; the massive walls I speak of are of concrete material; I have made a study of the flood conditions in the valley of the Big Sioux River; my sources of information have been government reports and the information I have gleaned from newspaper accounts and talks with various parties who have been on the ground and know the floods; the nearest I can judge, according to the information I have obtained, the greatest flood that there is any record of in that valley was the flood of 1881; I think the design and

construction of the plant down here would be sufficient to withstand the flood stages of 1881; I think it would do that if there were no spillway or drainage ditch because the plant was constructed before the spillway was, and so far as I can find out no account was taken of the spillway at all; independently of that, the nearest estimate that I could make of the probable volume of the flood of 1881, the dam would discharge that without even raising the water any higher than we carry it ordinarily; in my judgment, the company operating this plant would absolutely not be justified in the expenditure of any money for the construction of the drainage ditch, and spillway that has been talked about here on the basis of benefits to the plant in any way; it is my opinion that there is no appreciable benefit to the plant of the construction of the improvement out there.

(Cross Examination)

"Q. Mr. Link, you made for the County Commissioners of this county a hydro survey at one time, of this territory, did you not?

A. I don't think I made a survey.

Q. You made a report to the Board? A. Yes.

Q. And the data you testified about? Your attorney asked you on what data you based your opinion and you said upon government reports.

A. And some survey data taken by the Board's engineer.

Q. And you made a report as to the feasibility of this drainage project did you not?

A. The feasibility? In what way do you mean? I don't quite get your idea.

Q. That it was feasible from an engineering as well as a financial standpoint?

375 A. It was feasible to build it, yes."

In that report I stated that the maximum flood liable to occur in the reaches of the Big Sioux River under consideration which has this ditch construction, will probably not exceed ten thousand second feet. This condition was probably approximately as it existed in 1881; and that the floods which occurred in the spring of the year 1916—the amount of water that came down the river and the ditch at that time did not exceed six thousand or six thousand five hundred second feet. It seems to me the amount of water that went through the old spillway in 1916 was 1400 cubic feet per second; I am not sure; I recommended to the Board that the spillway be constructed to take care of approximately 2500 cubic feet per second; in my judgment the amount of water

that was carried down the Sioux Valley during the freshet of 1916 was approximately 6000 feet per second; that was the spring that the spillway washed out; I do not know that you call the 1916 flood an ordinary flood; I have not been able to find any record of flood stages in the river and I am not sufficiently familiar with the floods from year to year to know whether that flood would be considered an
376 ordinary flood or not; I would rather say that it was larger than the ordinary flood; that is if by the ordinary flood you mean the intensity of flood that occurs most frequently; the amount of water that came down the Sioux Valley in the year 1881 is probably the maximum; I do not remember whether in that report I recommended to the Board that the opening which had occurred at what we have been calling Schotz, about 3 miles north of town, a dam be placed in there to keep the river in its old channel and to keep it from coming down through the ditch; I would recommend it; at the time I made this report I was employed by the Bylls-Co., Byllsby & Co. manage the Northern States Power Co., but it isn't the same company by any means, we do the managing for the Northern States Power Co.; I am familiar with the plant of the Northern States Power Co. and the improvements made since 1910; I was familiar with the construction of the old plant through the drawings and inspecting of the plant, etc.; defendant's Exhibit "7" was prepared before my time; in a general way I should say it substantially represents the plant here; it looks to me more like a picture plan than it does like a working plan; it was signed by the chief engineer, so I presume probably it was one of the construction plans; I do not remember the distance between the bottom of our turbine and the outlet in our draft tube; but I would say in the vicinity of 18 or 20 feet; the Northern States Power Co. had to lower their tail race to take advantage of the head at the Bennett dam; we destroyed the Bennett dam and lowered our tail race to take in that head; that lowering gave us more head; the lowering of the tail race does not give us more power; the head we had before was sufficient to run the generators full capacity with the wheels flooded; the lowering of the tail race enables us to pull a larger load with less water; we got no more power out of the units than we got before; they have a certain fixed output; the increasing of that head only conserved water; it didn't increase the output of the plant at all; the higher the head the less water you use, but if you have a machine in there with a fixed output, it
377 doesn't make any difference how much head you put on it, you can't get any more power out of it; it will burn up if you do; what I mean is that the lowering of our tail

race, we could only turn out 6000 kilowatts from each unit, but we could get that 6000 from a smaller supply of water and consequently when the river is low we are able to get current longer than we could before; the capacity of the plant is fixed by the units in there; they could be run approximately 6000 kilowatts each; there are three units; the result of piled up water on our tail race is to lower the head but with those units not to produce less power; the head is the total fall; I don't think I have any positive information as to the length of time that the floods last here, but the general impression I have gotten from the data is that the maximum conditions only last for two or three days; the flood itself, the river in flood stage I imagine for a considerable longer period of time; I think I am familiar in a general way with the general topography near our plant; Exhibit "5" fairly represents the condition from the northwest corner of the plant toward the old falls for a short distance; Exhibit "4" I am unable to identify; defendants' Exhibits "8" and "9" fairly represent the condition at our tail race; if a dam were put in at Schotz up here which was outside of the drainage ditch project, which kept the river in its banks, permitting the water to flow around the city to our water plant instead of going through and coming into the spillway, it would benefit the Northern States Power Co. to the extent that it would not deprive them of what they had a right to; I would not call it a benefit because we
378 have a right to that water; the benefit would be to give us the water that we have a right to here and which was taken away by the ditch; if there were controlling works placed in this ditch at Thompson's bridge some 12 miles up the river which maintained the level of the water in the river and will not permit the river water to go into the ditch until it reaches a certain height, which is flood condition, that would benefit the Northern States Power Co. in just the same way.

(Redirect Examination)

Q. From your examination of that region up there at the time you made the report as representative of H. M. Bylls-by, I wish you would tell the court what that ditch and improvement is with regard to lands down here in the city and particularly in regard to the region down about the Northern States Power Co. property; what is the proper term for it?

A. It acts as a flood water bypass; there is no drainage; by flood water bypass I mean that it takes flood waters out of the river and passes them around and back in again; it relieves flood water conditions a certain small extent in certain stages of the river; I would say that that ditch is not

a drainage at all in this section down here; in my judgment the power plant of the Northern States Power Co. as now constructed would be sufficient to withstand a flood equal to the flood of 1881; as I stated before I would think it would pass such a flood without raising the water higher in the dam than we ordinarily carry by means of flash boards; those flash boards should be removed at times of floods; the Bennett dam was destroyed under my supervision; it was de-
379 stroyed to get advantage of more head water or unite that head with ours in one plant.

Q. Something was said here by another witness about the cleaning out of that tail race or some part of the same. I wish you would tell just what was done in that regard and why.

A. The construction superintendent, without asking permission or without my knowledge, built the spoil right on top of the excavation, which was contrary to my intentions, and built it with practically a vertical face, and without very much arrangements of the stones; consequently the first flood that came down washed out some of the stone at the bottom of the piles and started the disintegration of the spoil, and subsequent floods I presume did more, and the elements helped it along, frost action, and a great deal of this spoil had fallen back into the tail race until it raised the level about 4 feet; this work that was done in 1920 was simply to clean that out, and in order to put it so it would not fall back again we moved it back on the west side about 10 feet from the edge of the ledge; on the east side we put a concrete facing on it because there we had used the top of the spoil bank which had been leveled off for an outdoor sub-station, and this was so close to the edge of the spoil bank that we had to make it sloping to hold the substation and some transmission line poles there, and we felt that without a concrete face it might slip in again so we put a concrete face on that side in order to prevent it; that was the reason for that work; the proposition was to restore the tail race.

380 (Recross Examination)

This bypassing of the water I have mentioned would tend to relieve the Sioux River from the point where it took the water from the river to where it deposited it back in the river; it would relieve the river of the amount it carried.

Q. Doesn't that ditch up through there also drain agricultural lands?

A. As I saw it when I inspected it, I should say to very small extent as I understand drainage; there were only 3 or

4 inlets I could see where the farmers could take advantage of the drainage.

(Redirect Examination)

If I were designing a hydro-electric plant on the present site of the plant here today, knowing that the ditch and spillway had been constructed and are there as they are, as I know the ditch and its history, I would not take the ditch and spillway into consideration at all in the designing that plant, particularly with a view to resistance to floods or possible floods.

A. G. RISTY, recalled and examined by the Court, testified as follows:

The northern end of this ditch No. 1 and 2 was one mile north of Baltic; the end of the ditch opens into the Sioux River; there are no artificial laterals; if there are heavy rains on the lands adjoining this ditch which runs north and south in a general direction that flood the lands on either side of it, it is the intent and purpose that the ditch shall take care of such flood waters.

381 Q. How will it get into the ditch?

A. It slightly slopes into the ditch?

Q. How could it get over the embankment without laterals?

A. There are pipes at certain places to let the water in through the embankment into the ditch, and that you can adjust running out into the farm lands; there are pipes here and there along the ditch to let waters in when the bottom lands overflow, and it has also been proven that these ditches drain the bottom lands, because there are farms all along and it has lowered the water in their wells to a very considerable extent since the ditch was dug, so it shows it drains the lands; they propose to have gates in the embankment so that when the pressure was from the inside it would close the gates and if the pressure came from the outside it would open them within this service pipe.

Q. Then the real purpose of this ditch as I understand it is to take the water from the Sioux River in flood times and conduct it down to the spillway and into the river at the mouth of the spillway.

A. And preventing the overflow to a great degree from spreading over the farm lands.

Q. And the purposes of the ditch, the effects that
382 the ditch is to perform, the thing that you intended when you were constructing was that it should be an

[auxilary] to the river and relieve it of the surplus flood waters?

A. If the Court please, I was not on the Board when the ditch was constructed; only when we repaired the spillway, it has been my understanding always that it was to help carry off the flood waters.

Q. It is rather to take the water from the river at its maximum capacity and thus relieve the river of that water rather than to drain the lands along the sides; in other words, it is to keep them from being overflowed with this water?

A. That has always been my understanding.

Plaintiff rests.

Motion to Dismiss

The Counsel:

At this time, Your Honor, at the close of the plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these actions and set aside the restraining order heretofore issued, for all the reasons and upon all the grounds urged in the motion made at the opening of these cases.

And for the further reason that the record now shows that notice of an opportunity to be heard upon the amount or proportion of benefits these plaintiffs have received and the amount or proportion of assessment that will be made against their property for such benefits, has been given to them and the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessment to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases, based upon their judgment of values and benefits con-
383 ferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred, by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason the record now shows the Board of County Commissioners of Minnehaha County, charged by the

law of this State with the execution of the provisions of the drainage ditch law, has jurisdiction to proceed in respect to the property within said drainage area including the property of the plaintiffs in these actions, and if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs or otherwise, and the record does not indicate upon its face any gross departure from the requirements of the statute, therefore this Court cannot inquire into these collateral proceedings, and the same are not questions presenting a federal question.

The Court: The motion is denied pro forma.

The defendants, to maintain the issues on their part, called as a witness F. L. BLACKMAN, who being duly sworn testified in substance as follows: My name is F. L. Blackman. I resided in the city of Sioux Falls on July 15, 1916, and at that time had property within the drainage area of Drainage Ditch No. 1 & 2. Defendants' Exhibit 10 being a petition dated July 15, 1916, addressed to the Board of County Commissioners of Minnehaha County, South Dakota, signed by the City and others, the name of F. L. Blackman appearing thereon, was signed by me.

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384 GEORGE W. BURNSIDE, in behalf of defendants, being duly sworn, testified:

As mayor of the City of Sioux Falls, I signed defendants' Exhibit 10, being a petition addressed to the board of County Commissioners of Minnehaha County, dated July 15th, 1916; at a special meeting of the city commission, they decided to ask the County Commissioners to protect the destruction of the drainage ditch in order to protect our water plants.

F. E. WARD, being called as a witness on behalf of the defendants, testified in substance as follows:

Defendants' Exhibits 10 to 32, inclusive, are records and files in my office as County Auditor of Minnehaha County, with reference to the establishment of Drainage Ditch No. 1 and 2. Defendants' Exhibit 10 is the petition of the City of Sioux Falls, F. L. Blackman, et al, for the establishment and construction of Drainage Ditch No. 1 and 2. Defendants' Exhibit 11 is the bond accompanying and filed with the pe-

tition. The material portion of said Bond, being defendant's exhibit 11 is as follows:

385 "Bond on Petition for Drainage.

Whereas, the parties whose names are signed hereto have prepared and executed and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition to reconstruct and improve drainage ditches Number 1 and 2, in Minnehaha County, South Dakota, and to construct a new spillway or outlet to the said drainage ditches numbered 1 and 2, and to pay therefor by an assessment upon the property, persons and corporations benefited thereby, a copy of which petition is hereto attached marked Exhibit "A" and made a part hereof.

386 Now, Therefore, we F. L. Blackman, E. D. Clark, W. Brady, Dan Donahoe, Den Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, as principals, and Inter State Surety Company as surety, do hereby undertake, promise and agree to and with the County of Minnehaha, of the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or in case the said petition is denied on appeal.

F. L. Blackman, E. D. Clark, W. Braley, Den Donahoe, Dan Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary C. Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, Inter State Surety Company, by A. B. Fairbanks, Its Attorney in Fact.

This bond approved August 1, 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 12 is the order of the Board of County Commissioners for filing said petition and bond. Defendants' Exhibit 13 is a letter of transmittal of said petition with reference to Drainage Ditch No. 1 and 2, to the State Engineer at Pierre, the material portions of which are as follows:

"August 4, 1916.

Homer M. Derr, State Engineer,
Pierre, South Dakota.

Dear Sir:

I enclose herewith new drainage petition with reference to Drainage Ditches Numbers 1 and 2 and the spillway thereof,

which have been ordered filed and transmitted to you. It is the especial wish of the County Commissioners that you view this drainage proposition with them at your earliest
387 convenience, as it is necessary that this improvement be made soon, so as to avoid further damage. The parties have agreed to abandon the Covell's Lake extension terminus, in case the drainage proposition is established in accordance with this petition, or a modification thereof.*****

Please give this matter your immediate attention, and advise as to when you can view this drainage proposition with the Commissioners.

Yours truly,

Enc.
EOJ:M County Auditor."

Defendants' Exhibit No. 14 are the minutes of the Board of County Commissioners of August 3, 1916, of adjournment from that date to August 14, 1916. Defendants' Exhibit 15 are the proceedings of the Board of County Commissioners, under date of August 14, 1916. Defendants' Exhibit 16 is the resolution of Board of County Commissioners for a survey of the territory to be drained by Drainage Ditch No. 1 and 2. Defendants' Exhibit 17 is the Surveyor's Report, the material portions of which are as follows:

"Report of Preliminary Survey of Said Proposed Drainage Ditch for the Territory now Partially Covered by Drainage Ditches Numbers 1 and 2, Sioux Falls, South Dakota.

To the Honorable Board of County Commissioners, Minnehaha County, South Dakota:

In accordance with the resolution of your Honorable Board dated August 14th, 1916, authorizing and directing a survey of the proposed drainage of the territory covered by drainage ditches numbers 1 and 2, as now established, and directing that the exact line or lines of said proposed drainage be established under the supervision of the State Engineer, I took up the work, and, as per your request, file here-
388 with a limited report of the survey of such territory showing the exact line of the proposed drainage ditch as follows, to-wit:

Section One

Commencing at a point 58 feet West and 1035 feet North of the Southeast Corner of Section 29, Township 102, Range 49, West of the 5th P. M., running thence South *****, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number one as now established and constructed.

Section Two.

Commencing at a point 1035 feet North and 58 feet West of the Southeast Corner of Section 29, Township 102, Range 49, the same being the commencement point of Section 1, hereinbefore described, running thence North *****.

Section Three.

Commencing at a point 1640 feet East of the center of Section 18, Township 103, Range 49, running thence North ******, the said line being the center line of said proposed drainage.

That in addition thereto, the Big Sioux River is to be straightened in Sections 17, 18 and 20, Township 103, North of Range 40, in order to afford better means of communication between the lower end of Section 3 of said ditch, and the upper end of Section 2 thereof, the same being intended to cover the exact location of drainage ditch number 2, as now established and constructed.

I further recommend that the Big Sioux River be straightened *****.

All of the above cut offs to have a bottom width of 60 feet, and side slopes of one and one-half to one. A right-of-way 100 feet in width and one-half each side of the above described center lines will be required. The plans and specifications for the proposed spillway on Section 9, of
389 Township 101, Range 49, will be furnished later.

Dated this 13 day of September, A. D. 1916.

Respectfully submitted, L. E. Stevens, Deputy State Surveyor. Filed in the office of the Auditor of Minnehaha County, S. D. this 13 day of September, 1916, Harry H. Howe, County Auditor, by E. H. Shenkle, Deputy.

Defendants' Exhibits 18 and 19 are the proceedings of the Board and the resolution of the Board fixing the exact line

and width of Drainage Ditch No. 1 and 2, of September 13, 1916. Defendants' Exhibit 20 is the drainage ditch notice for Drainage Ditch No. 1 and 2. Defendants' Exhibit 21 is the affidavit of publication of drainage ditch notice, the material portion of which is as follows:

390 "Affidavit of Publication

C. L. Dotson, being first duly sworn, deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a Daily Newspaper of general circulation, printed and published in the City of Sioux Falls, in said County and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper and in charge of the advertising department thereof, and has personal knowledge of all facts stated in this affidavit, and that the notice and advertisement headed Drainage Ditch, a printed copy of which is hereunto attached, and made a part hereof, was printed and published in the said newspaper for ..... issues.

That the first publication of said notice in said newspaper aforesaid was on Saturday, the 16th day of September, A. D. 1916, and that the succeeding publications were
391 severally on Saturday, the 23rd day of September A. D., on Saturday, the 30th day of September, A. D. 1916; that the fees charged for the printing and publication of said notice and advertisement in said newspaper, as aforesaid, were ..... dollars and ..... cents, and for this affidavit, Twenty-five cents, and that the said fees for the printing and publishing of said notice and advertisement and for this affidavit, as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper, as provided in Session Laws of 1903, and amendments thereto * * * * * Filed in the office of the Auditor of Minnehaha County, S. D., this 30th day of Sept. 1916 Harry H. Howe County Auditor.

Defendants' Exhibit 22 is a Certificate of Posting said Drainage Ditch Notice. The material portion of which certificate of posting Drainage Ditch Notice, is as follows:

'I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby certify that on the 21 day of September, A. D. 1916, I posted three copies of the annexed Notice in three public places near the route of the proposed drainage mentioned therein, as follows, to-wit: One on the bridge on North Minnesota Avenue crossing Drainage Ditch Number One, in the City of Sioux Falls; one on the bridge in Berwick's Addition to the City of Sioux Falls, crossing Drainage Ditch Number One near Fifth Avenue; and one on the bridge crossing Drainage Ditch Number One on Section 29 of Mapleton Township; that I also posted one of said copies at the South Front Door of the Court House in the City of Sioux Falls, all in Minnehaha County * * * * * *

392 Filed in the office of the Auditor of Minnehaha County, S. D. this 23 day of Sept., 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 23 are the minutes of the Board of County Commissioners in relation to Drainage Ditch No. 1 and 2, of October 2 and 3, 1916, the material portions of which are as follows:

"October 2, 1916.

At the meeting in the County Court room, the Commissioners listened to arguments presented by those in favor of the drainage ditch, and the straightening of the Big Sioux River, and also to arguments against the straightening of said Big Sioux River, there being no objection to the establishment and construction of the main ditch project. The State Engineer, Homer Derr, recommended that the main drainage ditch, as petitioned for, be established and constructed with proper controlling gates and a sufficient spillway.

Claims for damages were filed as follows:

Kittery Realty Company	$2000.00
Margaret Finnegan	1000.00
James L. Finnegan	8000.00

The whole afternoon was taken up in the discussion of the drainage project, and the suggested straightening of the Big Sioux River. At the hour of five o'clock P. M. an adjourn-

ment was taken until ten o'clock A. M. on Tuesday, October 3, 1916."

"October 3, 1916.

Pursuant to adjournment, the Board convened at ten o'clock A. M., and in company with the State Engineer, Homer Derr, visited the site of the proposed spillway and control gate, at the head thereof. The Board then returned to the Commissioners' Room, and held a conference with the State Engineer with reference to said proposed drainage. Mr. C. T.
393 Charnock then moved the adoption of the resolution establishing said drainage, and that the vote be taken by districts. Mr. J. E. Johnson seconded the motion. Upon roll call

A. G. Risty, District No. 1 voted yes.

J. E. Johnson, District No. 2 voted yes.

J. L. Fritz, District No. 3, voted yes.

C. T. Charnock, District No. 4, voted yes.

J. A. Jensen, District No. 5, voted yes.

The Chairman then declared the resolution adopted. The State Engineer was then requested to prepare and submit plans and specifications for the necessary spillway and control, or headgates, at his earliest convenience. * * * **

Mr. C. T. Charnock moved that the hearing on damages occasioned by the establishment of Drainage Ditch No. 1 and 2, be adjourned until Friday, October 6, 1916, at ten o'clock A. M., and be made a special order for that date. Motion seconded by J. A. Jensen, and carried unanimously."

Defendants' Exhibit 24 is the resolution of the Board of County Commissioners establishing Drainage Ditch No. 1 and 2 upon the petition of the City of Sioux Falls, F. L. Blackman, et al. Defendants' Exhibit 26 are the minutes of the Board of County Commissioners for October 6, 1916. Defendants' Exhibit 27 is a resolution of the Board of County Commissioners of October 6, 1916, assessing damages as compensation for lands taken in the construction of Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch No. 1 and 2.

Resolution Assessing Damages.

Whereas, the matter of assessment of damages caused by the establishment and construction of Drainage Ditches No.

1 and 2, was, on Tuesday, October 3, 1916, at a regularly adjourned meeting of the Board, deferred to and made a special order for Friday, October 6, 1916, at ten o'clock A. M.,
and the Board having met on said last named date,
394 and having heard and considered the claims for damages, and having taken into consideration the fact that the principal portion of said drainage ditch has already been constructed, and assessments for damages therefor having already been made and paid in the original construction of said Drainage Ditches No. 1 and 2, and that the principal part of the work to be done consists of building a proper spillway, flood or control gates, cleaning, deepening and widening the channel of the said drainage ditches as now constructed, building levees and dikes where deemed advisable, and other improvements to said drainage system;

Now, Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the damages arising from the establishment of Drainage Ditch No. 1 and 2, including compensation for the lands to be taken for said drainage, be and they are assessed and awarded as follows, the same being in accordance with plats thereof, filed in connection with the original construction of
Drainage Ditches No. 1 and 2:

395 To the Kittery Realty Company, for damages to Tract One (1), etc. * * * * *

Be It Further Resolved, that it is the judgment and determination of this Board that in consideration of the fact that damages were assessed and paid in the original construction of Drainage Ditch No. 1 and Drainage Ditch No. 2, for all damages sustained by each tract of land, or other property, through which the said drainage ditches and the present drainage ditch pass, as damages and compensation for the land taken by the route of such drainage, that no damages will accrue, or should be paid, by reason of the establishment and construction of said Drainage Ditch No. 1 and 2, except as hereinbefore provided, and that the claims of Margaret
Finnegan and James L. Finnegan for damages by rea-
396 son of the recommended straightening of the Big Sioux River, which straightening has not been considered and determined, be and the same are hereby disallowed, without passing upon the merits of said claims, in case it is determined to straighten said Big Sioux River, and said claims are refiled, and that no other damages will accrue to any person or property by reason of the establishment and construction of said Drainage Ditch, except as herein awarded.

Be It Further Resolved that a fund to be known as "Drainage Ditch No. 1 and 2 Fund", be and it is hereby established, and that the proceeds of any assessment, or assessments, hereafter to be made in this proceeding be and they are hereby pledged to such fund, and when such assessments are collected, it is ordered and directed that they be deposited to the credit of such fund, to be applied in the payments of the warrants to be issued on such fund, in the order of the registry of such warrants with the County Treasurer. It is ordered that the warrants to be issued on such fund draw six per cent., interest from date of issue. It is further ordered that, if any of the persons entitled to damages under this resolution will accept a warrant or warrants on such fund in lieu of money, then that warrants on such fund for the proper amounts be issued therefor to the persons entitled thereto, to be signed by the Chairman and countersigned by the Auditor, but if any person or persons will not accept a warrant upon such fund in payment of the damages herein awarded, then the Chairman of this Board, and the Auditor, are authorized to issue warrants on such fund, in such sums as may be found advisable, and to sell the same at not less than par, and out of the proceeds thereof, to pay the damages herein awarded, taking the receipts of the persons entitled thereto therefor. It is further ordered that all expenses in connection with said Drainage Ditch No. 1 and 2, hereafter to be incurred up to the time of the letting of the contract for the construction of said ditch, be paid by warrant upon such fund.

397 Be It Further Resolved that in case any person herein awarded damages will not accept the same, the Chairman of this Board is directed to tender him the amount thereof, and in case of his non-acceptance thereof, to deposit the same in the Sioux Falls, South Dakota, to the credit of such person, and to give such person notice of such deposit.

Approved this 6 day of October, A. D. 1916, by the Board of County Commissioners of Minnehaha County, South Dakota.

By A. G. Risty, Chairman."

Attest:
County Auditor.

Defendants' Exhibit 28 are minutes of the Board of County Commissioners of December 16, 1916, relative to Drainage Ditch No. 1 and 2, passing a resolution fixing the exact

line and width of drainage ditches straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, and fixing the time and place for hearing thereon, and defendants' Exhibit 29 in said resolution, the material portions of which are as follows:

"Resolution.

Whereas, on September 3, 1916, this Board, by resolution duly adopted, established Drainage Ditch No. 1 and 2, but expressly reserved for further 'consideration and determination the question of the straightening of the Big Sioux River at the several points recommended in said Engineer's report, without passing upon the merits thereof, for some later date when the straightening of the Big Sioux River will be given more complete consideration covering the points recommended and other points requested at the hearing': and

Whereas, the Engineer, L. E. Stevens, has filed his supplemental report with reference to the straightening of the Big Sioux River, recommending narrower ditches than previously recommended, and also recommending the ex-
398 tension of the straightening of the Big Sioux River, and thereby varying the route of said drainage, together with maps and profiles; and

Whereas, the Board has personally inspected the route of said proposed drainage, as described in said petition for Drainage Ditch No. 1 and 2, and as described in said Engineer's reports;

Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of the ditch straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, be and the same is hereby fixed as described in said Engineer's original report, as amended by his supplemental report, and that the requisite right-of-way of said drainage ditch and dump space, be and the same is hereby fixed as described in said Engineer's report; and

Be It Further Resolved that it is deemed practicable and necessary to vary the route of said drainage occasioned by the proposed straightening of the said Big Sioux River, so that it will pass through other lands than those described in the original notice of hearing; and

Be It Further Resolved that the further consideration and hearing of said matter be adjourned to Saturday, the 30 day of December, A. D. 1916, at ten o'clock A. M., at the office of

the County Auditor of said County, in the City of Sioux Falls, South Dakota, and the same is hereby fixed as the time and place for the hearing of the said petition with reference to the straightening of the said Big Sioux River, as recommended in the said Engineer's original and supplemental reports, and that notice thereof be given in accordance with the provisions of Section 4, 5, and 28, of Chapter 138 of the Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota. * * * * *

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399 Defendants' Exhibit 30 is a notice of hearing on the Sioux River cut-offs on Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch Notice.

Sioux River Cut-offs on Drainage Ditch 1 and 2.

Notice is hereby given that Saturday, December 30, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, filed August 3, 1916, for the establishment and construction of a drainage ditch pursuant to the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909, insofar as said petition refers to the straightening of the Big Sioux River, as prayed for in said petition, and as recommended by the Engineer's original and supplemental reports. The consideration whereof having been deferred for further consideration, when Drainage Ditch No. 1 and 2 was established, and said meeting having been adjourned for that purpose. The exact line and width of said ditch was determined by the action of said Board on December 16, 1916, and in general terms is as follows: * * * * *

The tract of country likely to be affected by the establishment and construction of said proposed cut offs in the Big Sioux River is in general terms described as all of the lands and property affected by the construction of Drainage Ditch No. 1 and 2, as established by resolution in these proceedings under date of October 3, 1916, and of record in the office of the

County Auditor of Minnehaha County, South Dakota.

400 The separate tracts of land through which said proposed drainage will pass, and part of which will be required therefor, and for dump space, and the names of the owners of said tracts, as appears from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, on August 3, 1916, that being the time of filing said petition, are as follows: * * * * *

(Note. Plaintiff is not named nor is any of its property described in this notice.)

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have, why the said drainage should not be established and constructed, and all persons deeming themselves damaged by said proposed drainage, or claiming compensation for the lands proposed to be taken for said drainage, are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 16 day of December, A. D., 1916.

BOARD OF COUNTY COMMIS-
401 SIONERS OF MINNEHAHA
COUNTY, SOUTH DAKOTA,
By A. G. Risty, Chairman."

Attest:
Harry H. Howe,
County Auditor.
(Seal)

Defendants' Exhibit 31 is the certificate of posting the aforesaid notice, the material portion of which is as follows:

"I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby specify that on the 20 day of December, A. D. 1916, I posted three copies of the annexed notice in three places near the route of the proposed drainage mentioned therein, as follows, to-wit:

One on the bridge over the Sioux River between Sections 29 and 32, in Mapleton Township; One on the bridge over the Sioux River on the North Half of Section 8, in Mapleton Township, and one on the bridge over the Sioux River between Sections 29 and 32, in Sverdrup Township; that I also

posted one of said copies at the South Front Door of
402 the Court House in the City of Sioux Falls, South Dakota, all in Minnehaha County, South Dakota. * * * *

Defendants' Exhibit 32-A is the affidavit of publication of the aforesaid notice, the material portion of which is as follows:

"C. L. Dotson, being first duly sworn deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a daily newspaper of general circulation; printed and published in the City of Sioux Falls, in said County, and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper, and in charge of the advertising department thereof, and has personal knowledge of all the facts stated in this affidavit, and that the notice and advertisements headed Drainage Ditch Notice No. 1 and 2, a printed copy of which is hereunto attached and made a part hereof, was printed and published in said newspaper for ..... issues. That the first publication of said notice in said newspaper aforesaid, was on Wednesday the 20th day of December, A. D. 1916, and the succeeding publications were severally, on Wednesday, the 27 day of December, A. D. 1916. That the fees charged for the printing and publication of said notice and advertisement in said newspaper as aforesaid, were Ten Dollars and ....cents, and for this affidavit, Twenty-five Cents, and that the said fees for the printing and publishing of said notice and advertisement, and for this affidavit as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement, inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or understanding for the division thereof has been made
403 with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper as provided in Session Laws of 1903, and amendments thereto. * * * *

The defendants' Exhibit 32 is the minutes of the Board of County Commissioners of August 10, 1917, adjourning said hearing until August 11, 1917, at which time the Board passed

a resolution establishing said river cut-offs, a material portion of which resolution is as follows:

"Commissioners' Proceedings.

August 10, 1917.

Pursuant to resolution of July 27, 1917, adjourning and fixing the time of hearing upon the straightening of the Big Sioux River, under the petition upon which Drainage Ditch No. 1 and No. 2 was established, all members of the Board being present, and a delegation of farmers and property owners interested, Engineer L. E. Stephens having made and filed his report of the exact line and location of the several cut offs suggested and recommended, and the Board having heard the protests of those objecting thereto, and the petitioners in like manner having been heard, and the Board having heard the argument of counsel thereon, the further consideration thereof was adjourned to August 11, A. D. 1917, at two o'clock P. M."

"Commissioners' Proceedings.

August 11, 1917.

Pursuant to adjournment, The Board of County Commissioners convened at two o'clock P. M. All members of the Board being present, and after taking up and considering the project of straightening the Big Sioux River upon the petition for the establishment of Drainage Ditch No. 1 and 2, heretofore established, and the Board being fully advised
404 with reference thereto, it was moved by C. T. Charnock, and seconded by J. A. Jensen, that the following resolution be adopted:

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, pursuant to the resolution of this Board of October 3, 1916, establishing Drainage Ditch No. 1 and 2, and reserving the consideration and determination of the question of the straightening of the Big Sioux River at several points recommended in the Engineer's report, that it is the determination of this Board that it will be conducive to the public health, convenience and welfare, and that it is necessary and practicable for the drainage of agricultural lands within the drainage area of said drainage ditch No. 1 and 2; that the hereinafter described ditches straightening the Big Sioux River be established and constructed as a part of the drainage system hereinbefore established, and designated as Drainage Ditch No. 1 and 2.

Be It Further Resolved that the said ditches straightening the said Big Sioux River be, and the same are hereby established, with a bottom width of 20 feet; and a depth not to exceed the depth of the main channel of said Big Sioux River, with a right-of-way for ditch and dump space of 100 feet, one-half on each side of the center line along the lines of hereinafter and particularly described as follows * * * * *."

All of the foregoing Exhibits were offered and received in evidence.

Mr. Ward, as County Auditor of Minnehaha County, identified Defendants' Exhibits 2 and 3, and 33 to 42, both inclusive, as records and files of his office in relation to this drainage ditch proceeding, all of which were offered and received in evidence.

Defendants' Exhibit 2, being a petition signed by O. S. Thompson et al. to abandon the outlet of old Drainage Ditch No. 1 and for the establishment of a new outlet thereto, the material portion of which is as follows:

405 "To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

The undersigned petitioners respectfully represent that they are all residents of the County of Minnehaha, South Dakota, and that each of them is the owner of certain lands situated in said County, in the Valley of the Big Sioux River, all of which lands will be affected by the drainage herein mentioned and proposed.

Your petitioners further represent that it is necessary for the drainage of agricultural lands in the said Big Sioux River Valley, including all of the lands affected by Drainage Ditches No. 1 and 2, as the same have been established and constructed, that said ditches be repaired and put in proper condition and that the same be cleaned, deepened and widened, and that the Levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary in order for said ditches to carry off the surplus water and properly drain the lands affected thereby;

That it is also necessary to permanently close said Ditch No. 1 above the present spillway, or outlet, thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, in Township 101, of Range 49, where the course of said ditch as now constructed turns from a Southerly direction to

a Southeasterly direction, and to extend said ditch from such point, running thence in a Southwesterly direction, through Covell's Lake in the City of Sioux Falls, across the Southeast quarter of Section 5, the East Half of the Southwest Quarter of Section 8, the West Half of Section 17, the East Half of the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, about 40 rods
406 north of the bridge across said river commonly known as the "12th Street Bridge", situated on the section line between said Section 18 and Section 19.

Your petitioners further represent that the proposed maintenance and repair of said drainage ditches No. 1 and 2, and the extension of said Ditch No. 1, are necessary for the reasons that the present spillway and outlet of said Ditch No. 1, as now constructed and used, is impracticable for the purpose for which it was intended, and if allowed to remain in its present condition, will probably cause large damage to the owners of property adjacent thereto and affected thereby; that it is impossible to put said spillway or outlet in a condition to carry off the surplus water and properly drain the lands affected by said drainage ditches, without causing great damage to the owners of property as aforesaid; that for these reasons it is necessary to establish and construct a new outlet for said drainage ditches, which can be done by establishing and constructing the extension herein proposed.

Your petitioners further represent that the proposed repair and maintenance of said Drainage Ditches No. 1 and 2, and the establishment and construction of said proposed extension of or outlet to Drainage Ditch No. 1 will be conducive to the general health, convenience and welfare of the City of Sioux Falls, and of the inhabitants of the Big Sioux River Valley between the Cities of Sioux Falls, and Dell Rapids, and will prevent the annual loss of many thousand acres of crops in said valley, and will prevent great damage to the lands in said territory, and to the buildings, bridges, highways and other improvements thereon.

Your petitioners further represent that the territory likely to be affected by the proposed repairs to and maintenance of said drainage ditches, and the establishment and construction of the proposed extension to or outlet of said
407 drainage ditch No. 1 includes all of the lands in said Big Sioux River Valley that are affected by said Drainage Ditches No. 1 and 2, as the same have been estab-

lished and constructed, and all of the lands in said valley between the cities of Sioux Falls and Dell Rapids that are subject to overflow by the Big Sioux River.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold."

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408 Defendants' Exhibit 3, being the bond accompanying the petition of O. S. Thompson, the material portion of which is as follows:

"Whereas, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold have prepared and executed, and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition for drainage, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof;

Now, therefore, We, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold, as principals, and R. J. Huston and Iver R. Peterson, as sureties, do hereby undertake, promise and agree to and with the County of Minnehaha, in the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or the same is denied on appeal.

Dated at Sioux Falls, South Dakota, April 8th, 1916.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold, R. J. Huston, Iver R. Peterson.

I hereby approve the foregoing bond and the sureties thereto.

HARRY H. HOWE, County Auditor."

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409 Defendants' Exhibit 33, being the order for filing the petition of O. S. Thompson, et al, the material portions of which are as follows:

"Order for Filing Petition for Drainage.

Whereas, O. S. Thompson, and others, of the County of Minnehaha, South Dakota, have this day presented to this Board a petition for the drainage of lands in the Big Sioux River Valley, which lands have heretofore been drained by drainage ditches Nos. 1 and 2, as hereinbefore established and constructed, in which said petition is represented that it is

necessary to permanently close said drainage ditch No. 1, above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast Quarter of Section 5, in Township 101, Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a Southeasterly direction, and to extend said ditch from such point running thence in a Southwesterly direction through Covell's Lake in the City of Sioux Falls, and across the Southeast Quarter of Section 5, the East Half and the Southwest Quarter of Section 8, the West Half of Section 17, the East Half and the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of said Section 18, about forty rods North of the bridge across said river, known as the Twelfth Street Bridge, situated on the Section line between Sections 18 and 19, all in said Township and Range, and said petition having been by this Board examined, and being found sufficient in form, and being accompanied by a proper bond, with sureties approved by the County Auditor;

Now, Therefore, It Is Ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that said petition be forthwith filed with the County Auditor, and a copy thereof be transmitted by said County Auditor to the State Engineer."

Thereafter, on April 12, 1916, a copy of said petition was transmitted to the State Engineer at Pierre, South Dakota, and on May 3, 1916, a resolution was passed by the Board ordering a survey to be made for this proposed extension, and ordering the surveyor to report to the Board upon the length, size, width and depth of the ditch required for this proposed outlet. On May 24, 1916, the surveyor reported his survey, the exact line and width of the ditch, and the amount of right-of-way, together with the estimated cost of the same, and on June 9, 1916, the Board of County Commissioners, by resolution, fixed the exact line and width of the proposed outlet of Drainage Ditch No. 1 and designated the time and place for hearing the same, and designated June 29, 1916, as the time of hearing thereon, and ordered notice to be given. On June 10, 1916, notice dated on that day was published and posted as required by law.

Defendants' Exhibit 42 is the resolution of the Board establishing a drainage ditch as an outlet of Drainage Ditch No. 1 and the abandonment of the old outlet of Drainage

Ditch No. 1, and the repair of Drainage Ditch No. 1 and Drainage Ditch No. 2, the material portions of which are as follows:

"The matter of the petition of O. S. Thompson, and others, representing that it is necessary that drainage Ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, Township 101, Range 49, and that such ditch be extended from such point running thence in a Southwesterly direction through Covell's Lake, and terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in said Township, and that it is also necessary that drainage ditches No. 1 and 2 be repaired and put in proper condition, coming on to be heard by the Board
411 of County Commissioners at a meeting of said Board on Thursday, June 29, 1916, pursuant to notice theretofore given, and written objections thereto having been filed by the City of Sioux Falls, the South Dakota Central Railway Company and Catherine W. Peck, and others, and such objections having been presented orally by counsel for the various objectors, and the said petitioners having appeared personally and by counsel in support of said petition, and various parties having filed claims for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet, and said hearing having been adjourned to this 8th day of July, 1916, and this Board having fully heard and considered said petition and all matters, evidence and arguments presented in opposition to and in support of the same;

Now, Therefore, Be It Resolved that the repair and maintenance of said drainage ditches 1 and 2, and the establishment and construction of said proposed extension to or outlet of drainage Ditch No. 1 will be conducive to the public health, convenience and welfare, and it is necessary and practicable for draining agricultural lands, and it is so found.

Be It Further Resolved that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point on the West bank of Drainage Ditch No. 1, 1610 feet North and 58 feet West of the Southeast Corner of Section 5, Township 101, Range 49, where said drainage ditch swings Southeasterly from a Southerly direction, and that a new extension to or outlet of said drainage ditch, commencing at said point and running thence in a Southerly direction through Covell's Lake in the City of Sioux Falls,

terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in Township 101, Range 49, as described in the resolution adopted by the Board June 10, 1916, be constructed, and that such extension or outlet be and the same hereby is established.

412 Be It Further Resolved that drainage ditches No. 1 and 2 be repaired and put in proper condition, and that the same be cleaned, deepened and widened, and that the levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary, in order that said ditches may carry off the surplus water and properly drain the lands affected thereby, the amount and extent of such repairs to be determined by this Board after an inspection, and, if deemed necessary, a survey of said drainage ditches.

Be It Further Resolved that this Board proceed to consider the claims presented and filed by various persons for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet; that before the assessment of damages this Board personally inspected each tract of land or other property through which said extension or outlet will pass, and that the damages sustained by each tract of land or other property through which said extension will pass, and damages as compensation for the land taken for the route of such drainage be assessed by this Board at a regularly adjourned meeting.

Dated this 8th day of July, 1916.

* * * * * * * *

The material portion of the judgment in the case of Oluf O. Gilseth vs. A. G. Risty, and others, as County Commissioners of Minnehaha County, South Dakota, et al, Defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, Intervening Defendants, rendered by the Circuit Court of Minnehaha County, South Dakota, upon the 19th day of July, 1921, offered and received in evidence, is as follows:

"The Court having heard and considered the evidence introduced on behalf of the parties, and having heard the argument of counsel, and being fully advised in the premises, and

having made and entered its decision in writing, con-
413 sisting of Findings of Fact and Conclusions of Law;

Now, Therefore, on motion of Messrs. E. O. Jones, R. H. Warren, and Porter & Bartlett, representing the defendants and interveners,

It is hereby Ordered, Adjudged and Decreed that the plaintiff's complaint herein be, and the same is hereby dismissed on its merits."

LEONARD BOYCE, being called as a witness in behalf of the defendants, testified in substance as follows:

My name is Leonard Boyce. I have lived in Sioux Falls for about fifteen years. In 1917 and 1918 I was connected with the Sioux Falls Construction Company, as Superintendent of the construction of the spillway on drainage Ditch No. 1 & 2, constructed by the County Board. As such Superintendent, I made arrangements with the Water Department of the City of
Sioux Falls, by which it furnished water to be used in
414 the construction of the spillway on Drainage Ditch No. 1 & 2. The City put in a meter in front of the Penitentiary in a manhole where the main runs into the Penitentiary. We ran a line from there down to the spillway. They knew at the time they put the meter in, the purpose the water was to be used for. We used the water from that connection upon which they furnished the meter in the construction of the spillway. The City rendered bills from month to month, or from time to time for the water so used. These bills were presented to the County Board, and allowed, and warrants were drawn in favor of the City of Sioux Falls, or its water works department, for the amount of these bills, which warrants were delivered by me to the City.

As Superintendent of this work, I had certain steel reinforcing material delivered for that work. Some of it came in on the Milwaukee Railroad, and some on the Great Northern Railroad. There is a spur or sidetrack that extends to near the spillway North of the Penitentiary. I made arrangements with the officers or agents of the Chicago, Milwaukee & St. Paul Railway Company and the Great Northern Railway Company, in the City of Sioux Falls, to have this freight spotted or delivered to us out near the end of this spur near the spillway, and such freight, several car loads, was in fact delivered to us on this spur near the spillway.

During the construction of this spillway in 1917 and 1918, electrical power was used in the work of construction. The Northern States Power Company furnished power or electricity used for power in such construction work. They had a power line that ran by or near the work of construction
415 of this spillway. The agents of the Northern States Power Company made the connections for us so that we used this electrical power which they furnished. They rendered us statements from time to time of the electricity which we used, which statements were presented to the Board of County Commissioners and by them audited and allowed. I think the warrants were drawn direct to these parties.

During the time that I was Superintendent of construction on the spillway on Ditch No. 1 & 2 I saw the City Commission up there looking over the work as it progressed. The whole Commission was together.

Cross-Examination.

My recollection is that they were up there in the Fall of 1917 when we were working on the West side of the bridge on the highway. Possibly October or November, 1917.

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416 P. H. EDMISON, being called as a witness on behalf of the defendants, testified in substance, as follows:

My name is P. H. Edmison. I live in Sioux Falls, and am in the transfer, building material and storage business, Manager of the Sioux Falls Warehouse Company. I had the contract for furnishing the cement used in the concrete work on the construction of the spillway on Ditch No. 1 & 2, during the Fall and Winter of 1917 and 1918. This cement was shipped from St. Louis. My contract with the Board of County Commissioners was to deliver this cement on the spur near the spillway North of the Penitentiary. In fulfilling that contract, I discussed with the agents of the Great Northern Railway Company and the Chicago, Rock Island & Pacific Railway Company of the City of Sioux Falls, the matter of delivering this cement on this spur. I discussed the matter with Mr. Pilcher, the Agent for the Chicago, Rock Island & Pacific Railway Company, as to his ability to deliver freight coming in over his line on this spur. He told me that he could not do it, as they had no way of getting it up there. Some cement which came in over the Chicago, Rock Island & Pacific Railroad was taken to the spillway by truck. (p. 237)

I arranged with the Great Northern Railway Company to deliver the cement that came in over their line on this spur

near the Penitentiary for the spillway business, without extra charge on the freight rate to Sioux Falls. Defendants' Exhibits 52 to 65 inclusive, which are freight bills issued by the Great Northern Railway Company for cars of cement shipped from St. Louis, Missouri, to Sioux Falls, dated July 26, 1917, to September 12, 1918, are the freight bills for the cars of cement which were delivered to the County of Minnehaha for its use in the construction of the spillway on Drainage Ditch No. 1 & 2, which cars I had arranged with the Agent of the Great Northern Railroad Company in the City of Sioux Falls, to be delivered at the spillway, and they were so delivered and I paid the Great Northern for its service.

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418 W. R. LARSON, being called as a witness in behalf of the defendants, testified in substance as follows:

My name is W. R. Larson. I had the contract with the Board of County Commissioners to deepen and widen these drainage ditches in controversy. The work was done in 1918 and 1919. We started in May, 1918, at the Minnesota road bridge, about one thousand feet from the water works, right across the Sioux Falls & Watertown Railroad, with a trenching machine shipped from Chicago over the Great Northern Railroad into Sioux Falls. It was shipped to their freight depot, and then I made arrangements with their agent here to have it spotted to the side-track over by the water-works. From the bridge we worked North towards Renner, up until about September. In the process we widened, and deepened it, and threw up an embankment on one side. There was a dike on the other side. The following year we did work on this ditch with another machine brought from Sioux City over the Chicago, Milwaukee, & St. Paul Railway, and delivered at Renner. There being no agent at Renner, I arranged therefor, and paid the freight through the Sioux Falls Agent. Those machines extend up, in the air about thirty feet, and this ditch is about 1000 or 1500 feet from the Chicago, Milwaukee & St. Paul right-of-way, or line of railroad. (p. 253)

Stipulation.

At this time make the record show that it is stipulated between the respective parties to these actions, that the intervening defendants are the owners of ditch warrants drawn on Drainage Ditch No. 1 & 2 to the amount alleged in their answers, which have been issued and are now unpaid. (Tr. p. 253).

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419 C. T. CHARNOCK, being called as a witness on behalf of the defendants testified in substance as follows:

My name is C. T. Charnock, I am one of the defendant County Commissioners in these actions; have lived in Sioux Falls about twenty-five years, and am familiar with the value of farm land in the vicinity of Sioux Falls, also the value of City property in the City of Sioux Falls. I have been over and am familiar with all the lands within the area of Drainage Ditch No. 1 & 2. Prior to fixing the apportionment of benefits thereon on June 10, 1921, I accompanied the Board of County Commissioners in making a personal inspection of all of the lands within the drainage area. The Board selected and determined the benefit to the unit adopted, which unit is situated about three and one-half miles North of Sioux Falls. We placed a value upon this land without the ditch, and a value upon it with the ditch. The difference between these values was the sum of $25.00 which, in our judgment, was the real beneficial value to this unit produced by the construction of this drainage ditch. The Board applied that unit to all the lands within the drainage area, and used the same method of determining the number of units of benefit to all of the lands affected. In applying this unit towards fixing the proportion of benefits to the Chicago, Milwaukee & St. Paul Railway Company, we first took into consideration the land belonging to the railroad company, the acreage, and we assessed that practically the same as abutting lands, and then we took into consideration the benefits to the grades and the culverts that could be done away with, and to tracks and bridges, etc. That was figured out by our Engineer. The amount or number of units was arrived at by figuring it out in dollars and cents, and then dividing the total amount by the benefit to the unit or twenty-five, thereby obtaining the number of units of benefit which was, in our judgment, received by this railroad company.

420 We pursued the same course in fixing the number of units of benefit to the Chicago, St. Paul, Minneapolis & Omaha Railroad Company; also to the Chicago, Rock Island & Pacific Railroad Company; also to the Great Northern Railroad Company. We used the same method in arriving at the proportion of benefits which, in our judgment, the Northern States Power Company received from this drainage ditch. In fixing the proportion of benefits to the Northern States Power Company there were a number of different elements taken into consideration. First, was the dam at Schjodt's. We put that in to control the water there in the

river, and also controlling gates or wiers at Thompson's, and the cut-offs of the river. We also took into consideration the property here in Sioux Falls known as the hydro-electric plant. These benefits, were arrived at by the same process of figuring the total benefit and dividing the same by the value of the benefit to the unit. The number of units which were fixed against these various plaintiffs in these actions represented the judgment of the Board in fixing the proportion of benefits upon the showing that was made, and the computation of our Engineer. We adopted the same process in arriving at the number of units which were fixed against the City of Sioux Falls for benefits. We used the same process all the way through on all the property that was taken under the ditch here.

Cross-Examination.

The unit we used was one acre of agricultural land. In determining the benefit to the Northern States Power Company, the Board took into consideration the dam at Schjodt's, the purpose of which was to prevent the water from the Big Sioux River, where the River had broken through into the ditch, from being diverted into the ditch. The Power Company was objecting to the ditch taking its power. The same con-
421 dition is true with reference to the controlling gates at Thompson's. The agricultural land had a value placed upon it, and was computed by the acre. I don't mean to say that all the land was assessed at one price. They vary in price according to benefit. Referring to the property of these plaintiffs, the method pursued was to figure the benefit in dollars and cents. The property now before the Court was not computed on the acreage plan. When we were making this assessment, we placed everyone the same value on it.

We did not make any difference whether the property belonged to the City or individuals. In assessing the railroads, we took the land that the railroad companies owned into consideration first, then the railroad itself, and then the culverts and bridges. The acreage that the railroad companies owned was only one element taken into consideration, and it was all assessed upon the unit plan. We took in the mileage but mileage was not the only element taken into consideration. We did not use the valuation of the railroads, but we used the valuation of the benefits that we thought the railroads would receive from it. The Board went over the proposition with the Engineer, and he figured out the method to use and it was approved by the Board. We accepted his figures. The Engineer figured the proportion of bridges that could be saved by di-

verting the water through the spillway, and that was computed in dollars and cents, and divided by twenty-five, which made so many units. The whole system was figured on that plan. All of the different elements of benefit were figured up and added together. The Engineer showed us what benefits this would be, what it would amount to, and that is the way we handled it, by the $25.00 unit, the same as we did the farms.

It was all figured out for us on paper. Then we took
422 the map and travelled over the entire system. The Engineer figured the savings to the bridges, the benefit to the road-bed, and the culverts and the land owned by the railroad. That was all taken in. Those are all the elements I remember.

Q. Now, Mr. Charnock, what was the basis upon which the streets of the City of Sioux Falls were figured on. What were the elements that entered into that?

A. If I remember right they were taken in about the same value as the property abutting.

Q. You mean that all of the streets within the drainage district were figured by the acreage and also other benefits?

A. We didn't figure the lots by the acre.

Q. I am not talking about lots, I am talking about streets?

A. When you get to the streets they are in where lots are laid out.

Q. I am asking about the city property or streets?

The Court: As I understand the witness, they did not consider that upon the acreage basis at all. Am I right?

The Witness: Yes sir.

Q. Upon what basis was the benefits figured?

A. It was figured on the valuation.

Q. Valuation? A. Yes.

Q. Upon the acreage valuation?

A. We figured if you kept the water off this lot you had benefitted it so many dollars.

Q. I am asking about the city streets.

A. I am telling you that we took the streets by the same value.

Q. And figured them in acre valuation?

A. No, not in acre valuation, lot valuation.

Q. Upon what basis?

423 A. I don't know as I can explain it so you can understand it.

Q. What benefits did you figure out that the city would derive to their streets from this spillway and ditch?

A. The drainage. Keeping the water off of them would be certainly a benefit to the streets as well as abutting property.

Q. Upon what basis, what theory?

A. I cannot tell you just how much.

Q. Upon what basis did you figure, for instance, Sherman Park?

A. I believe Sherman Park was run in by the acre.

Q. As agricultural land?

A. Somewhere near that.

Q. Was the streets that you just referred to also figured upon the basis of agricultural land?

A. Whenever they were on that, they were assessed along about the same as the property where the street was located.

Q. As agricultural land?

A. You wouldn't call city lots agricultural land?

Q. I am asking you what you done?

A. I am telling you we assessed the street along with the property where it laid.

Q. As agricultural land?

A. No, not as agricultural land.

Q. What about Phillips Park, how did you assess that?

A. There is only a portion of Phillips Park, I think, taken in. That is the north end.

424 Q. Upon what basis did you put that?

A. That was the same way.

Q. In fact, you assessed the city property, all of it, the same way you have described it here?

A. I think so.

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425 HERMAN RETTINGHOUSE, being called as a witness on behalf of the defendants, testified in substance as follows:

My name is Herman Rettinghouse. I am a civil engineer and reside in Sioux Falls. I graduated in 1881 and came to the United States in 1882, and in the following year engaged in engineering work; was employed by the Milwaukee, Mitchell and Western Railway, which is now a part of the Chicago & Northwestern system, as an assistant and gradually advanced into higher positions until 1893, at which time I engaged in private work in Ashland, Wisconsin, where I was city engineer for three years. Also was engineer for two railroads and in the fall of 1897 again engaged with the Chicago & Northwestern Railway as assistant engineer and was promoted to superintendent of bridges and building on the same road in 1900, in which capacity I served for five years;

and from 1905 to 1907 was employed by the Wisconsin Central Railway Company as division engineer; had charge of the engineering construction work and maintenance of the entire road, and on January 1, 1907, again engaged with the Chicago and Northwestern as division engineer of the Northern Iowa and Sioux City Divisions, which position I held until the spring of 1913, when I was made division superintendent of the Iowa and Minnesota division of the Chicago & Northwestern. I remained there until November, 1913, and was then promoted to chief engineer of the Chicago, St. Paul, Minneapolis and Omaha, a part of the Chicago & Northwestern system. I retired from that service on March 1, 1920, at which time I was placed on the pension roll because of my impaired health. Since April 1, 1920, I have been a resident of Sioux Falls and have engaged in private practice as consulting engineer and senior member of the firm of Chenoweth & Rettinghouse, up to the present time. My first experience in public drainage work was in 1905 in a project which was affect-
426 in the Wisconsin Central Railway and another similar project in Southern Wisconsin; January 1, 1907, while in the service of the Chicago & Northwestern as division engineer in Iowa, which comprised practically the entire state covered by that railroad, the drainage work was very extensive. It was the principal part of my duties to make myself familiar with and handle the drainage problems which came up constantly. During this time we had from one hundred to one hundred fifty drainage problems of various magnitudes. When I became chief engineer of the Omaha Railway, we had a number of drainage problems in the states of Wisconsin, Minnesota, South Dakota and Nebraska. It was my duty as chief engineer to make myself very familiar with them and to cover all the phases of the problems as to benefits, damages and the manner of assessing benefits and damages. In November, 1920, my firm was engaged by the Board of County Commissioners of Minnehaha County, to make a topographical survey of the district covered by Drainage Ditch No. 1 and 2 for the purpose of preparing a correct map and furnishing data to the Board as would enable it to place the proportional benefits on the land and interests affected. Defendant's Exhibit 1 is the map prepared by my firm, which shows the topography of the country adjacent to and affected by Drainage Ditch No. 1 and 2 of Minnehaha County. Drainage Ditch No. 1 and 2 at its initial point is not exactly in the Sioux River. A small creek connects with the Sioux River near the Southwest corner of Section 29, Township 104, Range 49. The initial point of that particular section which we term sec-

tion No. 3 is located at that point, a matter of five or six hundred feet from the river proper. There are controlling works and gates there which enable the ditch to be closed off from the river or from the creek, or opened and at flood time part of the water taken out of the river. Section No. 3 is located
along the lowest land west of the Sioux River. The
427 land is naturally down lower than the banks of the river
proper, a great deal in some instances. The land west of the ditch gradually rises as you go away from the ditch until you get to the foothills. The surface water on the outside of this ditch can most assuredly get into the ditch. The ditch was constructed for the prime purpose of draining this section of the country and inlets have been made at various points, at roads and intervening points, to permit this surface water to drain into the ditch.

This third section terminates in connecting with the river on the east and west line of Section 18, Township 103, Range 49, about a thousand feet west of the east line of Section 18. This ditch connects with the river as stated and the river from that point to a point on the southeast quarter of Section 20 has been straightened at various points, being practically canalized. At the point spoken of there is a bayou or an old portion of the river bed, which is partly filled up along the north, due to the fact that the river has been straightened to the west of it, and Section No. 2 connects with this bayou about eight hundred feet east of the river proper. The ditch then extends parallel to the Milwaukee railway to near the junction point of the South Dakota Central line. At that point it diverges to a distance of about sixteen or seventeen hundred feet, running practically that distance parallel and in a southerly direction until it intersects the old bed of Silver Creek. It then follows Silver Creek in a southeasterly direction, cutting out all bends in it until it reaches a point at or near the Section line between Section 28 and 29, and runs in a southerly direction about a thousand feet parallel to the Milwaukee railway again until it reaches a point about a quarter of a mile north of the city limits, from which point it runs in a southeasterly direction to its terminus in the spillway. Throughout Section 2 which is described, the ditch runs in the lowest part of the country east of the river and serves the
purpose of a drainage ditch as well as for an overflow
428 from the river. It was put in for the dual purpose of
serving as an overflow and as a drainage ditch. You will notice on the map that Silver Creek runs in a very circuitous route along the ditch and it terminates in this ditch, so that

the waters of Silver Creek are more quickly disposed of than before and it therefore assists in draining the land adjacent to the ditch and Silver Creek and the same is true of the lands between the ditch and the river. The ditch assists in draining territory which is tributary to Silver Creek, which has its source north of the initial point of Section 2 of the ditch. The dam at Schjodts is about eight hundred feet from the former end of the lateral ditch constructed there. This dam is about thirteen hundred feet from the present cutoff channel of the Sioux River. There are two controlling works; the one mentioned composed of a gate at the initial point of Section 3. At the initial point of Section 2 there is a concrete bridge with a wier under the same which permits the water to rise to a certain point before it enters into the ditch and thereby is retained in the river proper. This was installed for the purpose of controlling the rise of the water in the river. In making of
the survey of which I had charge, I made frequent trips
429 over the territory in order to familiarize myself with
all the elements that might come into consideration and particularly as to the relative benefits derived, bearing in mind that it was necessary to arrive at some certain basis so as to be able to make the proper recommendations to the Board. In going over the territory, I came to the conclusion that at the location of this unit, it was about as good an illustration as could be found along the entire district, and I selected this unit for my recommendation to the Board. On Section 2 of this district, which terminates in the Sioux River, there are openings left at all necessary points to drain off the surface water and
carry it into the ditch. After we had made our report
430 to the Board and I can best illustrate it by reading the
sentence, "We also submit as an aid in your work of equalizing the benefits, a complete list of all the lands with the acreage of each parcel and proportionate benefits. We have made a thorough investigation and have minutely looked over all of the affected lands. In consideration of the proportion of benefits, we have selected a particular tract for a unit, one acre, more particularly described later, in the west half of the northwest quarter of Section 29, Township 102, Range 49". Together with that report we submitted a recommendation as to the proportional benefits and after the board had received this report, we made a trip over the entire district lasting several days. We had one of the maps with us and we viewed all the lands and all of the other points where other benefits were to be proportioned. The particular percentages of the different parcels of land came under consideration and were pointed out, and if a dispute arose as to whether

or not it was the proper amount of percentage, it was corrected and agreed upon right there by the Board, so that at the conclusion of our inspection the Board was familiar with all of the facts of the situation as I was myself. We used this unit selected as one and compared the other real estate with it. It was decided by the Board that the acre in question was worth one hundred dollars prior to the improvements and that it was worth one hundred twenty-five dollars subsequent to the improvements. Therefore the actual value of benefit to the unit selected was twenty-five dollars. All the agricultural land was assessed in relation to this unit. Many of the lands were only 30 or 40% depending upon the amount of benefit derived, as compared with this unit, being one hundred per cent. There were other lands that were as high as three hundred and three hundred fifty per cent of this unit. I am familiar with the cost of construction and upkeep of highways. In arriving at the benefit to the highways within this drain-
431 age area we estimated the benefits in this way. There is a certain amount of annual maintenance necessary for any road, and there is more than that amount necessary under flood conditions. That is to say, a road that is periodically flooded as against a road that never is flooded. The difference in the estimated cost of maintenance was capitalized, or represented the interest on a certain sum of money, and we consider the capitalized portion as a real benefit. We then, after obtaining that result after making a great many calculations, taking into consideration the various locations, some of them benefitted more than others.

We divided the amount arrived at by the value of the unit of $25, thereby obtaining the number of units as a proportional benefit for these roads. The sum we divided by the unit represented the capitalized value to that part of the highway; we applied the same method to the streets and highways of the City of Sioux Falls. We did not apply the acreage basis to the city property, excepting possibly the grounds where the water works are located. In applying the benefit to the unit and what the Board took into consideration as elements of benefit to the Milwaukee Railway Company, we took into consideration the fact that in the first place there were practically three elements. First was the right-of-way on the acreage basis, which was estimated in proportion to the adjacent lands. Second, that it was possible to shorten or abandon certain bridges. In order to determine the benefits derived therefrom is simply a mathematical proposition. It costs a certain amount of money each year in order to maintain a bridge, whether it is a pile bridge or a steel bridge. We know how

long these structures will last. We figure the cost of a bridge and divide it by the number of years in order to get the amount that is necessary to be expended each year. Taking the amount in dollars and cents multiplied by the length of the bridge and divide that and capitalize that at 7%,
which is the usual rate of interest, and that determines
432 the amount of benefit. This was the second element.
The third element is the fact that by reason of the flooding of the territory in which railroads are located, washouts often occur. We obtained data and from my personal knowledge and experience I have a very good idea of what it costs to repair washouts periodically appearing and we estimated as close as possible how much it would amount to every year and capitalized that amount again.

Again as an additional element, a road-bed is solidified or made stronger by not being subject to floods. A road-bed that is constantly or for great lengths of time subjected to submersion is certainly weakened, and again, so far as humanly possible, we figured the amount of benefits in dollars and cents and after getting all of these results or capitalized amounts, we divided that by twenty-five as our measure and determined the number of units of benefit. That system and general method and plan was used to determine the amount of benefits that each railroad received from these separate elements. There were three elements of benefit so far as the Northern States Power Company is concerned. One of them was the fact that through the construction of the wier at the initial point of section 2 and through the construction of the dam commonly known as Schjodt's dam and I believe some dike work done at other points, the power company was assured of a constant flow of water or a normal stage of water. The second element, that through the diversion of a part of the water of the Sioux River through this drainage ditch, which has been estimated at from twenty-six hundred to three thousand second feet, as against a total flood condition of six thousand feet, and all the way from 6000 to 10000 second feet, a benefit was created in that much water being taken away
from the tail race and lowering the available head at
433 the power company's plant. In determining what
proportion that would be, I was largely guided by the report made by Mr. Link, in which the results of his investigation were given and the amount of second feet of water in flood stages of the river at certain periods mentioned. I was also dependent upon the information and investigation made by Mr. Shenehon, who designed the spillway, and I came to the

conclusion as a fair proportion of the waters diverted, we could assume one-third of the entire river from the end of section 2 in lowering the head of the hydro electric plant, through the flood waters; also the lay of the land opposite the hydro electric plant is such that all of the flood waters, after passing over the dam, must pass through the tail race. All these elements were considered in the determination of the benefits accruing to the Northern States Power Company.

Q. Just a moment, let me call your attention to certain cut-offs in the river. What if any?

A. I said there were three elements and I only mentioned two. The other is the straightening of the river which has been done to a large extent between the upper end of Section No. 2, at this point clear down to this point near the Watertown & Sioux Falls Railway. The velocity of the water was greatly increased of the waters flowing through the river, and it thereby shortened the flood period, in that the water passed through the river much quicker than it did before. The total amount of water that is collected in the initial point of these cutoffs is hastened down the river past the Northern States Power Company's Plant. The ditch takes one third out of the river. I have estimated it as closely as humanly possible at one-third. It may be more. These were the elements we considered in apportioning the benefits to the hydro electric plant. Using these elements, we estimated the amount that would be saved by the power company through the fact
434 that the head was not lowered to that extent and capitalized that amount. The power company, by by-passing these flood waters, would have a constant aggregate output of hydro electric power and in season other than flood seasons the controlling works and dams keep all the water in the river that should be there and pass it around over the power company's turbines, insuring to them a constant flow even at a low stage of water in the river. (Tr. p. 285) The Great Northern had 2.4 acres of right-of-way which the Board considered benefited by reason of this ditch. They have one-fifth of a mile of track, two bridges protected, and 315 feet approximately of bridge that might be abandoned. The Chicago, Rock Island and Pacific has 12-1/8 acres of right-of-way that is benefited, one mile of track and two bridges benefited to be shortened, together approximately 230 feet. The Chicago, Milwaukee and St. Paul Railway has 172 acres of right-of-way, 14.2 miles of track, two bridges protected, one bridge shortened one hundred feet and one bridge of 176 feet abandoned, all benefited thereby. The Chicago, St. Paul, Minne-

apolis and Omaha has two and one-fourth miles of track, 27 acres of right-of-way, 405 lineal feet of bridges abandoned and two bridges protected.

435 These items I have mentioned, in my opinion, were benefitted by the construction of this ditch and the diverting of the water as I have testified. There were three elements in regard to the assessment of the city of Sioux Falls. First, the streets, estimated at about 14 miles of streets within the drainage district. They are benefited in the same manner as I have explained in regard to the county and town roads, although the benefits were more varied on account of the streets being built of different character. The second item was the parks. We figured that from the diversion of the flood, the annual maintenance of the parks was reduced, that is to say there was less work to maintain the grounds as compared with the ground that was flooded. Another item was the benefit to the water works. It seems to be a fact that through the placing of the spillway the life of the water works was saved, insofar as productiveness of the wells is concerned. Another item is that during flood conditions, the water works were unproductive. We have estimated a certain number of days each year that the water works were out of commission. These wells were flooded by surface water and made them unsanitary and unfit for drinking purposes. We figured the amount that that would bring and capitalized the amount same as the capitalization of the streets and parks and divided that amount by twenty-five in order to arrive at a certain number of units. From my experience and the facts and data that I have been able to gather, the benefits that I have mentioned are direct benefits to the railroad companies and their properties by reason of the construction and maintenance of this ditch; and the benefits which I have outlined to the city and Northern States Power Company were direct benefits to them. After determining the amount of the units and actual amount of money necessary to be raised, that amount is divided by the number of units to produce the value of a unit; and by that process we reduce the actual value of the unit down proportionately to each party affected.

436 Q. You reduced the valuation down proportionately to each property affected whether it was railroad or ranch property? A. All treated alike.

Q. And that, in the final analysis will be the assessed benefit after being equalized? A. It will.

Q. Calling your attention to the fact that the river continues around the city for some miles beyond the outlet of the spillway, what is the effect of by-passing this water upon adjacent lands, starting at the city limits on the north around this city until the ditch dumps the water back into the river. Is that a benefit or not?

A. It constitutes a direct benefit. The same benefit as to lands farther up the river.

Cross-Examination,

437 By Mr. Campbell:

When I speak of the ditch diverting something like three thousand feet of water, I have reference to the discharge capacity of the ditch at its lower end; I couldn't tell what proportion of the water came out of the river during the flood stage; I should think a majority of the water came out of the river; I don't know the capacity of the ditch at its upper end; we haven't figured that; the ditch does not divert water from the river at any other point than that; I do not know what the amount is that is diverted there; the wier that I speak of down here that controls the flood of the river is constructed to keep the water from going into the ditch at normal stage; if the ditch were not there, the waters would go down the river just the same. The second element that I said I took into consideration, that is, the diversion of the flood of the water would lower the tail race of the Northern States Power Company at flood times to the extent of the water that was diverted; I couldnt' tell you how much that would be; I couldn't tell you how many kilowatt hours of output the plant would gain by reason of that diversion; that is a matter in hydro-electric engineering that I have not attempted to qualify; the value of that increased head would be measured by the value of the increased output from the hydro-electric plant; this answer is based upon the assumption that it is cheaper to produce electric current from a hydro-electric plant than from a steam plant.

438 By Mr. Grantham:

I didn't know I determined the capacity of the stream; we have several cross sections taken at various points of the ditch and the river as well; I couldn't tell you whether I have a cross-section of the ditch at about the point where the ditch that runs to the spillway is fed by the river; we have taken cross sections of every half mile; the ditch is not uniform all

the way; I have no idea at all of the size of the stream; in testifying here that the ditch carries one-third of the water, I was basing my conclusion upon the investigations made; I determined on my survey the high water mark; the [heighth] above the banks of the stream of the high water varies at various points; the dotted line here on the map shows the high water line; at an elevation of 1438, the [heighth] of the high water line is about ten feet above the banks of the river; the water at that point would be about 8000 feet wide on the surface; it is impossible for anyone to tell you off-hand just what the average depth of water would be there without showing cross-sections at every point. I have no idea.

Q. How did you determine the capacity or amount of water carried if you didn't know the amount of water in the stream? A. I was not engaged for that purpose.

Q. You don't know as a matter of fact the amount of water that is carried down the stream in flood time?

A. I do not.

Defendant rests.

439 Endorsed: Filed in the District Court on Jan. 10, 1923.

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440 (Approval of statement of evidence by District Judge.)

The above named appellants having presented and filed in this Court their statement of the evidence in the above entitled cause, and the above named respondents having filed their objections thereto and asking that part of said statement be stricken and said respondents' statement of said evidence be substituted in lieu thereof, and the appellants having filed their objections to said substituted statement of said respondents, and said differences having been submitted to the above named court, and said statement having been made up and completed in conformity with the directions of said
441 Court,

Now Therefore, It Is Ordered that said statement so made in conformity with the order of this Court and hereto attached be and the same is hereby approved as a true and complete statement of the evidence in this cause.

By the Court:

JAS. D. ELLIOTT, Judge.

Attest:

(Seal of Court) Jerry Carleton, Clerk.

Endorsed: Filed in the District Court on Jan. 10, 1923, at 2. P. M.

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442 (Clerk's Certificate to Transcript.)

United States of America,
Southern Division,
District of South Dakota—ss.

I, Jerry Carleton, Clerk of the District Court of the United States of America, in and for the District of South Dakota, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Eighth Circuit, that the foregoing, consisting of 441 pages, numbered consecutively from 1 to 441, inclusive, is a true and complete transcript of all of the record, process, pleadings, orders and final decree as enumerated in the Praecipe of the parties appellant and the Praecipe of the party appellee to this cause filed herein, directing the Clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original Citation, together with the affidavit of service thereof, and in addition thereto a copy of said Praecipes and all written opinions of the Court filed in said cause.

Seal
U. S. Dist. Court,
Dist. of South Dakota.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, in the said District, this 15th day of March, A. D. 1923.

JERRY CARLETON, Clerk.

Filed Mar. 20, 1923. E. E. Koch, Clerk.

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292 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

United States Circuit Court of Appeals, Eighth Circuit.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,
No. 6317. vs.
Great Northern Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

(Order of Submission.)

Memorandum of Clerk:

On the 17th day of December, 1923, this cause, together with causes Nos. 6312, 6313, 6314, 6315 and 6316, was submitted to the United States Circuit Court of Appeals for the Eighth Circuit and a full copy of the order of submission having been included in the transcript taken for the Supreme Court of the United States on appeal and an application for writ of certiorari in cause No. 6312, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee, the same is omitted from the transcript in this cause, No. 6317.

(Opinion.)

Memorandum of Clerk:

On the 18th day of March, 1924, an opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in causes Nos. 6312 to 6317, inclusive, and a full copy of the opinion having been included in the transcript taken for the Supreme Court of the United States on appeal and on application for writ of certiorari in cause No. 6312, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee, the same is omitted from the transcript in this cause, No. 6317.

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293 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1923.
Tuesday, March 18, 1924.

A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants and Minnehaha National Bank of Sioux Falls, South Dakota, et al., intervening defendants, Appellants,
No. 6317. vs.
Great Northern Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Great Northern Railway Company have and recover against A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., intervening defendants, the sum of Twenty Dollars for its costs herein and have execution therefor.

March 18, 1924.

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294 (Petition for Appeal to Supreme Court, U. S., Assignment of Errors and Allowance of Appeal.)

(Petition for Appeal and Allowance thereof.)

To the Honorable Presiding Justice, or any of the Judges of the Circuit Court of Appeals of the United States, for the Eighth Circuit.

Now comes the above named appellants, by their solicitors, and complain that in the record and proceedings, and also in the rendition of the Decree of the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Louis, in the State of Missouri, in the above styled and numbered

cause, on the 18th day of March, A. D., 1924, affirming the Decree of the United States District Court, for the District of South Dakota, Southern Division, in said cause, manifest error has intervened, to the great damage of the petitioners. In substance, said errors are these:

1. Appellee was given said relief by collateral attack, by means of a Bill of Equity, when it had an adequate remedy at law which it could pursue, at its election, either in the Courts of the State of South Dakota, or in the Federal Court.

2. It was given the relief aforesaid, despite the fact that the record shows without dispute that the appellants, the Board of County Commissioners, in establishing the said new project, and in attempting to obtain said contribution from appellee, acted strictly in accord with the statutes of the State of South Dakota governing the establishment of such new project.

3. Appellee got said relief, though, in addition to the fact that the said Board had in fact thus complied with said statutes of the State of South Dakota, it was the settled law of the said State at the time the Circuit Court of Appeals acted as aforesaid, that the doings of said Board with reference to the aforesaid project were in compliance with
295 the statutes of South Dakota, as construed by the highest court of that State. It was further settled at said time by the highest court of the State of South Dakota, that the very project at bar was the formation of a new drainage district, or ditch. And the Circuit Court of Appeals erred in disregarding the interpretation of the applicable statutes of the State of South Dakota as formulated by the highest court of that State, and substituting its own interpretation for that of said highest court of that State.

4. The Circuit Court of Appeals erred in granting the relief which it did grant and affirm, because neither the pleadings nor the evidence warranted such relief, or any relief, and because its finding that appellee was entitled to the relief which it obtained, is contrary to the pleadings and to the evidence, and contrary to and unwarranted by the law.

5. Said Circuit Court of Appeals erred also for the reasons set out in the assignments of error filed herewith.

The appellee invoked the jurisdiction of said United States District Court, as set out in its bill of complaint, on the ground that it, the appellee, was a citizen of the State of Minnesota; that the appellants were citizens of the State of South

Dakota, and that more than $3,000.00, besides costs, was actually in controversy. It did not invoke the jurisdiction solely on the aforesaid grounds, but, in addition, asserted in its bill of complaint that appellants were not proceeding in accordance with the requirements of the applicable statutes of the State of South Dakota; that if it were assumed they were acting in compliance with said statutes, such statutes themselves were unconstitutional and void, and violative of the Constitution of the United States, and amendments thereto, and that the action of appellants was depriving appellee of its property without due process of law, in violation of said Constitution and amendments thereto.

296 Therefore, your appellants and petitioners say that this cause and matter is not one in which the decision of the said Circuit Court of Appeals of the United States is made final, and say further that the controversy between appellants and appellee involves an actual controversy over more than One Thousand Dollars, besides costs.

Wherefore, petitioners pray for an allowance of the appeal, to the end that the cause may be carried to the Supreme Court of the United States, and petitioners pray for a supersedeas of said judgment, and such other process as is required to perfect the appeal prayed for, to the end that the errors therein may be corrected.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Solicitors for Appellants.

Appeal and supersedeas allowed, and bond fixed at the sum of one Thousand and no/100 Dollars ($1000.00), conditioned as the law provides, this 31st day of May, A. D., 1924.

WM. S. KENYON,
Judge of the Circuit Court of Appeals of the United States, for the Eighth Circuit.

Assignments of Error.

Now on this 31 day of May, 1924, comes A. G. Risty et al. as County Commissioners, etc., et al., Appellants, by their solicitors, Benj. I. Salinger, Elbert O. Jones and Norman B. Bartlett, and in connection with their petition for appeal to the Supreme Court of the United States say that in the find-

ings, judgment and decree entered in the above cause on the 18th day of March, 1924, manifest error has intervened, to the injury, wrong and prejudice of this appellant, and that the same is erroneous and unjust to appellant;

1. Because the Circuit Court of Appeals failed to follow the construction of the South Dakota Constitution and statutes as pronounced by the highest court of the state
297 and did its own construing of said state law and based its affirmance of the decree of the District Court on a construction on its own part, which is in conflict with the construction of the highest court of the state.

2. Because it was based on the reasoning that appellant Board had no authority to make an assessment except in aid of a drainage project to drain agricultural lands and that said Board had no authority in law to establish a drain except for the drainage of agricultural lands.

This is erroneous and the interpretation of the Constitution and statutes by the Circuit Court of Appeals is erroneous because it is and for a long time has been the settled law of South Dakota as declared by the highest court of the state in construing its said Constitution and statutes that a Board such as appellant Board [it], is by such Constitution and statutes authorized to establish and construct a drain for a public purpose and that such public purpose included but was not limited to the drainage of agricultural lands, and that such authority existed as to such drainage as the very one at bar is, and it is undisputed in the evidence that one object of this project was to drain agricultural lands.

3. Because it is not only a fact that the highest court of the state has ruled in construing the Constitution and statutes of the state of South Dakota that the drainage ditch at bar was lawfully established and that the acts of appellant Board were lawful, but the record shows both facts without dispute; and the Circuit Court of Appeals' affirmance is despite such ruling and despite said state of the evidence.

4. Because there is no evidence in the record to show any fraud or subterfuge on behalf of the appellant Board or anyone at all in the establishment of this new drainage ditch; and there is absolutely no evidence in the record that appellee was prevented from making a full and fair defense to such establishment in the proceedings had upon notice given by the appellant Board by which this new drainage ditch was established. Unless appelle was by some subterfuge prevented from making a full defense to the establishmnt of this

project at the time of its establishment, the mere state-
298 ments now that it was established by subterfuge is of no avail to it in this collateral attack.

5. Because the affirmance was based on an interpretation of the statutes of South Dakota by the Circuit Court of Appeals that such statutes did not permit or authorize appellant Board of County Commissioners to establish and construct a new drainage ditch over the line of two older ditches, which new project contained a materially larger area than the combined areas of such old ditches and called for cleaning out, widening, deepening and diking of the old ditches to double their former capacity—the construction of river cut-offs to accelerate the flow of water therein, and the installation of a new and larger spillway, all at a cost of more than double the cost of the original ditches; which interpretation was contrary to the interpretation given to such statutes by the highest court of the state of South Dakota in this very drainage project.

6. Because the statutes of South Dakota, as interpreted by the highest court of the state, permit and authorize the appellant Board to establish over the line of one or more old drainage ditches a new drainage project containing a materially larger drainage area than the combined area of such old ditches—with additional river cut-offs—new and larger spillway, and a cleaning out and deepening, widening and diking of the old ditches to double their former capacity, at an expense of more than double the cost of the original ditches; and the undisputed evidence in this case shows the proceedings of the appellant Board sufficient under such statutes to establish and construct such new drainage project and make an apportionment of benefits for the payment of the cost thereof, and did not warrant the finding and conclusion of said Circuit Court of Appeals that said proceedings were in fact for repair and maintenance only.

7. Because it is based on the holding and reasoning that appellant Board had acted without authority from and had not complied with the provisions of the statutes of
299 South Dakota regulating the maintenance and repair of ditches already established. The appellees, City of Sioux Falls, C. Milwaukee & St. P. Ry. Co., and the C. St. P. M. & Omaha Ry. Co., conceded that the project at bar was the creation of a new ditch and a new project. That fact is established by the undisputed evidence as against all of the appellees. It is undisputed in the evidence that there was a full compliance with every statute dealing with the establish-

ment of a new ditch. Therefore, the affirmance was given because there had been a failure to comply with statutes that had nothing whatever to do with the establishment of a new ditch or assessing for the cost of its construction. The court disregarded that the relevant statutes had been complied with and based its action wholly on the fact that statutes that had no application had not been complied with.

8. Because the appellant Board to whom had been delegated by the statutes of South Dakota the authority to determine the purpose and character of this drainage project had, after notice and hearing, determined that this drainage project, among other things, was for the benefit of the public health, welfare and convenience and was necessary and practicable for draining agricultural lands, from which determination no appeal was ever taken; and the highest court of the state of South Dakota was held in interpreting such statutes that such determination is final, no appeal from the same ever having been taken.

9. Because the notice dated September 15, 1916 and the hearing held pursuant thereto on October 2, 1916 was a notice to and an opportunity to be heard by appellee on the formation of this new drainage project with an enlarged area subject to benefits and that appellees property was included therein, and gave to it its day in court and its opportunity to contest the establishment of said drainage project, the legality thereof, the necessity therefor, the character and purpose thereof, and it having waived the same and defaulted therein and not having appealed from said determination, is bound thereby.

10. Because what was in effect done was to restrain
300 legislative action on the part of the appellant Board acting in a legislative capacity under delegation from the legislature of the state. The legislature itself could have by enactment of the statute done everything the Board did or was proposing to do, and it should be conceded that the legislature could not have been enjoined from enacting such a statute. The only difference is, that the Board was bound to give certain notices and hearings before any assessment could become a lien, and the Board did what it was bound to do.

11. Because the proceedings at bar were proceedings in rem, for the purposes of taxation, and dealing in this matter or any review of the same involves property rules, over which the courts of the state are the final authority, and both resi-

dent and non-resident property owners, must at least in the first instance, resort to and exhaust the remedies provided by the statute in the state tribunals for reviewing such controversies before they may enter either the state or the federal courts at all.

12. Because although where a resident of a state may enter the courts of a state, one who has diversity and a controversy involving more than $3,000.00 need not submit himself to those state courts but may at his election enter the federal courts, yet in a proceeding in rem like a drainage project the resident of the state must first submit to administrative review and may not enter the courts of his state without first exhausting such administrative review, and the non-resident cannot disregard such administrative review and have his proceedings in rem reviewed in the first instance in the federal courts. The non-resident can enter the federal court only when the resident of the state can enter the state court.

13. Because the injunction was granted on the reasoning that one should not be compelled to appear at the hearing to equalize apportionments for the reason that it would be had before said Board and said Board had no authority whatever to act—that one should not be compelled to submit to a hearing before a mere trespasser. This disregards,
301 first, that the mere assertion that the Board was without authority did not justify the failure to appear at said hearing, and, second, it disregards the decisions of the highest court of the state that the Board was acting on full authority, and, third, it appears by the undisputed evidence that they had full authority.

14. Because the hearing enjoined was one to be had for the purpose of equalizing a tentative estimate only which had been made by the appellant Board. This estimate was not final and additional acts by the Board were necessary after such hearing was held before any tax, assessment or servitude could become operative. Manifestly the holding of such hearing could not give rise to a multiplicity of suits as against this appellee, no matter how many suits might arise as to other parties. Manifestly the proposal to hold such hearing cast no cloud on title, because other acts by the Board were necessary before any amount that was finally fixed could become a tax, assessment or servitude upon its property, and there was no evidence at all that there would result irreparable injury to appellee. This is specially applicable to the appellee City of Sioux Falls and to the four railway company

appellees, because even if an assessment had been made and a tax levied, it would have created no lien upon their property.

15. Because appellee made no case under any acknowledged head of equity jurisdiction and in the essence, based its claim for relief upon the assertion that it was threatened with exaction of an illegal tax. At any rate there could be no right to have equitable relief until such time, if ever, as the threatened tax was about to be collected by taking from appellee the title to the lands affected by the assessment. Up to that time nothing could happen more than to exact a sum of money for taxes which were illegal taxes, and for that wrong or threatened wrong the law provides an adequate remedy either in the state or federal courts.

16. Because if, as is contended by the Circuit Court of Appeals, the appellants acted utterly without authority of law and were therefore naked trespassers, that fact
302 gave appellee an adequate remedy at law in either the federal or state courts at their election, to-wit, to sue in trespass—hence appellee's bill in chancery should not have been entertained. If, on the other hand, the acts of the appellants were in all respects lawful, the appellee was not entitled to any remedy either at law or in equity.

17. Because, assuming that appellee could enter the federal court at all, it had at all times a plain, adequate and complete remedy at law in the premises in said courts by appealing from the establishment of the ditch to the circuit court of the state and thence removing the entire controversy involved, including the making of assessments, to the law side of the federal courts, where a trial de novo could be had. Instead appellee lodged a bill of complaint seeking an injunction.

And while it may be true appellee has waived its right to this appeal from the establishment of the ditch, that does not alter the fact that it had no right to enter a court of equity on the ground that though it had at one time the right to thus appeal to and have review in the federal court and a trial de novo there on the law side, by its default and waiver it had voluntarily lost that right.

The right to enter chancery cannot be created by waiving or failing to exercise an adequate remedy at law.

Passing that, the appellee had the right to appeal from the action of the appellant Board as to apportionment of benefits

directly to the circuit court of the state and thereupon to remove this very controversy for review on the law side of the federal District Court and there have a trial de novo.

18. Because, assuming for the sake of argument that the District Court and the Circuit Court of Appeals had authority to pass upon the merits, both of them erred in finding for the appellee in that there is absolutely no evidence to support the contention of the appellee on the merits; that is to
303 say, there is no evidence whatever that the appellant Board ever did anything whatsoever in the premises other than what it was authorized to do by the Constitution and statutes of the state of South Dakota. And in addition to this being the state of the evidence, the highest court of the state, construing said Constitution and statutes of the state, has ruled in a way that is binding upon said federal courts that in truth and in fact appellants acted on full authority and in every way in compliance with the requirements of said Constitution and stautes of the state of South Dakota.

19. Because appellee was not entitled to any relief for the reason that it was given legal notice by the notice dated September 15, 1916 of the proposed formation of this new drainage project containing an enlarged benefited area with its property included therein, and that the same was about to be established and that appellee could at a hearing to be held on October 2, 1916, resist such new project, and appellee waived such hearing with full knowledge that it was bound by all subsequent action of the appellant Board which necessarily followed in the premises; and in addition thereto appellee stood by and without any objection on its part to said proceedings, saw the expenditure of over a quarter million dollars, for the payment of which appellee is charged with knowledge that the same must be made out of the property benefited, included in which class is appellee's, and in addition thereto, appellee actively aided and abetted said work as the same progressed and made no protest, and he is now estopped from questioning the legality of said proceedings.

Wherefore Appellants pray that the said findings, judgment and decree of the said Circuit Court of Appeals be reversed and that such further orders and proceedings be had as law and justice may require and that this case may be re-

manded and such relief given to appellants as may be their due.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

(Endorsed: Filed in U. S. Circuit Court of Appeals, May 31, 1924.

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304 (Bond on Appeal to Supreme Court, U. S.)

Know all Men by These Presents:

That we, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, as principals, and the Southern Surety Company, of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the Great Northern Railway Company, (a corporation) Appellee, in the above cause, in the sum of One Thousand Dollars ($1,000.00);

Conditioned that, whereas, on the 18th day of March, A. D., 1924, in the Circuit Court of Appeals of the United States, for the Eighth Judicial Circuit, in a suit pending in that Court upon appeal, wherein the Great Northern Railway Company, a corporation, was plaintiff and appellee, and A. G. Risty, et al., as County Commissioners, etc., et al., were defendants and appellants, numbered on the Docket as No. 6317, a Decree was rendered against the said A. G. Risty, et al., as County Commissioners, etc., et al., appellants, and the said A. G. Risty, et al., as County Commissioners, etc., et al., having obtained an appeal to the Supreme Court of the United States, and filed a copy thereof in the office of the Clerk of this Court, to reverse the said Decree, and a citation directed to the said appellee, citing and admonishing it to be and appear at a session of the United States Supreme Court, to be held in the City of Washington, D. C.;

Now, if the said A. G. Risty, et al., as County Commissioners, etc., et al., shall prosecute their appeal to effect, and answ-

er all costs if they afil to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

A. G. RISTY,
Signing for all the Appellants, Principals.

(Seal) SOUTHERN SURETY COMPANY
OF DES MOINES, IA.,
By H. B. Charnock,
Attorney-in-fact, Surety.

305 The foregoing bond is hereby approved. May 31, 1924.

WM. S. KENYON,
Judge of the United States Circuit Court of Appeals, for the Eighth Circuit.

* * * * *

(Certified copy of Power of Attorney issued to Mr. H. B. Charnock by the Southern Surety Company of Des Moines, Iowa., etc., attached to original bond.)

(Endorsed: Filed in U. S. Circuit Court of Appeals, May 31, 1924.

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306 Citation

United States Circuit Court of Appeals
Eighth Circuit

A. G. Risty et al. as County Commissioners, et al., Appellants,
No. 6317. vs.
Great Northern Railway Company, Appellee.

United States of America

To Great Northern Railway Company, Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Great Northern Railway Company is complainant and A. G. Risty et al. as County Commissioners, et al. are defendants, and in which case the said defendants perfected an appeal to the Circuit Court of Appeals, Eighth Circuit, an appeal has been allowed to the said A. G. Risty et al. to the United States Supreme Court. You are hereby cited and admonished to be and ap-

pear in said court at Washington, D. C. sixty days after the date of this citation to show cause if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable William S. Kenyon, Judge of the United States Circuit Court of Appeals, Eighth Circuit, this 31st day of May, A. D. 1924.

WM S. KENYON,
Judge of the United States Circuit Court of Appeals, Eighth Circuit.

Service of the within Citation this 2nd day of June, A. D., 1924, at Sioux Falls, South Dakota, is hereby acknowledged.

HAROLD E. JUDGE,
Counsel for Appellee.

(Endorsed); U. S. Circuit Court of Appeals, Eighth Circuit, No. 6317. A. G. Risty, et al., as County Commissioners, et al., Appellants, vs. Great Northern Railway Company. Citation on Appeal to Supreme Court, U. S., and acknowledgment of service. Filed Jun. 5, 1924. E. E. Koch, Clerk.

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307 (Praecipe for transcript on Appeal to Supreme Court, U. S.)

The Clerk of the above named Court is hereby directed to prepare and certify a transcript of record in the above entitled case for the use of the Supreme Court of the United States by including therein the following:

1. The printed transcript of record filed in your court.

2. Appropriate reference to the hearing held at St. Louis in the Circuit Court of Appeals.

3. The opinion of the Circuit Court of Appeals in this cause except the title thereof.

4. The decree of the Circuit Court of Appeals, except the title thereof.

5. Petition for appeal and order allowing the same, except the title thereof.

6. Assignments of error.

7. The bond on appeal and approval, except the title, and the powers of attorney, verification and authentication which may be shown by sufficient memoranda.

8. Citation in appeal and admission of service thereof.

9. Memoranda as to the praecipe filed.

10. Clerk's certificate.

Dated at Sioux Falls, South Dakota, this 3 day of June, 1924.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT.
Counsel for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jun. 5, 1924.

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308 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of South Dakota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, except the order of submission and opinion, had and filed in the United States Circuit Court of Appeals, omitting, however, the full captions, titles and endorsements in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for appellants, in a certain cause in said Circuit Court of Appeals wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Great Northern Railway Company was Appellee, No. 6317, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this tenth day of June, A. D. 1924.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 30,421. U. S. Circuit Court Appeals, 8th Circuit. Term No. 456. A. G. Risty et al., as county commissioners, et al., appellants, vs. Great Northern Railway Company. Filed June 16th, 1924. File No. 30,421.

(4406)

IN THE

SUPREME COURT

OF THE

UNITED STATES

A. G. RISTY, ET AL, AS COUNTY COMMISSIONERS, ETC. ET AL,

Appellants, now Petitioners,

VS.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, being No. 6312 on the docket of said Circuit Court of Appeals of the Eighth Circuit,

Appellee, now Respondent.

Also the five other cases set forth on the cover page hereof.

PETITION FOR WRITS OF CERTIORARI IN EACH OF THE SAID SIX CASES.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioners A. G. Risty, et al, as County Commissioners, together with the County Auditor and County Treasurer of the County of Minnehaha, and State of South Dakota, respectfully show to this Honorable Court:

(The parties styled appellants in the opinion of the Circuit Court of Appeals will hereinafter be referred to as petitioners, and the parties styled appellee in said opinion will hereinafter be referred to as respondent).

At the December term, in the year Nineteen Hundred Twenty-three, the above entitled causes were decided in the United States Circuit Court of Appeals for the Eighth Circuit. They had been by petitioners appealed to that Court from the District Court of the United States for the District of South Dakota. They were tried as one case in said District Court and also in the Circuit Court of Appeals. A single opinion covering all these cases was written in each of these courts.

The opinion in the Circuit Court of Appeals was by Kenyon, Circuit Judge, and Trieber and Dyer, District Judges.

The places in the transcripts wherein may be found the opinions respectively of the District Court for the District of South Dakota, and of the said Circuit Court of Appeals, the Bills filed, the Assignment of Errors presented to the Circuit Court of Appeals, the Decree and Judgment of each of the two said Federal Courts, and the Answers of the present petitioners, defendants and appellants below, may be found attached to this petition and as a part hereof, under the caption "Exhibit A',, covering this and five other cases decided by the Circuit Court of Appeals for the Eighth Circuit in which one opinion was written, being numbered in that court 6312 to 6317, inclusive.

PRELIMINARY STATEMENT.

It may as well be stated here as anywhere that one of the principal reasons for applying for these writs is that the decision of the Circuit Court of Appeals is in conflict with the decisions by the highest Court of the State of South Dakota. That Court, construing the Constitution and Statutes of that State, has held that a certain ditch was lawfully established and that every step taken in establishing and in proceeding to obtain assessments, complied with the laws of that State. The Circuit Court of Appeals holds exactly the opposite. According to the highest Court in South Dakota, these respondents

are within the assessment area and must contribute to the cost of the ditch. The Circuit Court of Appeals holds exactly to the contrary. The decision of the highest Court of the State makes all persons benefited by the ditch liable to assessment. The Circuit Court of Appeals says that this is not true so far as these six respondents are concerned. There thus exists a situation which entitles us to the writs applied for, for self-evident reasons and under the holding of the *Forsyth* case, 166 U. S. at page 515.

Proceeding now to speak in a general way as to the situation, we beg to say that the petitioners, the Board of Commissioners of Minnehaha County in the State of South Dakota, did in the year 1916, acting on the authority of Section 6 of Article XXI of the Constitution of that State, and in accordance with sections numbered 8458 to 8491, inclusive, of the Revised Statutes of 1919 of that State, establish a drainage ditch in that County designated as "Drainage Ditch No. 1 and 2." Each of the respondents had property within the assessment area drained by this ditch. Drainage warrants in something over a quarter of a million of dollars were issued and used to pay for the construction of that ditch. Though the laws of said State permitted an appeal and a trial de novo and other review of all action on the part of petitioners, no appeal was taken and no review attempted. Once more complying with the laws of said State, the Board proceeded to make a tentative apportionment of benefits against persons and property affected, and in compliance with the laws of the State arrived at units to be used as a possible basis for ultimate assessment. Each of these units amounted to about $9.50, and the total number of units was something over 32,000. By way of illustration, let it be said that out of this total some 1600 units were allotted to the respondent Milwaukee Railroad Company. The entire apportionment aforesaid was, as said, purely tentative. It fixed no amount of money that anyone should pay and placed no cloud upon the title of anyone to any property. When this tentative apportionment was finished, no one could tell what amount, if any, in dollars,

would finally be in controversy, with reference to those having property within said drainage area.

Complying again with the laws of said State, the Board then gave notice of time and place for a hearing at which these tentative apportionments would be equalized. At this hearing such tentative apportionment should and would be adjusted; the tentative apportionment made as to any party within said drainage area might be raised, lowered, or entirely cancelled. Not only that, but at this hearing additional territory might be included, or territory included, excluded, so that the said tentative unit of $9.50 would no longer obtain and a different number of dollars would represent the units for the purpose of assessment value. After this notice for hearing had been given the respondents each filed a bill in equity in said Federal District Court of South Dakota. This Bill sought to enjoin the Board from assessing the complainants, now respondents, at all, or assessing any of their property. All of them, except the City of Sioux Falls, had diversity of citizenship. As to none of them did it ever appear that when they filed said Bills there was in actual controversy a sum exceeding $3,000.00 or any sum of money at all.

There is no showing anywhere which authorized a Court of equity to grant relief to complainants.

In a general way, all six of the respondents urged in their Bills that said action of the Board violated the Constitution of the United States and Amendments thereto; that said action was authorized neither by the Constitution of the State of South Dakota nor the statutes of said State, and that the Board was acting wholly without authority and was committing a naked trespass. The District Court held there had been no violation of Federal law. With certain reservations to be noted later, it found for the respondents, and enjoined petitioners from ever taking any step that might result in any contribution to the cost of said ditch on part of any of these respondents, or their property.

On appeal to the Circuit Court of Appeals, this action of said District Court was fully affirmed, except that the last named Court found it unnecessary to pass at all upon the alleged violation of the Federal Constitution, and affirmed with the holding that this should be done even though the Federal Constitution had not been violated. It is from this action of the Circuit Court of Appeals that this application for certiorari has resulted.

GENERAL REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioners ask the allowance of this writ because the Circuit Court of Appeals acted erroneously, speaking generally, in that it disregarded the following rules and propositions of law, and erroneously disregarded the following propositions of fact which are either conceded in the record or are proved without dispute, to-wit:

I.

The decision of the Circuit Court of Appeals has created a conflict between itself and the decisions of the highest Court of the State of South Dakota, to-wit, *Gilseth v. Risty* (S. D.) 193 N. W. 132; *Lumber Co. v. McMacken*, 31 S. D. 507 (141 N. W. 382); *In Re Sorenson Ditch*, 27 S. D. 342 (131 N. W. 300); *Davidson Co. v. Watertown Tile Co.* (S. D.) 196 N. W. 96. This conflict is in substance such a conflict as entitles petitioners to the writs of certiorari they are seeking, under the rule laid down by this Court in the case of *Forsyth*, 166 U. S. at page 515. The said South Dakota decisions, each and all are a construction by the highest Court of that State of the Constitution and Statutes of that State. The conflict goes beyond opposition to the Gilseth case, *supra*, which holds that the very project at bar, and the very actions of the petitioners (Board) that are complained of in the bills for injunction filed by the respondents, are valid under the laws of South Dakota. It is a conflict that will lead to the most

serious complications not only as to the ditch project at bar but to like complications in every drainage project attempted in South Dakota in the future, wherein the procedure will be the one that is sanctioned by the said decisions of the Supreme Court of South Dakota.

(a). According to the decision of the South Dakota Court the drainage ditch at bar was lawfully established, and the procedure adopted in this case will effect the lawful establishment of any drainage project proceeded with in the future.

(b). The South Dakota Court in effect defines the area for assessment purposes with reference to obtaining contribution to pay for the cost of such ditch.

(c). It rules that every act on the part of the Board (such acts as are described in the bills of complaint filed by respondents) was performed in accordance with the Constitution and Statutes of the State of South Dakota.

The Circuit Court of Appeals rules precisely to the contrary.

If this Court does not resolve this conflict, the ditch at bar and others like it established in the future, as the one at bar was, will be in lawful existence according to the South Dakota Court, and will not have such existence according to the Circuit Court of Appeals. Under the ruling of the South Dakota Court all within the assessment area must contribute; under the decision of the Circuit Court of Appeals only part of them need contribute. Indeed, if the decision of the Circuit Court of Appeals is not annulled there is nothing to prevent other resident taxpayers from obtaining a federal injunction restraining the collection of the assessment from them although the highest Court of the State has held that they are subject to such assessment. For that matter, in the case at bar, the Federal Court has relieved the City of Sioux Falls, a resident, from contribution, despite said decisions of the Supreme Court of the State of South Dakota.

But we respectfully submit that this is not the time for full argument as to which line of decisions is right. This is but an application to be heard in this Court. It is after this application shall be granted that the choice between the two lines must be made. In other words, it is on the hearing after the writ is granted that it will be for you to say whether the Circuit Court of Appeals should be affirmed or reversed.

See point I, page I of the Brief.

II.

As distinguished from creating the general conflict dealt with in the preceding point the Circuit Court of Appeals erred in its decision in these six cases. Its decision should have been in favor of the petitioners and would have been in their favor had the Circuit Court of Appeals followed the construction of South Dakota law as construed by the highest Court of that State, in the Gilseth case, 193 N. W. 132, and other decisions set forth in Point 1. It erred in deciding as it did because it erred in doing its own construing of said state law and basing its affirmance on a construction on its own part which is in conflict with that of said construction of said state law on the part of the highest Court of the State.

See point V, page 11 of the Brief.

III.

The controversy at bar is a proceeding *in rem*. As to such an one, both residents and non-residents of South Dakota must (at least in the first instance), resort to the State tribunals provided for reviewing such controversies, before they may enter the Federal Court at all. (*Weld Co.* case, ... U. S. ....., 44 Sup. Ct. Rep. 385).

See point III, Page 5 Brief.

IV.

As to every taxation project the proceeding is one *in rem*

as to any property within the state, even though owned by a non-resident. Dealing with such project or any review of the same involves property rules; and as to such rules the Courts of the State are the final and only authority.

See point II, page 4, and point III, page 5 Brief.

V.

It was error to grant injunctive relief because what was in effect done was to restrain legislative action on part of the petitioner Board, acting in a legislative capacity under delegation from the legislature of the State. The legislature itself could have, by statute, done everything the Board did and was proposing to do, and it should be conceded that the legislature could not have been enjoined from enacting such a statute. The only difference is that the Board was bound to give certain notices and hearing before any assessment could become a lien, and the Board did what it was bound to do.

See point IV C, page 11, Brief.

VI.

There being no controversy over an amount exceeding Three Thousand Dollars there was no right to enter the Federal Court by either resident or non-resident, even though it be assumed that a substantial federal question was being presented. That is to say, so far as a controversy, such as the one at bar, is concerned, no one may enter the Federal Courts unless the controversy involves more than Three Thousand Dollars. (*Holt vs. Ind. Mfg. Co.*, 176 U. S. 68).

See point II, page 4, Brief.

VII.

The respondent City of Sioux Falls should not have had its suit entertained in the Federal Courts because it is not a non-resident of the State of South Dakota and could and did enter the Federal Court only, assuming it could enter it at all, upon the assertion of alleged federal constitutional questions.

And it had no right to have those entertained because under the rule of the case of *Weld County,* 44 Sup. Ct. Rep. page 385, it had no right to enter the federal Court at all without first resorting to such tribunals as the law of South Dakota had provided for the review of a controversy like the one at bar; and said respondent has never resorted to those tribunals.

See Point II, page 4, Brief.

VIII.

What is said in Point 3 and Point 7 hereof is as true of the five non-resident respondents. While to be sure, they had diversity of citizenship they did not have a suit involving an actual controversy over a sum exceeding Three Thousand Dollars (See Brief point III, at page 5). Therefore, they stood in the same position as to the necessity of resorting to the State tribunals, (at least in the first instance), as does the respondent City of Sioux Falls.

IX.

It erred in granting the relief to either and all of the six respondents because there was no substantial federal question involved, for the trial Court held that the Constitutional questions so called that were raised were untenable, and because in truth the pretended constitutional questions were purely colorable and made for the purpose of imposing on the jurisdiction of the Federal Court by asserting pretended Constitutional questions.

See point III, page 5, Brief.

X.

While it is true a Federal question may give the Federal Courts jurisdiction, even though it does not consider that question in its decision, that rule is not applicable here. Here, the Federal Court was entered on the ground of diversity of citizenship with a controversy not shown to exceed Three

Thousand Dollars, and with Federal questions which the Court held untenable or not necessary to be considered in deciding. All the grounds upon which the Federal jurisdiction had been invoked proving untenable the Court erred in passing upon the so-called merits of the dispute. Where there is no substantial Federal question nor the requisite amount in controversy the dispute is one for settlement in some tribunal other than the Federal Court.

See point III, page 5, Brief.

XI.

It is true that where a citizen of a state may enter the Courts of that state, one who has diversity and a controversy involving more than Three Thousand Dollars need not submit himself to those state Courts but may at his election enter the Federal Courts. But where, say, in a proceeding *in rem*, like a drainage project, the citizen of the state must submit to administrative review and may not enter the Courts of his own State, the non-resident may not have such proceeding *in rem* reviewed in the Federal Courts. He can enter that Court only where the citizen of the state can enter the State Court.

See point III, page 5, Brief.

XII.

If, as is contended by the Circuit Court of Appeals, the petitioners acted utterly without authority of law and were, therefore, mere trespassers, that fact gave respondents an adequate remedy at law in either the Federal or State Court at their election, to-wit, to sue in trespass, — and hence, their bills in chancery should not have been entertained.

If, on the other hand, the acts of the petitioners were in all respects lawful, the respondents were not entitled to any remedy either at law or in equity.

See point IV, page 8, Brief.

XIII.

The Federal Court enjoined having a hearing which was to be had for the purpose of equalizing a tentative apportionment theretofore made. In addition to the reasons set forth in point 12, it was error to enjoin because in any view respondents were not entitled to invoke chancery jurisdiction. The naked fact that such a hearing was to be had did not invoke any of the heads of that jurisdiction. Manifestly, the holding of such hearing could not give rise to a multiplicity of suits as against each of these respondents, no matter how many suits might arise as to other parties. Manifestly, the proposal to hold such hearings cast no cloud on title nor could its being held create any irremediable injury.

This is especially applicable to the respondent City of Sioux Falls, and the respondents four Railway Companies, because even if an assessment had been made and a tax levied, it would have created no lien upon the property of those respondents.

See point IV, page 8, Brief.

XIV.

These suits by bills of injunction were at all events premature. The injunctions were sought at a time when all that was impending was a hearing to determine what proportionate amount, if any, should be contributed by each of the respondents; and it could not then be known whether any contribution would be imposed upon them at such hearing. Assuming there was ever the right to enter the Federal Courts, the respondents should have waited till after such hearing had been had and an assessment had been determined upon; and there was absolutely no warrant to entertain their bills to enjoin such hearing.

See point IV, page 8, Brief.

XV.

It was error to hold that an injunction was warranted

before said hearing to equalize apportionments was had, on the reasoning that one should not be compelled to appear at that hearing because it would be had before said Board and that said Board had no authority whatever to act — that no one should be compelled to submit to a hearing before a mere trespasser. This disregards, first, that the mere assertion that the Board was without authority did not justify the failure to appear at said hearing, and, second, it disregards the said decisions in the said South Dakota cases, that the commissioners were acting on full authority; and third, it appears by the undisputed testimony that they had full authority.

See point IV, page 8, Brief.

XVI.

Assuming respondents could enter the Federal Courts at all, they and each of them had at all times a plain, adequate and complete remedy at law in the premises, and in said Courts, by appealing from the establishment of the ditch to the Circuit Court of the State of South Dakota and thence removing the entire controversy involved, including the making of assessments, to the law side of the Federal Court, where a trial de novo could be had. Instead, they lodged Bills of Complaint seeking injunctions. And while it may be true respondents have waived the right to this appeal from the establishment of the ditch, that does not alter the fact that they had no right to enter a Court of equity, on the ground that though they had at one time the right to thus appeal to and have review in the Federal Court by a trial de novo there on the law side, they had voluntarily lost that right. The right to enter chancery cannot be created by waiving or failing to exercise an adequate remedy at law.

Passing that, they had the right to appeal from the action of petitioners, as to the equalization of apportionments of benefit, directly to the said Circuit Court of the State, and thereupon

to remove this very controversy for review on the law side of the Federal District Court, and there have a trial de novo.

See point IV, page 8, Brief.

XVII.

The Circuit Court of Appeals erred in giving the relief it gave the petitioners on the reasoning that the latter had no authority to make an asessment except in aid of a drainage project to drain agricultural lands. This is erroneous because it is and for a long time has been the settled law of the State of South Dakota as declared by the highest Court of that state, in construing its constitution and statutes, that the right of a Board, such as petitioner is, to establish a drainage ditch is not confined to the drainage of agricultural lands, but exists as to such a drainage ditch as the very one at bar is. And it is undisputed in the evidence that one object of the project was to drain agricultural lands.

See point V, page 11, Brief.

XVIII.

It is not only the fact that the highest Court of the State of South Dakota has ruled in construing the laws of South Dakota that the drainage project at bar was lawfully established and that the acts of the petitioners were lawful, but the record shows both facts without dispute. And the Circuit Court of Appeals affirmed despite such ruling and despite said state of the evidence.

XIX.

Assuming for the sake of the argument, that the District Court and the Circuit Court of Appeals had authority to pass upon the merits, both of them erred in finding for the respondents, because there is absolutely no evidence to support the contention of the respondents on the merits. That is to say, there is no evidence whatever that the petitioner Board ever did anything whatsoever in the premises other than what they were authorized to do by the Constitution

and the Statutes of the State of South Dakota. And in addition to this being the state of the evidence, the highest Court of the State construing the Constitution and laws of the State has ruled in a way that is binding upon said Federal Courts that in truth and in fact, the petitioners acted on full authority and in every way in compliance with the requirements of said Constitution and statutes of the State of South Dakota.

See point V, page 11, Brief.

XX.

The Circuit Court of Appeals based its action on the holding that the Board had acted without authority from and had not complied with the provisions of the statutes of South Dakota regulating the maintenance and repair of ditches already established. Some of the respondents conceded that the project at bar was the creation of a new ditch. That fact is established by the undisputed evidence as against all the respondents. It is undisputed in the evidence that there was full compliance with every statute dealing with the establishment of a new ditch. Therefore, the Circuit Court of Appeals affirmed because there had been a failure to comply with statutes that had nothing whatever to do with the establishment of a new ditch or assessing for the cost of its construction. It disregarded that the relevant statutes had been complied with, and based its action wholly on the fact that statutes that had no application had not been complied with.

See point V, page 11, Brief.

XXI.

The Federal Courts should have given no relief to the City of Sioux Falls because it was one of the signers of the petition that initiated the establishment of the ditch and the subsequent action of the petitioners. It was, therefore, estopped to object to being assessed to contribute its portion to

wards the cost of the construction; also estopped by reason of the premises to challenge the said ditch project on the ground of unconstitutionality; or to assert that the laws of the State of South Dakota had not been complied with either in the construction of said ditch or in proceeding to make an apportionment to obtain contribution to pay for its costs—for the City asked all to be done that was done.

See point V, page 11, Brief.

XXII.

The Federal District Court reserved from its decree such property as the respondents, Chicago, Milwaukee and St. Paul Railway Co. and Chicago, St. Paul, Minneapolis and Omaha Railway Co. had within the assessment area of the old ditches. But it failed to make the like reservation as to property which the City of Sioux Falls had in the same area; and the Circuit Court of Appeals erred in affirming without modification curing this omission as to the City of Sioux Falls.

Your petitioners are advised that said Judgments of the Circuit Court of Appeals are final, and are erroneous, and that this Honorable Court should require each of the six cases to be certified to it, by a writ in each of said cases, for its review and determination under the act of Congress permitting causes made final in the Circuit Court of Appeals to be certified for revision.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued under the seal of the Court, in each of the said six cases, directed to the United States Circuit Court of Appeals, for the Eighth Circuit, commanding that Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record, and all proceedings of the Circuit Court of Appeals had in the said causes, to the end that these causes may be reviewed and determined by this Honorable Court as provided by

the act of Congress, approved March 3, 1891, establishing the Circuit Court of Appeals, and defining and regulating its jurisdiction; and that the said judgments of the said Circuit Court of Appeals in each of the said causes be reversed by this Honorable Court, and that they have such further relief as may seem proper.

And your petitioners will ever pray.

BENJ. I. SALINGER,
Carroll, Iowa,

E. O. JONES, and
N. B. BARTLETT,
Sioux Falls, South Dakota,
Counsel for Petitioners.

CERTIFICATE.

The undersigned, Benjamin I. Salinger, states that he is of counsel for the petitioners herein, that he knows of the above proceedings had and that the facts therein and herein stated are true to the best of his knowledge and belief.

Benj I Salinger
Counsel for Petitioners.

"EXHIBIT A".

The opinion of said Circuit Court of Appeals, which covers all of said cases will be found on Page 217 of the Transcript of Record, sent to this Court in what was the case of Risty v. Chicago, Rock Island and Pacific Railway Company, No. 6312, in the Circuit Court of Appeals.

The opinion of said District Court which also deals with all of said cases, on Pages 81 to 101 of said Transcript.

(MILWAUKEE) The Bill filed in the District Court by the Chicago, Milwaukee and St. Paul Railway Company, on pages 3 to 20 of said Transcript.

The Answer filed in the District Court in said case on Pages 21 to 72 of said Transcript.

The Assignment of Errors on the appeal and in the case of the Milwaukee, on Pages 98 to 108 of said Transcript.

The Decree and Judgment of the District Court in the Milwaukee case, on Pages 94 to 98 of said Trascript.

The Judgment and Decree of the Circuit Court of Appeals therein on Page 257 of said Transcript.

(ROCK ISLAND) As to the case of the Chicago, Rock Island and Pacific Railway Company, No. 6312, the Bill in that case will be found on Pages 3 to 21 of the Transcript sent to this Court in that case.

The Answer filed in the District Court in said case on Pages 22 to 64 of said Transcript.

The Judgment and Decree of the District Court, on Pages 101 to 104 of said Transcript.

The Assignment of Errors on appeal therein to the Circuit Court of Appeals, on Pages 104 to 114 of said Transcript.

The Judgment and Decree of the Circuit Court of Appeals therein on Page 265 of said Transcript.

(OMAHA) As to the case of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, No. 6314, the Bill in that case will be found on Pages 3 to 20 of the Transcript sent to this Court in that case.

The Answer filed in the District Court in said case on Pages 22 to 65 of said Transcript.

The Judgment and Decree of the District Court, on Pages 88 to 91 of said Transcript.

The Assignment of Errors therein on appeal to the Circuit Court of Appeals, on Pages 91 to 102 of said Transcript.

The Judgment and Decree of the Circuit Court of Appeals therein, on Page 235 of said Transcript.

(POWER CO.) As to the case of the Northern States Power Company, No. 6315, the Bill in that case will be found on pages 3 to 21 of the Transcript sent to this Court in that case.

The Answer filed in the District Court in said case on Pages 22 to 65 of the Transcript.

The Judgment and Decree of the District Court, on Pages 100 to 103 of said Transcript.

The Assignment of Errors therein on appeal to the Circuit Court of Appeals, on Pages 103 to 114 of said Transcript.

The Judgment and Deeree of the Circuit Court of Appeals therin, on Page ..... of said Transcript.

(CITY) As to the case of the City of Sioux Falls, No. 6316, the Bill in that case will be found on Pages 3 to 18 of the Transcript sent to this Court in that case.

The Answer filed in the District Court in said case on Pages 19 to 63 of said Transcript.

The Judgment and Decree of the District Court, on Pages 86 to 88 of said Transcript.

The Assignment of Errors on appeal therein to the Circuit Court of Appeals, on Pages 88 to 100 of said Transcript.

The Judgment and Decree of the Circuit Court of Appeals therein, on Pages ..... of said Transcript.

(GREAT NORTHERN) As to the case of the Great Northern Railway Company, No. 6317, the Bill in that case will be found on Pages 3 to 20 of the Transcript sent to this Court in that case.

The Answer filed in the District Court in said case on Pages 21 to 64 of said Transcript.

The Judgment and Decree of the District Court, on Pages 99 to 101 of said Transcript.

The Assignment of Errors on appeal theren to the Circuit Court of Appeals, on Pages 101 to 112 of said Transcript.

The judgment and decree of the Circuit Court of Appeals therein on page ..... of said Transcript.

The Bill for the respondents was filed in the District Court on the 29th of July, 1921.

The Decree in said Court was entered therein on the 2nd day of March, 1922.

Appeal from this action of the District Court was allowed August 25, 1922.

The Circuit Court of Appeals affirmed and entered decree and judgment for the respondents on the 18th day of March 1924.

IN THE

SUPREME COURT

OF THE

UNITED STATES

A. G. RISTY, ET AL., as County Commissioners, Etc., et al.,

Appellants, now Petitioners,

Against

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Appellee, now Respondent.

Being No. 6312 on the Docket of the United States Circuit Court of Appeals for the Eighth Circuit.

Also five other cases decided by said Circuit Court of Appeals set forth in the caption to the Petition for Writs of Certiorari filed in this Court.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

***There is such conflict between the Highest Court of the State of South Dakota and the Circuit Court of Appeals as entitles petitioners to the Writ of Certiorari they are seeking, under the rule of the case of Forsyth,* 166 U. S. 515.**

At this point it is perhaps unnecessary to discuss which of said lines of decision is right. Our main insistence is that both

cannot stand, and that the decision of the Circuit Court of Appeals will stand unless this Court annuls it on *certiorari*.

The petitioners have contended throughout that they have established a new ditch, designated "Drainage Ditch No. 1 and 2," and that they have taken certain steps for bringing about contribution from those benefited, to the cost of this ditch. In the cases of *Gilseth vs. Risty,* (S. D.) 193 N. W., 132; *Lumber Co. vs. McMacken,* 31 S. D., 507, (141 N. W., 382); *In re Sorenson Ditch,* 27 S. D., 342, (131 N. W., 300); *Davidson County vs. Watertown Tile Co.,* (S. D. 196 N. W., 96, the highest Court of the State of South Dakota is construing the Constitution and Statutes of the State, and is holding that all acts on the part of the petitioners were in compliance with, and therefore, authorized by such Constitution and laws. The Circuit Court of Appeals holds exactly to the contrary; holds, in effect, that this Ditch does not exist, and that all attempts looking towards assessment for its cost were naked trespasses. This creates a situation which was in substance one that induced this Court to allow *certiorari* in the case of *Forsyth,* 166 U. S., 515. The bald statements so far made are fairly self-proving, and scarcely seem to require elaboration. If the decision of the Circuit Court of Appeals is not annulled, this ditch does not exist, though the Supreme Court of the State holds and will continue to hold that it does. If both lines of decision stand, some holders of property benefited within the drainage assessment area must contribute, while others need not. The latter differentiation is not even founded upon the existence of diversity of citizenship, for in this very case the Federal Court has enjoined obtaining contribution from the respondent, City of Sioux Falls, which is not a non-resident. This situation as to the ditch project at bar, is, in all good conscience, serious enough, but what is done to this particular project is as nothing to what this conflict will do to all drainage projects undertaken in South Dakota in the future. If in such future projects, the procedure is that which is authorized by the decisions of the highest court of the State, yet, though such project be carried on in compliance with the

laws of the State as declared by the highest court of the State, it will be invalid under the decision of the Circuit Court of Appeals in this case. In short, unless this Court annuls the decision of the Circuit Court of Appeals, drainage ditches cannot be established in South Dakota merely by observing the procedure demanded by the constitution and laws of the State. To establish them, the proceedings will have to comply with rules laid down by two courts that are opposed to each other as to what is required. One will be compelled at the same moment to chase two horses running away in opposite directions.

We have said that this point demands the writs without argument as to which Court is right. Perhaps this is the proper place to say a word on this head. Perhaps if it were clear to this Court that the Circuit Court of Appeals was right, that might influence this Court on the question of granting the writs. The Circuit Court of Appeals, however, is clearly the one that is in the wrong. In every aspect the proceedings at bar are *in rem*. In every aspect the construction given the constitution and statutes of the State by the highest court of the State are binding on the Federal tribunals. In every aspect it is South Dakota law that must settle what is required to establish a drainage project in South Dakota, and what that law is is what the highest Court of that State construes it to be. The essence of the matter then, is that the highest Court of South Dakota has declared what must be done under the constitution and laws of the State to validate what these petitioners have done, and that the requirements of the law have been observed. Not only has the Circuit Court of Appeals created an inolerable conflict, but it has opposed itself to decisions of a State Court, which decisions are binding upon the Circuit Court of Appeals. Manifestly, both lines of decision cannot be right. Manifestly, both lines should not remain in existence. Manifestly, only this Court can eliminate one of them. It is for a final hearing to determine which of the two is right; in other words, to determine whether the Circuit Court of Appeals should be reversed or affirmed. That question should not be stressed at this

point, because now we are but asking permission to make a full argument as to which line of decisions should rule.

II.

The injunctions obtained by Respondents have made it impossible to ascertain what amount is or ever will be in controversy. This puts resident and non-resident respondents on the same footing, and on the authority of the case of Weld County, 44 Sup. Ct. Rep., 385, ***the Federal Courts had no power to decide at all, because the Respondents failed to resort to the tribunals provided by the laws of the State of South Dakota for Dealing with such a controversy as the one at bar.***

A naked conclusion that the requisite amount is in controversy, accomplishes nothing. The bill must state facts showing that such an amount is in controversy, and the bills at bar have no fact allegation on this point, and have nothing but that conclusion. If the bills had been in proper form, the respondents still had to prove the allegation. *First National Bank vs. Highway Commission,* ..... U. S. ....., 68 L. Ed. Adv. Opinions, 380. They have utterly failed to do so. The reason for our saying this is this: In beginning the steps necessary to obtain the funds to pay for the construction of the ditch, the Board made a purely tentative estimate of the apportionment which each of these respondents might ultimately be called upon to pay. The law of South Dakota provides that this is purely tentative, and provides for a hearing, upon notice, to equalize this tentative apportionment. On such hearing, new territory may be added, territory already in may be excluded, and any tentative apportionment may be lowered or raised, or may even be cancelled. It follows that until this hearing was had there could not even be as much as a final estimate of how much any particular person or tract affected should pay. No matter what the tentative apportionment was, it could result from the hearing that any particular property owner might have no more than Ten Dollars apportioned to him. The injunctions at bar stopped this hearing. Consequently, it is

manifest that at the time when the injunctions were applied for, it could not be known that more than Three Thousand Dollars was in controversy as to any one. Of course, the hearing has never been had, so the respondents got their injunction without any evidence that the requisite amount was in controversy.

Nor is that all. Even that hearing could not establish an amount in controversy. No assessment could be made, and no lien could be created towards that end. The hearing was, under the law, one step to that end; still further steps were required. Having stopped the first step which could definitely create an estimate even, as to the amount in controversy, respondents have failed to show the requisite amount.

III.

As to a proceeding in rem such as the ditch project at bar is, and as to a proceeding in rem involving a controversy over taxation, the rules for dealing with lands within the State for taxation purposes are the same, whether the owner of the lands be a resident, or a non-resident, and the Respondents had no right to enter the Federal Courts because they did not go into the tribunals provided by the State.

As to proceedings *in rem* affecting lands within the State, one cannot obtain treatment differing from that accorded the resident by retaining his ownership of the land and maintaining citizenship in some other State. If this be not so, the State law will not control as to rules of property.

We have frequently assumed, for the sake of the argument, that these respondents had the right to enter the Federal Court, and have contended, even if that be assumed, that it was error to grant the relief they obtained, or any relief. In a way, we have assumed, for the sake of argument, that there might be a difference between a resident and non-resident owner of lands, in dealing with a taxation project concerning lands within the State. We now drop these arguments and

concessions, and submit that neither resident nor non-resident, in this case, had the right to enter the Federal Courts, and that if it be assumed they had, they lost that right by failing to prove conditions precedent, that are binding alike upon resident and non-resident.

To begin with, there is no constitutional requirement that anyone may have a drainage or taxation controversy reviewed in judicial tribunals. While it is true that in some cases a non-resident may have judicial review in the Federal Court, though the resident cannot have it, no non-resident can enter the Federal Court, especially in a proceeding *in rem*, if the resident of the State may not take the controversy into the Courts of the State. In fewer words, if, under the law of South Dakota, its citizens must settle such a controversy as the one at bar, by going into administrative tribunals provided by the law of the State, the same is true of the non-resident. The law that keeps the citizen out of the State Court, keeps the non-resident out of the Federal Court. In this case there was no substantial Federal question presented. So far as the two Courts have spoken, they held what we have just stated. But if there was such question, it was the duty of the parties to the controversy to submit to the administrative tribunals provided by the State, before entering the State or Federal Courts on any ground. *Bank of Greeley vs. Com. of Weld County,* ..... U. S., ..., 44 Sup. Ct. Rep., 385. *Sioux Falls Bank vs. Minnehaha County,* 29 S. D., 146, (135 N. W., 689); *Bagley Elevator Co. vs. Butler,* 24 S. D., 429, (123 N. W., 866); *Curtis vs. Pound,* 34 S. D., 633, (150 N. W., 287). We need not discuss what the law would be if the provisions creating these administrative tribunals were in some way violative of the Federal law. The record presents no such situation. We need not discuss whether, if the administrative tribunals were exhausted, there might not be judicial review in the State Courts, and ultimate reaching of the Federal Court by writ of error to the highest Court of the State. The concrete situation is that this Court has settled, in the Weld County case, supra, that a citizen of South Dakota had no right to enter

ese Federal Courts, of whose action we are complaining, be-
use he had not gone into said administrative tribunals. We
ve already pointed out that whatever keeps the citizen out
the State Court, should bar the non-resident from entering
e Federal Court, and that this would be true even if there
d been presented (and there was not) a substantial Federal
estion.

In a word — a proceeding *in rem* gives less preference to
e non-residents than a suit in personam. It will be conced-
that if no judicial review were provided for the citizen of
uth Dakota to collect a promissory note for One Thousand
llars, he could not enter the Federal Courts on the ground
at State Courts procedure had not provided him a method
r such collection. It should be conceded that if a non-
sident of South Dakota had nothing but a claim for One
ousand Dollars in money, and he could not enter the State
urts of South Dakota to obtain collection, of course he could
t enter the Federal Courts for the like purpose. If all else
ruled against us, it is certainly true that if, under the Weld
unty case, supra, the City of Sioux Falls could not enter
e Federal Court because it had not first entered the State
ibunal, the same is true of these non-resident respondents,
the amount in controversy did not exceed Three Thousand
llars; and it did not. On no theory has there ever been a
fferentiation as to remedy between the resident and the non-
sident, except where the latter had the required amount in
ntroversy. On what reasoning can the City of Sioux Falls
ruled out of the Federal Court, and the non-resident allow-
to enter it, when the amount in controversy does not exceed
ree Thousand Dollars? On a thousand dollar claim, the
n-resident has just what the resident has. We repeat that
to *in rem* controversies there is even less differentiation be-
een the resident and the non-resident.

We also assert that neither resident nor non-resident can,
der any circumstances, enter the Federal Courts directly

and in the first instance, where the amount in controversy does not exceed Three Thousand Dollars. *Holt vs. Ind. Mfg. Co.*, 176 U. S., 72.

True, there are cases where the presentation of a substantial Federal question obtains review of the whole controversy, even though the Court does not find it necessary to consider the Federal question. The case at bar is not governed by that rule. Here, we have nothing but an assertion that there is a substantial Federal question, and an assertion that more than Three Thousand Dollars is in controversy. If it be demonstrated, as it has been in this case, that neither assertion is proved, the Federal jurisdiction has not in fact been invoked. If that be not so, every one can have any controversy considered in the Federal Courts by merely asserting by way of a naked conclusion that he has a substantial Federal question, and that more than Three Thousand Dollars is in controversy.

The bill of each respondent should have been dismissed because the amount in controversy is too small, and because it had not first gone into the proper State tribunal.

IV.

The Federal Court should not have entertained the bills of Respondents, because the controversy presents no element of the chancery jurisdiction: If the Respondents had the right to enter the Federal Court at all, they had an adequate remedy on the law side of the Federal Court, and at all events, suit in equity was prematurely brought.

A.

When all is said, there was an injunction to restrain the steps that might by possibility create an illegal tax. It is hornbook law that equity will not afford relief against such tax.

Here is what had happened: The petitioners had estab-

lished a new drainage ditch. Appeal from this could have been taken, but was not taken. The petitioners then proceeded according to law, to take the steps wherewith to obtain the funds to pay for the construction of the ditch established. A point was reached when all persons interested were notified that a hearing would be had to make a final estimate as to what sum, if any, persons within the assessment area of the new ditch, should contribute towards paying for its construction. Before this hearing could be had, the injunctions at bar were applied for. Even at this point, if there had been the creation of any tax, legal or illegal, (which, of course, is not so) equity had no jurisdiction. Assuming that an illegal tax is in some way to be considered as existing, what elements of chancery jurisdiction existed? Such hearing threatened no one with multiplicity of suits; at any rate, if it did, it would be a multiplicity consisting of many suits against many different persons, but not many involving either of these respondents. They cannot complain that others might have been subjected to suits, or compelled to bring them. The proposed hearing which the injunction stopped, could manifestly work no injury, to say nothing of an irreparable injury. The hearing could not result in a lien. It could, at the most, but determine on what basis, as to amount, a lien might later be established. It is, therefore, manifest that equity obtained no hold on the ground that a cloud would be cast on the title of any one. The hearing that was stopped surely could not place a cloud on anything. What is more, as to the respondents the four Railroad Companies, and the Respondent the City of Sioux Falls, no lien could in any event be placed against their property. The tax against these respondents could be no more than a personal charge to be collected on execution, and in the case of the City, by a proceeding in the nature of a mandamus.

The Circuit Court of Appeals holds, in effect, that all the Board attempted to do, and the acts which the injunction stopped, were wholly without authority; that the Board was a mere trespasser. Finding that, should have moved it to hold that equity had no jurisdiction, for there was an adequate

remedy at law on the law side of the Federal Court, to-wit: an action in trespass. And of course, the presence of this adequate remedy forbids that equitable relief should be given. It may be added that if the Circuit Court of Appeals is in error, and the Board was not a trespasser, and acted lawfully, still equity should have given no relief, because in the last case there would be no right to relief either in law or in equity.

B.

It is not overlooked by us that if appeal and removal were adequate remedies in the Federal Court, the right to such appeal has been lost by rspondents, so far as the establishment of the ditch is concerned. But we respectfully submit that equity does not obtain jurisdiction because one has voluntarily lost an adequate remedy at law. What is more, if it be assumed that the respondents have the right to enter the Federal Court at all, they can still appeal to the Circuit Court of the State, and remove the entire controversy to the Federal Court, and secure a trial de novo, if the Board is permitted to proceed with this hearing and to take the further steps, by way of assessment, that the laws of South Dakota require to be taken.

Neither do we overlook the rather remarkable argument found in the opinion of the Circuit Court of Appeals, to the effect that since the Board was acting as a mere trespasser, equity could enjoin the hearing to make apportionment of benefits, because that hearing was before the Board, and one should not be compelled to submit himself to the action of a mere trespasser. The difficulty with this is that the mere fact that a pleader says the Board was acting without authority, does not give the right to relief in chancery. Here is a case where, despite that pleading, and despite this argument and assertion of the Circuit Court of Appeals, it appears without dispute that the Board was acting on full authority, to say nothing of the fact that, in addition to the proof, it is the

holding of the highest Court of the State that they acted on full authority, *Gilseth vs. Risty, supra.* The argument of the Circuit Court of Appeals fails for want of sound premise, and no valid reason is perceived why said hearing should have been stopped by the injunction.

In any view, it is well settled that the suits are premature. *Western Union Tel. Co. vs. Howe,* 180 Fed., 44; *Milheim vs. Moffit Tunnel,* 262 U. S., 710; *Keokuk & H. Bridge Co. vs. Salm,* 258 U. S., 122. It is true that the Circuit Court of Appeals seeks to avoid and distinguish some of these cases just cited, but it does so by assuming, without warrant, that the Board was acting without authority. It may be true that in the cases we have just cited, it was not asserted that all authority was lacking. But that is a distinction without a difference because it appears here without dispute that authority was not lacking.

C.

Equity had no jurisdiction because, in effect, the injunction restrained legislative action. What the Board was doing was exercising legislative authority delegated to it. The legislature could, by statute, have established this ditch and fixed what each person affected should contribute. It should not be claimed that an injunction could have stopped the legislature from passing such a statute. The only difference is that such statute could have been passed without notice or hearing, while the Board acting under legislative delegation, was bound to give notice and opportunity to be heard — and it did so.

V.

The Circuit Court of Appeals erred in giving the relief Respondents obtained, because it could give such relief only by disregarding the construction of State law by the highest

Court of South Dakota, and by disregarding the undisputed testimony as well.

The essence of the dispute is whether the Board had complied with the appropriate laws of the State. As seen, the highest Court of the State held that there had been such compliance. The respondents had the burden of proving noncompliance. They utterly failed to discharge that burden. What is more, though petitioners did not have the burden, they established affirmatively that there had been full compliance on their part with the laws of the State, as interpreted by the highest Court of the State.

By way of amplifying the statement that the Court disregarded the interpretation of the highest Court of the State, and that it found against sound reasoning, and against the evidence, we beg to submit the following propositions:

The Circuit Court of Appeals declares that the project at bar was not authorized by law, because the law allows ditch projects only for the purpose of draining agricultural lands. The highest Court of South Dakota has held that drainage of such lands is only one of the purposes for which a ditch may be established, and held that the ditch at bar was authorized by South Dakota law. In addition to disregarding this interpretation of the said State Court, the Circuit Court of Appeals overlooked the undisputed evidence that the project at bar does involve the drainage of agricultural lands.

The vital basis of the opinion is the assertion that the project is invalid because whatever was pretended about it, it was in truth an attempt to make people, not chargeable therewith, contribute to the maintenance and repair of old ditches. In other words, the opinion rests on the fact that statutes dealing with the repair and maintenance of old ditches were not complied with. Three of the respondents conceded in their briefs that this premise was unsound; conceded that the ditch at bar was a new ditch, and that no subter-

fuge was being resorted to to burden people not chargeable with the maintenance and repair of an old ditch. What these three conceded is established as to all, without dispute. The opinion of the Circuit Court of Appeals notes these concessions, and then forgets them and fails to give what those concessions demand. It comes to this, then: The Circuit Court of Appeals has affirmed on the ground that irrelevant statutes were not followed, which involves overlooking the said concession and evidence, and, therefore, overlooking what were the relevant statutes. In still other words, it is demonstrated that the only statutes the Board needed to follow were those that regulated the establishment of a new ditch. It is undisputed that they followed those. It is, of course, true that there are hundreds of statutes that they did not follow. So the Circuit Court of Appeals has held as it has, that even though the relevant statute requirements were met, the project was invalid because irrelevant ones had not been followed.

The opinion does note the existence of the Gilseth case, but it does not so much as mention its holding, so far as the main question in dispute are concerned.

The Court overlooked the fact that the City of Sioux Falls was estopped from any relief. The City signed the petition which initiated the project, and it asked everything to be done that the Board had done, or was proposing to do. It went so far as to allege in its bill that this very project would prevent the City from losing its water supply. Surely, on proper consideration, it would have been held that this one respondent should not have the relief which it got. *DeNoma. vs. Murphy,* 28 S. D., 372; ***Sheppard vs. Barron,*** 194 U. S., 553.

Two of the respondent Railways had property in the assessment area of certain old ditches, and they also had property in the territory added by establishing the new ditch. As to the said Railroads, the trial court reserved from the injunction the right to assess as to their said property within the area

of the old ditches. Though the City of Sioux Falls was in precisely the same situation as these two Railways, no such reservation was made in the decree in its favor. And the Circuit Court of Appeals affirmed, without modifying to correct this manifestly arbitrary differentiation.

Respectfully Submitted,
BENJ. I. SALINGER,
E. O. JONES, and
N. B. BARTLETT,
Counsel for Petitioners.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1924.

A. G. RISTY, ET AL, AS COUNTY COMMISSIONERS, ETC. ET AL,

Appellants, now Petitioners,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Appellee, now Respondent.

Also the five other cases set forth on the cover page hereof Numbered 451 to 456, inclusive.

SUPPLEMENTAL ARGUMENT FOR PETITIONERS IN REPLY TO RESPONDENTS' BRIEF.

I.

The respondents in their statements and briefs misapprehend the question that is before this Court. This, for one thing, is made manifest by the injection of matters that can

not have any possible bearing on the controversy this Court is to pass upon. In their answer they assert that "the first intimation contained in the record of any thought of assessment of or attempt to assess any part of respondents' property appears in a notice published in April, 1919, (being of a hearing upon a matter of equalization of benefits resulting from said drainage district No. 1 and 2). The statement is a mistaken one, because the original drainage petition filed August 3, 1916, specifies, in a general way, the respondents' property, and the property is again described, in a general way, in the notice given prior to the establishment of said drainage district.

But, be that as it may, it is all immaterial. The sole question that is material is whether or not such a conflict has developed between the highest court of the state and the Circuit Court of Appeals, that *certiorari* should interfere on the authority of the *Forsythe* case. (17 Sup. Ct. Rep. 665). So also of the statement "that regardless of whether or not the alleged new drainage district has been legally constituted respondent was entitled to the relief asked because of the arbitrary and discriminatory acts of the petitioners" which (it is said) brings respondents "within the rule of the case of *Thomas vs. K. C. S. Ry. Co.*, 67 Law. Ed. 758, and *Railway v. Risty*, 282 Fed., 364 (the latter being the very case which we assert is in conflict with the decision of the Supreme Court of South Dakota in the Gilseth case). It is to be said in the first instance that if there be any color in the cited cases for the claim that is made for them, such claim is distinctly and fully negatived by the case of *Milheim v. Moffatt Tunnel*, 43 Sup. Ct. Rep., 694.

But, be that as it may, the fact that one is rightly entitled to relief because of arbitrary and discriminatory acts practiced upon him, does not relieve this court from resolving a conflict arising because the highest court of a state asserts that a certain drainage project was validly established and a

Federal court asserts the contrary. It is not out of place here to say that relief can be had against arbitrary and discriminatory action without having a Federal court create such a conflict. In other words, a holding that a drainage project was not validly established is not the only method of giving relief for arbitrary and discriminatory action. But, at any rate, whether or not there was such arbitrary and discriminatory action can, at the most, only go to the question of whether the Federal court, rather than the state court, was right. That question is to be argued after the writ of *certiorari* has been granted. At this time we have a right to the writ in order that it may be determined which of the two counts was right, thus eliminating the conflict that now exists. And for that matter — there is the question of whether the Federal court was not bound to follow the statute construction of the South Dakota court, be that right or wrong.

II.

The respondents misapprehend the issue on power to drain agricultural land. We do not assert any conflict exists on this head. The conflict is on whether lands drained, other than agricultural land, can be assessed for benefits without the establishment of a district specially therefor. The project at bar includes both agricultural lands and lands that are not of that character and the commissioners found the necessity therefor on the ground of a public purpose including the drainage of agricultural land. (P. R. p. 52). The Circuit Court of Appeals says that as to the lands other than agricultural, there was no power to proceed as the board of commissioners did, because no statute warranted their action in the premises. The Supreme Court of South Dakota (*Lumber Co. v. McMacklin,* 141 N. W., 382) rules:

> "The legislature may *dispense* with the organization of drainage districts and vest the corporate authorities of counties, townships and municipalities with such powers. It would seem equally clear that in such cases the

> acts of the corporate authorities would be the acts of the county, township or municipality. The legislature chose the second alternative and vested such powers in boards of county commissioners."

Again in *Davidson County, et al, v. Watertown Tile & Construction Co., et al,* 196 N. W., 96, the South Dakota Court said:

> "By Article 21, Sec. 6, of the Constitution, the Legislature was empowered to provide for either of two methods in authorizing drainage work. It might provide for incorporated drainage districts and vest the corporate authorities thereof with the necessary power, or it might *dispense* with the incorporation of drainage districts and vest the necessary power in the corporate authorities of counties, townships, or municipal corporations. In preparing for what the Code calls 'Intra-state Drainage', Sections 8458—8491, Rev. Code 1919, the Legislature *chose the latter method,* and vested the necessary power in the corporate authorities of counties, to-wit, the boards of county commissioners."

About the only argument that remains is also made, to-wit: that this question has not been squarely passed upon by the highest court of South Dakota. What we have just quoted is all that it is necessary to say to refute that argument.

III.

One theory indicated in the respondents' answers seems to be that the decision by the Supreme Court of the State of South Dakota should not be held to be controlling here, because respondents were not a party to it. Surely, the Federal courts may not indulge in a conflict with the highest court of the state, merely because the last named court settled a *status* in a case wherein the particular party present before the Federal court was not a party. It is elementary that as to matters *in rem,* such as the settling of whether or not a

drainage project does or does not legally exist, all the world is a party. The consequences of a contrary view are manifest. If there be a conflict as to the *status* of this project, the writ should not be denied because a party is promoting the conflict who was not a party to the decision that fixed the *status*. If the conflict exists, it exists no matter how many persons were made or not made a party to either of the proceedings said to be in conflict. And what has just been said applies as well to the statement:

> "Respondent had no property within the original drainage area; it was not a party to the original proceedings; it was not named, nor any of its property described or referred to in the proceeding resorted to for the purpose of enlarging the drainage area."

which, by the way, is not true as to describing property, for, in a general way, in the petition and original notice issued thereon, before the drainage was established, the respondents' property was described. (P. R. pp. 47-59, in case No. 451).

IV.

It is next asserted that the Gilseth case really never made any actual decision that conflicts with the rights of this respondent (which in a sense is a repetition of the allegation that respondent was not a party to that suit). What is really emphasized, is that whatsoever may look or read like the making of general law declaring that this particular project is legally established, is really in the nature of a *dictum*.

The main argument, as we construe it, seems to be that the Gilseth case really did not establish a *status*, and really did not intend to make any general law as to what was a lawfully established drainage project, but that in a suit, to which respondent was not a party, Gilseth was defeated by reason of an estoppel personal to himself. Related to this is the statement that there was such conduct on the part of Gilseth

as really estopped him from ever bringing the question of the legality of the drainage project in question into a court at all. Of course, if that is so — if the case rests on such estoppel rather than on disclosing incidentally that one might be asserted — then the respondents are not bound, and as to them nothing has yet been done that makes a conflict. Of course, this involves the examination of the Gilseth case and perhaps other cases.

Whatever is said in the Gilseth case with reference to estoppel is clearly purely incidental. It is one of these familiar illustrations of a court deciding a case and then saying that, if by any chance, the decision might be challenged, that at any rate something else exists that does not permit some people to challenge it. It is the familiar *deciding* of a case and then giving additional reasons for so deciding. Of course, it is elementary that this last reason detracts nothing from the binding effect of the real decision.

Now, how con it be said that the Gilseth decision rests on an estoppel. We find it is determined that the filing of a petition with a board of county commissioners asking for the establishment of a drainage district, gives the board jurisdiction to proceed with the inspection and survey, as required by the named statutes of the state; that on the filing of the surveyor's reports on the contemplated district, the board fixes a time and place for the hearing on the petition, pursuant to other named statutes; that where no appeal is taken from an order establishing a new district, the order becomes final and there cannot be any question of the jurisdiction of the board to proceed to carry out the work contemplated by the petition; and that the fact that a project contemplated in a petition for drainage involves the repair of an old project, does not affect the authority of the board to proceed, (basing this on a construction of the Constitution of the State, and of certain named statutes).

Suppose it is true that the particular litigant who obtain-

ed this decision should not have been successful, in any event, because of his own conduct. The court might well have refrained from settling the *status* of the project by declaring, at the outset that the right person was not invoking its powers. It saw fit in the Gilseth case to waive that position, and, as it could, proceeded to make authoritative and relevant declarations which all go to the proposition other than estoppel — to declare that no valid objection lay to this very project, and that it had been lawfully prosecuted. If the English language means anything, the Circuit Court of Appeals held to the exact contrary. To be sure, it did not do it for Gilseth, but did do it for certain others that would have been compelled to contribute if benefitted, if the the Circuit Court of Appeals had followed the Gilseth case.

It all amounts to this: If this conflict is not resolved by this court, every person subject to taxation for this project, except Gilseth, and the parties to the controversy now before this court, can hereafter enter the Federal court in South Dakota and assert that they should also be exempted from contribution on the authority of the said decision of the Circuit Court of Appeals. When that assertion is made, and in each and every one of the cases in which it is made, that will be the assertion on one side. And the other side will insist that contribution should be made despite the said decision of the said Circuit Court of Appeals, because of the decision in the Gilseth case.

This answers, too, the assertion that it is not clear that there is a conflict between the State and Federal Courts.

Respectfully submitted,

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E. O. JONES,
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Solicitors for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 95

A. G. RISTY, et al, as County Commissioners, etc., et al,

Appellants,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Appellee,

And the Five Other cases set forth on the cover page hereof numbered 95 to 100 inclusive.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 95

A. G. RISTY, et al, as County Commissioners, etc., et al,

Appellants,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Appellee,

And the Five Other cases set forth on the cover page hereof numbered 93 to 100 inclusive.

BRIEF AND ARGUMENT FOR APPELLANTS

Throughout what follows the Chicago, Rock Island & Pacific Railway Company will be referred to by the letter "R"; the Chicago, Milwaukee & St. Paul Railway Company by the letter "M"; the Chicago, St. Paul, Minneapolis & Omaha Railway Company by the letter "O"; the Northern States Power Company by the letter "P"; the City of Sioux Falls by the letter "S" and the Great Northern Railway Company by the letter "N".

Reference to any bill of complaint will be prefaced by the number of the ground of the bill and followed by the designation by letter above set forth; e.g., 5-B-M means Ground 5 Bill filed by the appellant Chicago, Milwaukee & St. Paul Railway Company; 5-A-O means Ground 5 of the Answer filed in the case of Chicago, St. Paul, Minneapolis & Omaha Railway Company.

The first set of figures following any reference to either bill or answer states the page of the printed record; and where this is followed by a dash and still other figures this reference is to the page of the typewritten transcript.

OPINIONS OF LOWER COURTS.

The lower courts tried these six cases together and decided them with a single opinion reported as follows: District Court, 282 Fed., 364; Circuit Court of Appeals, 297 Fed., 710. (Also M. 75; R. 249).

JURISDICTION OF THIS COURT.

The judgment to be reviewed is dated the 18th day of March, 1924. (R. 265-267; M. 358-359; O. 235-236; P. 303-304; S. 283-284; N. 293-293). Appealed, May 31, 1924. (R. 267).

The bills allege that the South Dakota drainage statutes are in contravention of the due process clause of the Fourteenth Amendment to the United States Constitution, and complainants are not afforded the equal protection of the law, in contravention of the Federal Constitution. (R. 15-20; M. 15-21; O. 15-21; P. 14-21; S. 13-19; N. 13-20).

That more than $3,000.00, viz.: the amount of the threatened assessment is involved. (R. 13-20; M. 14-20; O. 14-20; P. 13-19; S. 9-13; N. 13-19).

The Court ruled that there were substantial Federal questions involved. (R. 253-255).

That more than $3,000.00 was involved in each case, and sustained the order of the trial court granting the injunction, thereby preventing the appellants from ever making an assessment against appellees as apportioned, or at all, and therefore, there is now more than $1,000.00 involved. (R. 247-248).

These appeals are brought under authority of Judicial Code, Section 241.

Butte & S. Copper Company vs. Clark-Montana Realty Company, 249 U. S., 12; 39 Sup. Ct. Rept., 231.

American Sugar v. New Orleans, 181 U. S. 277.

Howard v. U. S., 184 U. S. 881.

Union Pacific v. Harris, 158 U. S. 326.

One of the appellees, to-wit, the Northern States Power Company, moved in this Court that the appeal in its case be dismissed. It involved a situation identical, on this head, with the other five appeals. Said motion was by this Court overruled.

PREFATORY STATEMENT AS TO THE NATURE OF THE CONTROVERSY.

I.

At the outset there is question whether this Court does not lack jurisdiction because the District Court lacked it.

Five of the six appellees have diversity of citizenship. They also raised federal constitutional questions. If there is in truth more than three thousand dollars exclusive of interest and costs in controversy, the District Court may had jurisdiction. The sixth appellee, the City of Sioux Falls, does not have diversity. But without reference to that, it is claimed each of the six appellees had the right to enter the District Court if a substantial question as to the application and construction of the Constitution of the United States was presented, and we concede that if appellees had the right to enter the federal court at all it is immaterial what happened after they entered, and concede there was power to determine all questions presented even though the decision on a substantial federal question was adverse to those who entered the court. The District Court, found that the attack on the statutes of South Dakota for being in violation of the Constitution of the United States was not tenable. And it is conclusively shown that this ruling is correct. The Circuit Court of Appeals affirmed this but with the statement that it was not necessary to determine the constitutional question. In other words, that there should be an affirmance even though it be true that said statute did not violate the Constitution. Both lower courts held that the federal questions presented were substantial. It is, therefore, obvious that whether the District Court had jurisdiction depends, for one thing, as to each of the appellees and

upon whether a substantial federal question was presented and as to all but the appellee, the City of Sioux Falls, on whether this court shall conclude the federal question pleaded was not a substantial one and upon whether there was the requisite amount in controversy.

Our position is, first, that no substantial federal question was presented; second, that though it be conceded that appellees were threatened with an assessment in more than three thousand dollars, the amount of benefits apportioned was but tentative and subject to later equalization, and that, therefore, the question of the amount involved was based purely upon speculation as to what the amount would be when finally fixed, and that therefore these suits were premature; and no sufficient amount in controversy is exhibited.

Related to this, is our contention that there was no jurisdiction on the equity side because at most, nothing is exhibited but the mere possibility of being subjected to an illegal tax. Injunction will not lie even when an illegal tax is actually sought to be enforced and it does not lie, in any event, where there is a mere possibility that there will be such an assessment and thereafter an enforcement. We therefore submit that though it is true an injunction may be granted where coupled with an attempt to exact an illegal tax there are other necessary elements to support chancery jurisdiction viz. fraud, casting cloud on title, or multiplicity of suits, these cases have no such elements.

The fraud upon which the lower courts fasten is the claim, in four of the bills, that in the guise of repairing established ditches which appellees claim the appellant board had built badly, it pretended to establish a new drainage project with the purpose of thus obtaining money in an unauthorized way for the repair and maintenance of the old ditches. The appellees Omaha and Milwaukee conceded, in the Circuit Court of Appeals, that this was not so. There is no allegation of fraud on part of the other four appellees except the said claim. We contend that this is not a sufficient pleading of fraud, in a collateral action, but if this be treated as such, there

is no proof sustaining it.

II.

As seen, it was the holding below, from which no one has ever appealed, that the drainage statute of South Dakota, and all that was done, do not violate the Constitution of the United States. But there is a casual remark in the opinion of the District Judge to the effect that something done denied the equal protection of the laws. On giving the opinion reasonably full consideration it becomes plain that what is meant is that the Court found that the procedure of the board was arbitrary, because (a) some of the territory in which the appellees have property should not have been included in the area of the new drainage project; (b) of apportioning benefits by what is called the unit method; (c) discrimination in favor of agricultural lands; (d) because appellees were either receiving no benefit or were threatened with an assessment grossly disproportionate to the amount of benefits received.

As to this, it is our position that none of these contentions are sustained by the proof, but even if they were, that is immaterial because those were all questions to be presented to and in the first instance determined by the board, and, if need be, on appeal to the regular courts of the State, that no one may enter any court, in the first instance, to have these matters determined there on application for an injunction; and that in collateral attack such as the one at bar it is not permitted to enter any court to raise such questions as the above before having exhausted the tribunals provided by valid statutes for determining those very questions.

III.

The complainants allege that there were many instances of failure to comply with the statutes of South Dakota. For instance: (a) that no order was made establishing the new drainage project; (b) that none was made giving it the designation now asserted for it; (c) that there was no resolution fixing the route, etc.,

of the ditches; (d) that certain things required to be filed were not filed; (e) there was a failure to act by resolution in ordering surveys, or providing for the fixing of benefits; (f) that things required by statute to be transmitted to the state engineer were not transmitted; (g) that things required to be recorded or indexed were not recorded or indexed.

We contend the proof does not sustain any such claims made, but that it is immaterial whether it does or not. This, because the highest court of the State has had before it this very drainage project and in construing the statutes of the State and the acts of the board held that there had been such substantial compliance with them as that jurisdiction was acquired. (Gilseth case).

IV.

The Court held that the new project was not for the purpose of draining agricultural lands, and we must concede that the project included property not used and in instances not usable for agricultural purposes. As to this the courts below held the board lacked all authority because while the Constitution of South Dakota gives the legislature power to provide for drainage other than that of agricultural lands the legislature has not exercised such power; that, therefore, there is no power in the board to establish drainage for what is merely "a public use" — that drainage for such public use as distinguished from draining agricultural lands can be initiated only by distinct corporate entities created for so establishing.

It is our answer that both Constitution and statute gave this board power to do just what it did and that the highest court of the State in construing the Constitution and statutes of the State so ruled, in what is known as the Gilseth case, 46 S. D. 374; Tile case, 47 S. D. 101; McMacken case, 31 S. D. 507.

V.

The appellants urged various estoppels based on what they allege the conduct of appellees to have been. For illustsration, that appellee City of Sioux Falls was one of the signers of the petition upon which the construction of the project at bar was based. The Circuit Court of Appeals held that though said acts had been done, this constituted no estoppel.

When we reach the argument of case required by division (d) of rule 25, we shall, in so far as we deal with the foregoing matters, give page reference to the printed record.

We now proceed to a somewhat more extended presentation of the scope of the controversy at bar.

The Appellants Risty and others constitute the Board of Commissioners of the County of Minnehaha in South Dakota. Other appellants are respectively the Auditor and Treasurer of that county. The appellant board in 1916 entered upon a drainage project known as "Drainage Ditch No. 1 and 2", and practically completed it. It issued drainage warrants in approximately $250,000.00 which were issued to defray the expense of said construction. The intervenors are the holders of those warrants. When the said project was practically completed, except some minor adjustments, the Board proceeded to make an apportionment as to benefits alleged to have accrued from said construction. This apportionment was in a sense merely tentative because opportunity was afforded to have said estimate of apportionment of benefits revised at a hearing appointed on notice given for the purpose of equalization. It could not be definitely known how much any property owner would be assessed in dollars and cents until after said equalization had been completed. No assessment to collect for alleged benefits received has yet been made,

nor attempt made to collect any of the cost of construction.

At a time when the drainage project had been completed, except some minor adjustments, and paid for by warrants and when as yet there had been no equalization, and though there was neither assessment nor attempt to collect same, the appellees in July, 1921, instituted six separate actions in the district court of the United States for the District of South Dakota, in which they assert that said proceedings on part of the Board were void, *first,* because the drainage laws of the state under which the Board had proceeded were violative of the due process clause of the Fourteenth Amendment, and of the guaranty of the Federal Constitution that no one should be denied the equal protection of the laws; *second,* that said proceedings were violative of the provisions of the constitution of the State of South Dakota; *third,* that if the statute laws of the State were constitutional so far as the constitution of the United States is concerned, the statute law under which the Board was proceeding was void because the Constitution of the State gave no authority for such statute law; *fourth,* that if said statute law violated neither constitution, the Board had so neglected and failed to proceed according to the statute law as that it never acquired jurisdiction in the premises, and *fifth,* that there was such disregard of the statute and such irregularity on part of the Board as that therefore it acquired no jurisdiction.

Both lower courts held that the project at bar was a subterfuge resorted to to get money that might be raised for a new ditch, for use in merely repairing an existing ditch and that there had been no compliance with the Statutes governing the repairing of existing ditches. Held, that only old territory was assessable and the attempt to bring in new property was void. (M. 90). This holding was made even though appellees Omaha and Milwaukee conceded that the project was the creation of a new drainage project, and even though, as appellant contends, the undisputed testimony shows that the project was a new and independent drainage

system.

The petition alleges that unless the district court enjoined, the Board would assess; that appellant county auditor would spread such assessment upon the record; that defendant county treasurer would collect said tax; that this situation gave the district court jurisdiction on the Chancery side, *first,* because the threatened proceedings would cast a cloud upon the title of the property owned by appelles; *second,* that such proceedings would cause a multiplicity of suits; *third,* that as against all this appellees have no speedy, adequate and plain remedy at law, at least, none on the law side of the Federal court.

The relief prayed was that each defendant and his agents, servants, employees, attorneys and successors in office be enjoined from proceeding further in the making of an apportionment of benefits upon the property of plaintiff for the construction of said drainage project; from proceeding in any manner under the "purported" statute law of the State of South Dakota; from any act looking toward the apportionment of benefits for any work heretofore done on said project; from doing any act tending towards the making of an assessment for the cost of any such work before done; that defendant county auditor be enjoined from making any apportionment of benefits for such work and from making any assessment therefore and from certifying any assessment thereof to the county treasurer; that the defendants, members of the Board of Commissioners, and their successors in office be enjoined from fixing any apportionment of benefits for the construction of said drainage system upon the property of plaintiff, and enjoined from making any assessment against plaintiff or its property or against the property of any other property owner in the area of the project for the costs of said work; that defendant county treasurer and his successors in office be enjoined from filing any assessment or collecting one against the property of the plaintiff or the other property owners named in the notice which the defendant

board had given.

It is further prayed that "the said purported statute of the State of South Dakota" be adjudged and decreed to be unconstitutional and void; that all acts of said board and of the state engineer of the state heretofore done on said project be adjudged and decreed to be illegal and void; that it be adjudged and decreed that no benefits have resulted to plaintiff from the construction of said drainage project, and be adjudged and decreed that no apportionment of benefits or assessment of damages be ever made against the plaintiff or its property, therefor. (M. 22-15, 16, 17-22, 23, 24; O. 16-17-22, 23, 24; R. 15, 16, 17-22, 25; P. 15, 16-21, 22, 23; N. 14, 15, 16-21, 22, 23; S. 14, 15-20, 21, 22).

The District Court granted the said injunction as prayed, but in doing so found that the drainage statutes of the State were not in violation of the Federal Constitution; it also found, that while this was so, the claim that there was such violation of the Federal Constitution was a substantial one.

There was a motion to dismiss, presenting grounds, among others, that the Court had no jurisdiction because the administrative proceedings provided by the laws of the State had not been exhausted prior to instituting these actions, and that full notice and opportunity to avail of that procedure had been given. (R. 209-318; R. 210-319; R. 254-382). Said motion was overruled pro forma. (R. 210-319).

From the decree these appellants perfected an appeal to the Circuit Court of Appeals from the Eighth Circuit. That court affirmed, generally, but in dealing with the constitutional question, it declared it was not necessary to determine whether there was a violation of the Federal Constitution and that there should be affirmance even though the statute law of South Dakota did not contravene that constitution. It, however, re-iterated the finding below that the said questions were substantial federal questions.

The proceeding at bar is an appeal from the said decision of the said Circuit Court of Appeals.

STATEMENT OF MATTERS MATERIAL TO CONSIDERATION HERE.

AS TO AMOUNT IN CONTROVERSY.

Section 8463, Revised Code, South Dakota for 1919, provides that "after the establishment of the drainage and fixing of the damages, if any, the board shall fix the proportion of benefits of the proposed drainage among the lands affected". It further provides that "the proportion of benefits which any * * * * * city * * * * and the proportion which any railroad company may obtain for its property by such construction shall be fixed and equalized together with the proportion of benefits to tracts of land".

By Section 8464, it is provided that "after the equalization of the proportion of benefits, the board may make an assessment against each tract of property affected in proportion to the benefits as equalized".

The Circuit Court of Appeals finds that on June 10th, 1921, the board by resolution fixed a proportion of benefits in units which it had decided to be a fair method of arriving at these benefits. (R. 251). This apportionment of benefits is found on (M. 19; R. 19; O. 19; N. 19; S. 17; P. 19). Thereafter a resolution passed fixing the time and place of equalizing and it provided for lawful notice of the proposed equalization. (M. 48, 49; S. 36, 40; N. 36, 37, 38, 40, 41; P. 37, 38, 41, 42; R. 37, 38). Before the equalization was entered upon the present suits were brought. The District Judge states in his opinion that no assessment can be made or any tax made effective until the benefits have been ascertained and equalized. (M. 79, 80). The defendants allege they have no knowledge of the total in dollars that will finally be equalized and assessed against the property of each of the appellees. (N. 37; S. 36; P. 38; R. 38).

The opinion of the District Court finds that it is

only after the proportional benefits are finally determined that the Auditor spreads the tax, and it becomes a lien on the property benefited. (M. 79,80).

The Circuit Court of Appeals agrees with appellants that a future undetermined, unequalized, and unspecified tax cannot be taken into consideration as to the amount in controversy — that the Court cannot engage in speculation as to such taxes (R. 262), but it affirms the holding below that a sufficient amount was in controversy, thus:

> "As the proportion of benefits had been fixed subject to change by the board only if appellee should convince them that their conclusion was erroneous, and in view of the claim in apparent good faith in each of the bills that the amount involved exceeded the jurisdictional amount, we hold, from a careful survey of the entire record, that the necessary amount existed in each case to give jurisdiction to the federal court." (R. 263).

It said further:

> "It is suggested that the Board may so equalize benefits that the jurisdictional amount will not be involved, but as the matter stood when the case was brought, each appellee was threatened with the levying of a tax for more than the jurisdictional amount, and some of the necessary steps had already been taken." (R. 263).

As already shown, the only steps that had been taken were merely preliminary to what might by possibility later become a tax for an amount greater than three thousand dollars, to-wit: fixing the proportion of benefits and notifying of time and place when the equalization of the benefits apportioned would be entered upon.

The City of Sioux Falls does not have diversity, and unless it presented a substantial federal question had no right to enter the federal court, assuming it had the right to enter at all, no matter how much was in controversy.

IS THERE A SUBSTANTIAL FEDERAL QUESTION.

We do not have the question whether the statute law involved was violative of the federal constitution. The District Court finds it was not. It declares it finds that all of the (constitutional) objections center about the criticisms that no notice is provided the owners of land affected by the drainage ditch, except the general notice, and in fact, no personal notice until the date fixed by the board for the equalization of proportional assessment for the various tracts of land benefited by the drainage. (M. 79, 80). It finds that the attack on the validity of the statute law is not tenable. (M. 80, 81, 82, 83). Of course appellants are satisfied with this holding and have never made it the subject of an appeal, and appellees have neither appealed nor cross appealed. What is now to be determined then is not whether the South Dakota statutes are unconstitutional but whether the appellees were in reason justified in their claim that they were. In other words, whether the finding of each of the lower courts that a substantial federal question was presented is sustained by the record. (M. 83; R. 263). At this point we merely state, we claim it was so thoroughly settled in the law that the South Dakota statute law in question violated no provision of the federal constitution as that any claim that it did so violate is unsubstantial and insufficient to give jurisdiction. It is obvious that elaboration on this has no place in this statement and that the proper place for it is in the argument and possibly in the brief. It will be elaborated later.

It is not amiss, however, to say here that in a way one objection to constitutionality was that the board had proceeded in an arbitrary and discriminatory manner, and that possibly it was intended thereby to claim that thus the constitution of the United States had been disregarded. We answer that no such objection was sustained in either of the lower courts. True, the Rock Island does plead that the equalization is so arbitrary and discriminatory as to violate constitutional provisions

(which provisions not stated) against depriving of property without due process of law and forbidding denial of the equal protection of the laws; (15 — 21); wherefore we answer as to at least five of the appellees that if it can be held (and we deny it) that such claim was made in pleading that neither of the lower courts sustained such an objection; that neither held the federal constitution had been violated in any respect, and that moreover the record establishes conclusively that there was neither arbitrary conduct nor improper, if any, discrimination. Our view is that the lower courts found there was arbitrary conduct and improper discrimination and that this deprived the board of authority without any reference to whether such arbitrary conduct and discriminatory action constituted a disregard of the federal constitution. With this holding and the evidence upon it we will deal in another place in this statement.

CHANCERY JURISDICTION AND PREMATURITY.

The trial court held that its equity side had jurisdiction and the Circuit Court of Appeals affirmed this.

The bills allege that the threatened apportionment of benefits would cause multiplicity of suits. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15). Issue on this allegation was joined. (M. 22, 23; R. 23, 24; O. 23; N. 22, 23; S. 21; P. 23, 24).

Another allegation is that this apportionment would cast a cloud on the title of appellees to their real property. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15). Issue was joined on this. (S. 36; M. 38; P. 38; N. 37; O. 38).

Another allegation is that if this apportionment is carried out, plaintiff will suffer immediate and irreparable injury. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15).

Finally it is alleged that if this apportionment is carried out, plaintiff will be without plain, speedy, and adequate remedy at law. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15).

The defendants pleaded in bar that the plaintiff does have such remedy at law. (M. 22, 23; R. 23, 24; N. 22, 23; P. 23, 24; O. 23; S. 21, 22). — And that the bill states no matter of equity entitling plaintiff to the relief prayed for, because it has such remedy at law. (M. 22; P. 23; S. 20; O. 22; N. 22; R. 23).

The trial court held that it conclusively appears on the face of the pleadings there is no speedy or adequate remedy at law, and that the remedy at law must be on the law side of the federal court and not a remedy in the state court, because the non-resident is not required to subject himself to the jurisdiction of the courts of the State in order to obtain relief. (M. 83).

While the court says there is allegation of a lawful ditch, it declares that the board are mere tresspassers

(M. 84), because the new ditch was in fact and in law never established (M. 89, 90), it holds that if either plaintiff was compelled to pay this tax no action to give them relief would lie on the law side of the federal court. (M. 83).

The Circuit Court of Appeals concedes that injunction will not lie where all that is presented is an illegal tax. (R. 261). It rightly states that where in addition to the illegality of a tax there exists one or more of the grounds upon which equity takes jurisdiction, the jurisdiction may be entertained even though one thing involved is the existence of an illegal tax. It states, as we contend, erroneously, that the said general rule does not apply where it is involved that the proceedings concerning the tax were without authority. (R. 252, 253). It states further, again erroneously, as we contend, that the jurisdiction will attach merely because there is threat of an illegal tax. (R. 259, 263).

We concede that equity has jurisdiction where there is exhibited either irremediable injury, multiplicity of suits, vexatious litigation, or the casting of a cloud upon title. The bills did make claim that these conditions existed and the Circuit Court of Appeals found that the contention was sustained. (R. 259). — And at this point we contend that the record does not sustain this finding, so far as the chancery heads other than fraud is concerned.

AS TO THE ASSERTION OF FRAUD.

The pleading is a charge on information and belief that less than thirty-five per cent of the total expenditure was for the purpose of constructing ditches and to straighten out the channel of the Sioux River, and that less than five per cent was expended for any purpose legitimately connected with the construction or maintenace of the old ditches. (P. 12; N. 9, 10, 11; R. 10, 11; S. R, 10). — And that by the filing of the petition the board acquired no jurisdiction to assess for the cost of the necessary repairs and maintenances of the old ditches. (M. 14, 15; O. 14, 15). It is further alleged that the change in the channel of the Sioux River and its going through the outlet of the old ditches at a point north of the city of Sioux Falls would, if permitted to become permanent, have operated to relieve the lands drained by the old ditches, and lands adjacent thereto, of surface water, and that all that was necessary was to permit the water to flow unhindered through the old ditches into the river and to allow the new river channel to be drained by the natural course of the water flowing through them. (M. b8, 10; O. 8; — Denials M. 30; O. 30).

The defendants plead that when the new project was entered upon they immediately reconstructed the spillway and outlet to the old ditches in a more substantial manner under the supervision of the state engineer and at a cost of more than $100,000.00. (M. 35; O. 34, 35, 36; S. 32, 33, 34, 35).

In effect the issue on the face of the bills is whether the project at bar was a mere subterfuge because all the board was authorized to do was to repair and maintain the old ditches and, instead of doing this, used but a very small part of the total expenditure for that alleged lawful purpose.

We find that both the lower courts greatly broadened this issue. The trial Judge found that everything

done came to merely giving the old ditches a new name; (M. 89); that the assessment upon plaintiffs was a mere afterthought. (M. 91).

The Circuit Court of Appeals found that the proceedings were a mere subterfuge because there had never been an abandonment of the old ditches, and that all that was done could be lawfully done only on statutes governing procedure in case of abandoned ditches. (R. 253). At the same time it found that on April 8th, 1916, a petition was filed asking among other things that the old spillway be closed and abandoned and the course of the old ditch extended in a southerly direction, *and that the board passed a resolution that said ditch be permanently closed above the present spillway or outlet thereof.* (R. 250).

Another basis for its finding that here was a subterfuge is that some of the appellees had no property in the original ditch area, while others did have, and that the appellees who have no property within the original area were brought into a new district and made liable for further assessments for maintenance and repair of ditches. (R. 252, 262). It is not made clear whether the flaw lies in bringing a party into the new district or in the fact that there is a claim they were brought into a new district where there was but a pretense of an independent project when in truth nothing was to be done or done except to maintain and repair ditches in territory in which the party brought in had no property.

It concedes that the original system became so defective in 1916 as to threaten great and irreparable injury and that it was this the board took steps to remedy; also, that the board proceeded to establish the so-called new drainage system upon a petition which had for caption: "To reconstruct and improve drainage ditches No. 1 and 2 (the old ditches) and to construct a new spillway or outlet to said drainage ditches and to pay therefor by an assessment upon the property, persons, and corporations, benefited thereby". (R. 254).

It is further declared that the water of the Sioux

River breaking through into laterals and threatening a change of its course and the possible destruction of state lands, led to no act in relation to the drainage of agricultural lands, but all done was prompted by the failure of the ditches, because of their inadequate or imperfect construction to carry the increased flow of water — and that if the project were an entirely new one, this will not avail because it was not for the drainage of agricultural lands. (R. 257).

The trial Judge held to the same effect, and is expressly affirmed. (M. 85; R. 249, 250).

The conditions of the drainage system existing when the new project was initiated are fully set out in the bills on O. 8, 9; M. 8, 9; P. 8, 9; S. 7, 8; R. 9; N. 8, 9. Also fully set out in the answers which are in substantial agreement with the allegations of the bills. (M. 26, 27, 28, 29; R. 28, 30, 31; S. 26, 28, 29; N. 27, 28, 29; P. 28; O. 27, 29, 30).

It was the view of the trial Judge, in effect, that what the board engaged in was not to create an independent drainage project but to pretend to do so in order to obtain means sufficient to cure its own default in not having constructed the original ditches properly. For illustration, it is said in its opinion that if the spillway had been properly constructed originally, and if it had not proven inadequate, there would have been no cause for action by the board in the year 1916. (M. 93; and see M. 85, 86).

The trial Judge held the board was responsible for the threatened ravages and it was its duty to maintain the old ditches and stop the ravages of the water, and it was this that caused them to construct the spillway in a more substantial way and to dike and to do other things. (M. 86, 87). And that the action of the board was influenced by the thought that the board having conducted the water down into these ditches and because of the inefficient manner in which they had constructed the ditches and built the spillway and the threat

of all resulting damages, it was the opinion of the board that plaintiffs were necessarily to be damaged. (M. 88).

The trial Court concedes that in 1916, the river cut through into the ditches and the latter became clogged in places and not wide enough in others and that the spillway was washed out by the force of the water which was being conducted down the ditch, that there was cutting the bluff, that large areas of land were being washed away and other dangers were threatened; but it holds that still the only proposition presented to the board was on maintenance or taking care of the waters that the board had conducted down the old ditches. (M. 88).

It ruled that nothing but repair and maintenance of what they had established confronted the board, and they should have prevented the danger threatened by the waters they had conducted through the old ditches through the hill into the river. (M. 86, 87).

The trial Judge points out forcibly how great the danger was in 1916 and how radical steps of protection would have to be, but still holds that all that was in fact entertained was a scheme to maintain and take care of the waters that were being conducted by means of the old ditches. (M. 86, 87, 88).

Another reason assigned by the district Judge is that the board had no authority to proceed, first, because it did not act under the statute dealing with abandoned ditches (M. 89, 90), and, second, that the board were mere trespassers because the alleged new ditch project was in law never established and in law has no existence (M. 84, 89, 90), — that by not following Section 8489, the abandonment statute, the board acted absolutely without authority, right, or color of right. M. 89, 90).

One basis on which the district Judge held that the project was a mere subterfuge is to assume it was nothig but a scheme to repair and maintain the existing ditches and upon that assumption to declare the proceedings void because there had been no compliance with

statutes which gave authority for repair and maintenance, statutes that are the only authority for a project that has no object except to repair and maintain an existing drainage system. (M. 87, 88). In like case is the opinion of the Circuit Court of Appeals in making one ground for finding subterfuge by assuming that the old ditches were not abandoned though perhaps a small portion was. (R. 256). And on that assumption it bases a ruling that the proceedings are void because the one statute which is alone authority for dealing with abandoned ditches had not been followed. It even sets out the statute that alone is authority for what it is assumed was done. (R. 255, 256).

Before entering into the state of the proof on these heads we submit that whether this was or was not a subterfuge is not now an open question because, first, appellees had the opportunity to present their claim that they might not rightfully be assessed because no independent project was being formed and could have appealed to the courts of the state if the board had held against them, and having failed to take advantage of this opportunity are now foreclosed on this head; second, the highest court of the state, speaking in the Gilseth case, has ruled that this was in truth a new and independent drainage project and that jurisdiction had been acquired by the board by following the statute relevent to the establishment of new drainage systems.

If not overlooked by the Circuit Court of Appeals, there is a disregard of the fact that the appellees Omaha Railway and Milwaukee Railway concede in their brief in that court that the board resorted to no subterfuge and that it constructed a drainage system which was new and independent and made no effort, in the guise of establishing a new project, to raise money wherewith to repair and maintain existing ditches.

Coming now to the evidence, it appears that in July, 1916, one Thompson and others in due form asked the board to permanently close and abandon the southern end of one of the ditches about a mile in length and including the site of the destroyed spillway and to establish a new outlet for it through Covell's Lake and thence back into the river. (R. 224 to 229). The petition of the City, F. L. Blackman and others, was presented on August 3, 1916, and prayed the establishment of a new and enlarged drainage district with suggestion that the old ditches be enlarged and improved. It prayed that the canalizing of the course of the river adjacent be a part of the new project. It suggested the enlargement of the assessment area so as to include about ten sections of land additional. (R. 42).

This is the petition upon which the new drainage project was established. (R. 51).

Waite says that he asked Rettinghouse in regard to the watershed in this drainage area, and he thinks he said it was 4500 square miles. This was the whole watershed. (R. 179).

There is in evidence the commissioner's report, 5 pp. 562, 563, in which it is recited that the board had resolved that the width of the old drainage ditch No. 1 be and is fixed at forty feet at the bottom, with a side slope of one and a half feet to one. (M. 119). The same is shown by drainage ditch record A. pp. 121 to 123, inclusive, and with reference to old drainage ditch No. 2. (M. 159).

Risty testified the new ditch is in the neighborhood of eighty to one hundred feet wide as far north as Renner. (M. 266; R. 165).

The work of construction was upon plans approved by the state engineer. (R. 164; R. 204). Risty says that after the filing of the Blackman petition in 1916 and when it was decided that the spillway was to be repaired the board employed engineers to investigate it; that at this time about a year and a half before all the

preliminaries were cared for, and before the board went to actual excavation; it employed a competent engineer to lay the plans.

Rettinghouse says the ditch was constructed for the prime purpose of draining this section of the country, and inlets have been made at various points, at roads and intervening points, to permit this surface water to drain into the ditch (R. 237), — that through said Section 2 the ditch runs in the lowest part of the country east of the river and serves the purpose of a drainage ditch as well as one to care for overflow and it was put in for the double purpose of serving both ways. (R. 237).

Risty says if there are heavy rains on the lands adjoining the ditch running north and south it will flood the lands on either side of it and it was the intent and purpose that the ditch should take care of such flood water — that the real purpose of the ditch as he understood it is to take the water from the river in flood times and conduct it down to the spillway into the river at the mouth of the spillway and to prevent overflow to a great degree from spreading over the farm lands. (R. 209).

Thompson says the intake of the spillway at the lower end of ditch No. 1 is rip rapped, then there are two gates leading into a hole that goes down through the ground about 40 feet. The shaft is perpendicular for about 40 feet. At the lower end of it a channel is run out towards the river towards the east sloping downwards so that it comes out just above the river level on the lower end. (R. 204).

Rettinghouse says the discharge capacity of the ditch at its lower end was something like three thousand feet of water per second. (R. 243). And thinks a majority of that water came out of the river during flood stage. (P. 294).

Barlow says his understanding is that the spillway is designed for 2000 second feet and could take an over-

load of 500 more, making a total of 2500 feet. (R. 170, 171).

There is a very great amount of testimony showing so much work and kind of work as to demonstrate that here was no mere plan to repair. (R. 161, 164, 204; R. 165; R. 231, 237, 238, 241; M. 261, 262, 266, 342, 362).

The Circuit Court of Appeals found that the total original cost was only $127,706.29. (R. 185; R. 224 to 229).

The cost of old drainage ditch No. 1 was $46,600.10. (M. 155); that of old drainage ditch No. 2 was $81,-106.11, making a total of $127,706.21. (M. 202, 203).

The cost of the new drainage ditch was $309,221.40. (M. 18).

The effect of canalizing the river and enlarging the ditch, of constructing and installing wiers, dams and controlling works and a substantial spillway was to create a double and more perfect system of drainage. (R. 41).

The object of the new project was to establish a more perfect drainage system with more substantial controlling works and equipment and to create ditches of more than double the capacity of the original one. (R. 19).

By handling more water than the original ditches could the new area was proportionally increased to cover all the land described in the notice of equalization. (R. 19).

Thompson says the old spillway was washed out in 1916. (R. 204). — And the present spillway was finished in 1918. (R. 204).

Risty says that where the board diked, the ditch had taken the channel of the creek where there had not been enough dirt taken out to make a dike, and when the floods came the waters backed up on the farm lands to the west; that the board diked there probably five or

six feet high thus protecting these lands after that. (R. 165).

Rettinghouse says the ditch takes one-third of the water carried by the river on as close an estimate as is humanly possible and it may be more. (R. 241).

The original course of the Big Sioux River adjacent to these ditches was very crooked. (Map R. 185).

Risty testified there are pipes here and there around the ditch to let water in when the bottom land overflows, and it has been proven these ditches drained the bottom lands because there are farms all along, and it has lowered the water in their wells to a very considerable extent since the ditch was dug — and "they proposed" to have the gates in the embankments so that when the pressure was from the inside it would close the gates, and if from the outside would open them within this pipe. (R. 208, 209).

The trial court disregarded the issue tendered by the defendants that plaintiffs are not entitled to the aid of a court of equity because they have neglected and refused to tender or offer the amounts of such benefits as actually did accrue to them. (M. 49; S. 15; O. 22).

The contention that the project was without authority because it was not intended for the drainage of agricultural lands.

This divides into (a) whether the property of appellees is agricultural land and (b) whether if it be not, whether the establishment of the drainage system at bar was as to these appellees without authority.

It is alleged in various ways that the nature and location of the property of the plaintiffs is such as that it has never been used for agricultural purposes, and is suitable for nothing but uses other than agricultural. (P. b-8, 7; R. 8; M. 13; O. 13; S. 7; N. 7, 8).

Woods testified that a very small part of the Mil-

waukee right-of-way acreage, is taken up by round house grounds and yards near the ice house and most of it is right-of-way, but if there were no railroads through it the most of it could be used for agricultural purposes. (R. 197).

And Bassett, a witness for the plaintiffs, says he knows of no reason why if the tracks were not on the right-of-way and station grounds those premises could not be used for agricultural purposes, except those station grounds that were right on to the rock; that sections 27 and 31 can be used for agricultural purposes but that the track section does not have any soil to amount to anything. (R. 191).

Pilcher, the agent of the Rock Island, testified he knows of no reason why the land of that road could not be used for agricultural purposes were it not covered with railroad tracks; that it has agricultural land as a basis. (R. 183).

Next it is alleged that the work done was not done to bring about the drainage of agricultural lands. (O. 8, 9; M. 8, 9). Denials (M. 30; O. 30). It was further alleged the new ditches were not needed to drain agricultural lands because the old ditches had sufficient capacity for that purpose. (M. 7; O. 7). Denials (M. 28; O. 28).

But there is much testimony that the railroad company appellees have no agricultural lands within the district and nothing but property which is used exclusively for railroad purposes. (Omaha, R. 167; Rock Island, R. 177, 182, 183, 196; Milwaukee, R. 196; Great Northern, R. 184). This, though it is testified that these companies had approximately 340 acres of agricultural land as defined in *Milne vs. McKinnon*, 32 S. D. 627, within the drainage area, which is subject to assessment as such, viz rights-of-way, station grounds, parks, pumping stations, streets, and power plant. (M. 271, 276, 286, 295, 303; R. 196).

As to the Power Company it is testified that all the

land it owns can be described as a large pile of stone here and there in topsy turvy condition and that there is not soil sufficient to be used for cultivation of crops. (M. 246). And that the property north from the dam to the hydro-electric plant is mostly granite. (M. 244, 245).

As to the City — One witness says Phillips Park cannot so be used; that neither the land in Phillips Park or Sherman Park can be used for agricultural purposes. (R. 183).

Hardimon adds that no part of Sherman Park is agricultural land and that Phillips Park is not — is quite broken and is not used for agricultural purposes. (R. 200). Charnock testifies to his belief that Sherman Park "was run in by the acre somewhere near like agricultural land"; that the streets were assessed about the same as the property where the streets were located; that he did not call city lots agricultural lands, though they were assessed as such. (R. 234, 235).

One witness who had testified that the parks were not agricultural lands (Spellerberg) testified also that an acre and a half or two in Phillips Park can be tilled or turned into pasture and made to produce after a fashion, but that one would have to wait until after the flood had gone and that it was a late crop proposition (R. 184), that there are fifty-two or fifty-three acres in Sherman Park of which about twenty or twenty-five acres are on the lower level, and if this land were not used for park purposes it would not make good pasture because there is not enough grass; that while some land around there is used for pasture it is higher than the park land, and while it is true that the land north of the park is used somewhat for cultivation of crops, it was taking chances. (R. 185).

It was admitted in answer that the property of the plaintiffs was not being used for agricultural purposes and that it was the kind of property described in the bill, e. g., right-of-way, railroad tracks, the power plant

to generate electric current, and city parks. (P. 29; R. 29; M. 38; O. 38; S. 27; N. 28).

Upon this it is contended (R. 14, and M. 15), that the Constitution of South Dakota gives no authority to provide any drainage except for the drainage of agricultural lands.

In the opinion of the trial Judge it is said:

"These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands". (M. 91).

"The Constitution provides that the drainage of agricultural lands is especially declared to be a public purpose and the legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest in the corporate authority of counties, townships, and municipalities, the power to make special assessments upon the property benefited thereby according to the benefits received".

"Pursuant to this provision of the Constitution the Legislature has provided for the drainage of agricultural lands, but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of land 'for any public use'." (M. 79).

"It may be said that to remedy these wrongs constituted a public use, as referred to in the Constitution of the State. Admitting that that is true, we are confronted with the proposition that there has been no legislation conforming with the provisions of the Constitution, authorizing the legislature to provide for the establishment of drainage ditch districts, and the naming of officers with the

powers therein referred to. If, therefore, any claim were made that the commissioners were acting under this authority, independent of the provisions of law with reference to the drainage of agricultural lands, the answer is that the provision of the Constitution is not self-executing, and that no legislation has been provided carrying this provision of the Constitution into effect". (M. 93, 94).

While we concede that if the District Court had jurisdiction at all it could pass upon the question here presented though same is not a federal question, we contend that the lower courts have at this point misconceived what the provisions of the South Dakota Constitution and statutes are, and, passing that, it has been determined by the highest court of the State in the case of Gilseth, 46 S. D. 374, that the very project at bar was authorized by the Constitution and laws of the State.

The Circuit Court of Appeals puts it thus:

> "We are satisfied that under Section Six, Article Twenty-one, of the South Dakota Constitution, drainage of lands for any public use other than the drainage of agricultural lands, must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Which ever way, therefore, the matter is viewed, the board was acting without legal authority in its apportionment of benefits and threatened assessment of taxes". (R. 257).

In other words, the only authority the board has is to establish drainage districts to provide drainage which constitutes a public use provided that that public use consists of drainage agricultural lands.

THE PREMATURITY OF THE SUIT.

The record shows without dispute that the statute requires, first, a tentative apportionment of benefits, and then provides for a hearing at which this tentative assessment may be equalized, i. e., raised or lowered. Despite this the Circuit Court of Appeals ruled that though suit was brought before any equalization as to the benefits apportioned to these plaintiffs was had, it was not premature (R. 263); ruled that though when the suits were brought it was not known what the final proportion of benefits would be, that these suits were not premature because it was definitely known what the total expenditure was, wherefore, it was merely a deduction in mathematics to arrive at the assessment that threatened each appellee. (R. 262). The opinion of the District Judge declares that under Section 8463 the apportionment takes place before it is known what will be the actual amount of money expended and then holds that suits brought at that stage were not premature. (M. 78). Though there cannot be a final assessment until after the construction of the project has been completed, and though these suits were brought before its completion and, therefore, before any assessment could be or was made, yet the district court ruled that these suits were not premature. (M. 78, 81). Though no assessment could be spread by the auditor until the benefits were finally fixed and though there was not even an assessment to be spread when these suits were brought, still the District Court ruled that they were not prematurely brought. (M. 78). These suits which were held to be not prematurely brought, were instituted before any tax had been levied and, therefore, of course before it became effective or there was any attempt to enforce it. (M. 80, 81).

AS TO PROPERTY NOT BEING INCLUDED IN THE AREA OF THE NEW DRAINAGE DISTRICT.

There is allegation that nothing described in the notice given was included in the property assessed for the construction of the new drainage ditch. (R. 6; P. 6; N. 6); Denials (N. 26, 27; P. 28; O. 27; S. 26; M. 26). Alleged, that no property of the plaintiffs is within the area of the new drainage district. (N. 6; P. 6). Denials (N. 26, 27, 28; P. 28). Further, that, at all events, the board had no power or jurisdiction to include any of the property of plaintiffs within said drainage district. (M. 6; P. 3). Denials (N. 26, 27, 28; P. 28. 29).

As to the allegations of fact, there was no evidence to sustain them. On the contrary the Blackman petition and original notice published, describe the appellees property within the drainage district in the same manner as all other property included therein. (R. 47-70, 59-89). As to the allegation that power to include was lacking, that is answered by the law, and by the holding of the Gilseth case which is binding on this court. And here again, it is not amiss to add that the point is not available in this suit because the plaintiffs had opportunity to have this corrected in the tribunals provided by the statutes for that purpose.

ALLEGED FAILURE TO COMPLY WITH THE STATUTE.

Many such failures are put in issue. Before entering upon presenting these, it is proper to repeat that the Gilseth case has bindingly determined that the statutes were so substantially followed as that the board acquired jurisdiction. This determines that none of these complaints are well taken. Moreover, jurisdiction having been acquired, the omission to present these complaints to the proper tribunals provided by statute foreclosed the right to now urge them in this collateral attack.

In view of what has just been said, we will not undertake to particularize as to each and every one of these numerous attacks. But will select a few that are typical.

It is complained that a number of things were not effected by means of the adoption of resolutions. One of these is that there was no such resolution with reference to the proceedings initiated by the petition upon which the project is founded. (M. 56, 57). It appears that Exhibit "16" is a resolution adopted for that very purpose. (M. 320; R. 212; O. 200; N. 257; S. 248; P. 260). Though it was denied, resolution was adopted establishing the new drainage project. (M. 323, 324; R. 215, 216; O. 203, 204; N. 260, 261; S. 251, 252; P. 263, 264) — indeed, the Circuit Court of Appeals so found. (R. 250, 251). Though it is denied, the Circuit Court of Appeals finds that there was resolution adopted after the surveyor's report was filed to fix the line and width of the proposed ditch. (R. 250, 251). And there *was* resolution adopted fixing the exact line and width of the ditch and the time and place for hearing the petition. (M. 57, 58). There *was* resolution adopted for straightening the ditch and straightening the river cut-offs. (M. 327, 328, 331; R. 219, 223; O. 207, 211; N. 264, 267; S. 255, 258; P. 267, 271).

There *was* order that the Backman petition be filed and that a copy of it be transmitted to the state engineer; and it was filed in the office of the auditor on August 3rd, 1916. (M. 50, 56; R. 42, 48; O. 42, 48;

N. 42, 47; S. 41, 46; P. 43, 49).

There *was* surveyor's report made under direction of the state engineer. (R. 212; O. 200; N. 257; S. 248; P. 260). The Circuit Court of Appeals found that report of survey was made and filed by the engineer in charge. (R. 250, 251). The survey *was* ordered and made. Some of the bills themselves so allege. (S. 11; N. 12; R. 12; M. 12, 13).

The Circuit Court of Appeals found the Blackman petition was transmitted to the state engineer and that thereupon a survey was ordered (R. 250); and the letter of transmittal is found on. (R. 212; O. 200; N. 256; S. 248; P. 259).

There *was* inspection by both the board and the state engineer. (R. 162, 238). The resolution on which it was done is found on (M. 57; R. 49; O. 49; N. 49; S. 48; P. 50).

AS TO THE COMPLAINT OF BUILDING WITHOUT COMPETITIVE BIDS.

It suffices to say that as to this the statute was followed. Bids were received. But the statute authorized rejecting all of them and proceeding to construct under the supervision of the board and on contract on its part. The bids were rejected and the work was performed under a cost plus contract. Aside from this last fact there is not even a hint that rejecting the bids and proceeding to build for itself was even improvident, to say nothing of fraudulent or improper.

THE CLAIM OF ARBITRARY ACTION.

It has already been pointed out to be the settled law of this case that there has been no infraction of the federal Constitution. What the Circuit Court of Appeals rules is that there was conduct so arbitrary as to invalidate the proceedings, without reference to any constitutional aspect.

Roughly, what the appellees contend is that the arbitrary conduct consists (a) of discriminating against appellees in favor of the owners of agricultural land within the drainage district area; (b) that the apportionment of benefits as a whole and as to all affected by the drainage project was by an unreasonable method and without any rational basis; (c) that in truth no benefits accrued to these appellees from the proposed drainage project — at any rate, greatly less than the amounts they were threatened with assessment for.

We think it proper to say again, that if all these contentions were well made appellees cannot be heard upon them in this collateral suit; that these were all matters to be presented to the board and if necessary on appeal from its refusal to give relief asked. — That, so,

appellees are now foreclosed to raise these points.

SPEAKING, FIRST TO THE ALLEGED DISCRIMINATION.

It was ruled below that the method of apportioning benefits was an arbitrary method, that the standard of approportional assessment adopted could not obtain even approximately correct general results, and that there was discrimination as between these plaintiffs and property owners who were to be assessed for the drainage of agricultural lands. (M. 84, 90, 91, 92). Until the argument *in extenso* is reached it would serve no useful purpose to elaborate beyond this statement, and so of the testimony on the point. It must suffice at this stage to point out types.

Rettinghouse, the engineer of the board, testified that in reducing the valuation down proportionately the method was alike in dealing with railroad or ranch property and that no discrimination would appear after the equalization. (R. 242).

Defendant Risty, that the board compared the benefits arrived at as to the Power Company and dealt with it on the unit basis of the benefit to the one acre tract of agricultural land, the acre that had been selected as the unit. (R. 257).

Risty says the board used this $25.00, the actual benefit to the unit, in determining the apportionment of benefits which each of the various classes of lands aside from farm lands should be assessed, and did this in regard to farm land (R. 166); that as to comparing the alleged benefits to railroads to the unit, he does not remember what value the board placed on it, that they had the value of agricultural unit fixed and also the apportionment of benefits (R. 154); that in all cases the board tried to take into consideration the right of way, the value of the lands as compared with adjacent lands, and the benefits that might be drived from the drainage project as to the maintenance of tracks and

bridges and so on (R. 153); that in dealing, throughout, the method was to ascertain what in the judgment of the board was the benefit which it thought was right and proper. Then it divided by the benefit to the agricultural unit to get the number of units apportioned to the City, and based its judgment in part on the fact that most of the members were farmers and knew the price land was selling at. (R. 255).

Charnock says the board placed a value on the land selected as a unit without the ditch and another with the ditch, and in its judgment found the difference to be $25.00 and applied that unit to all the lands and used the same method of determining the number of units of benefit to all of the lands affected (R. 232); — that the same process was used on all property taken. (R. 233).

It appears most clearly that in all it did, the Board exercised its honest judgment and made necessary investigation — that if there is any criticism to be made it could not be more than that there was honest mistake in judgment. (R. 233, 234, 255, 256, 258).

AS TO DISCRIMINATION IN FAVOR OF AGRICULTURAL LANDS.

Rettinghouse testifies that lands were assessed on the basis of 30 or 40 out of a hundred depending on the amount of the benefits received taking the unit as one hundred, and there were lands assessed as high as three hundred and three hundred fifty. (R. 259).

Risty says that as to the manner of determining the benefit of the unit of agricultural land the board made an estimate of what that land was in its judgment worth and how much more it would be worth after the benefit of the ditch (R. 255); that the engineer spread the amount the Milwaukee would be benefited on the same basis as the farm land adjacent. (R. 163).

Charnock says the agricultural land had a value placed on computation by the acre (R. 233), that the engineer showed the board what the benefit would come to in money and thus the $25.00 benefit unit as to farms was arrived at. (R. 234).

Rettinghouse says that as to the Milwaukee there was considered its right of way, on the acreage basis, which was estimated in proportion to the adjacent land. Charnock, that in applying the unit to the Milwaukee, the board first considered the acreage belonging to it and assessed that practically the same as abutting lands. (R. 232).

Risty says that when the railroad property and other properties were reached, the board considered the benefits they would derive annually and capitalized that. On considering how much the average annual benefit would be to these properties, say a certain piece of railroad, and having that amount fixed it took the benefit which this unit of farm is supposed to receive and divided the benefits of the railroads thereby. To illustrate, if the benefit to the unit of farm land was twenty-five dollars, the board would make the apportionment of benefits 25 per cent. When it came to placing the unit on other property it, after exercising its judgment and making necessary investigation, arrived at a certain amount. It divided that by 25, the benefit to the farm unit, and that gave the number of units for assessment. (M. 256).

AS TO DISCRIMINATION AGAINST THE CITY.

Charnock testified that as he remembers it the streets of the City were taken at about the same value as the property abutting, though the lots were not figured by the acre and the City was not dealt with on the acreage basis (R. 234), — and that no difference was made resting on whether the property belonged to the City or to individuals (R. 233); that the streets were assessed along about the same as the property where the streets were located, and that one would not call city lots agricultural land. The streets were not assessed as agricultural land. (R. 235).

One of the defendants said only the north end of Phillips park was taken in and it was assessed the same as was all the City property or any of the property. (R. 235).

Risty said for one thing that in comparing the benefits to the property of the City with agricultural units, the board took into consideration the public highways that would be annually overflooded and proceeded as in all other cases. That in all cases the board tried to take into consideration the right of way and the value of lands as compared with adjacent lands (R. 153); — that in comparing the benefits of the property of the City with agricultural units the board took into consideration the public highways that would be annually overflowed, had in mind as road builders what damage that would do to such roads and in its judgment fixed the damages to be what it thought was right, and thus fixed a number of units on a piece of property and then proceeded in like manner as to all other cases (R. 256); that the board compared the apportionment as to parks, water systems, streets, and highways, with the agricultural unit (R. 256); and that with reference to parks, water systems, highways, and streets, in the city, the board based its determination on the same facts used with reference to all other property, and estimated according to its judgment and based its action on an investigation of the benefits to the public and the loss

there would be if the foregoing things in the city were annually overflowed. (R. 255).

THE CLAIM OF ARBITRARY ACTION.

The basis for asserting that the action of the board was arbitrary seems to be, first, that the proportion of units out of the total of 32,549.62, tentatively fixed, was:

Chicago, Rock Island & Pacific Railway Co.,	839.45
Chicago, Rock Island & Pacific Railway Co.	1681.
Chicago, St. Paul, Minneapolis & Omaha Railway Co.	839.45
Northern States Power Co.	5351.63
Great Northern Railway	613.85
City of Sioux Falls	3147.95 (R. 251)

Related, the tentative proposed assessment, in dollars and cents, to-wit:

Great Northern,	$ 5,800.00	(13)
Power Company,	51,000.00	(13)
Rock Island,	4,974.00	(13)
City of Sioux Falls,	29,905.52	(12)
Omaha,	7,500.00	(13)
Milwaukee,	15,000.00	(13)

The same subject is attempted to be covered by testimony, say, that the Rock Island owns a little less than thirty acres in a drainage district designed to drain upwards of 20,000 acres of agricultural land (R. 6-177); and, say, that the Milwaukee owned nothing but its right-of-way.

Those who helped make and did make the proportional assessment became witnesses:

Risty testified that while it might seem arbitrary, say as to county highways, the board knew pretty well what it would take to keep such roads in good passable condition, both when there was no overflow and in sea-

sons when there was (R. 258). It is pointed out that the appellees at no time appeared before the board and thus it was denied making what might have been deemed a more satisfactory appraisement. Risty testifies it was the judgment of the Board that the real benefit to lands should be computed on the basis of a profit unit and that when this was determined it proceeded to equalize and fix the proportion of benefits among the other property. (R. 262). To show how much it all was all a matter of judgment and opinion, Risty illustrates with the case where a basement is filled with water and says that it might well be that the estimate by the board would vary from one made by the owner, and that neither might be right. (R. 256). He says the board made an estimate of damages that might accrue to highways and streets overflowed and based its estimate on its best judgment. (R. 256).

DISCRIMINATION CONCERNING THE RAILROADS.

Risty testified on cross examination by the appellees that as to the Rock Island, Omaha, Great Northern, Milwaukee, the City of Sioux Falls and the Power Company the board took into consideration the value of the right-of-way, compared the right-of-way with adjacent lands and considered what protection from water would bene fit these properties and the saving it would be in the upkeep of the railroad track, bridges, etc. (R. 256, 257).

Charnock testified that in assessing the railroads the board considered the land owned by them, the railroad itself and the culverts and the bridges (R. 233): and in applying the unit to the Milwaukee there was first considered the acreage belonging to it, and that was assessed practically the same as abutting lands. (R. 232). It is testified that with reference to the Milwaukee in fixing its proportion to be 1678 units the, board took into consideration what it would damage these tracks if washed out and the expense of rebuilding; the board assumed that were it not for the spillway those tracks would wash out and be under water for a certain period;

that witness himself had seen that railroad under water for eight or ten days and compelled to turn trains around and run them over other railroads; that these tracks were on lands subject to overflow, and that in this connection the board considered the distance the Milwaukee property was from land that had overflowed; that in this territory floods occurred often. It was testified further that the personal experience of the engineer of the board gave him a very good idea of what the cost periodically would be for washouts and his estimate was as close as possible as to what would be saved if there were none, and this was capitalized. (R. 160).

As to the Rock Island, Risty says the board considered inthe apportionment the damages that might be done to its tracks, grades by high water. (R. 258).

Charnock says the board took into consideration the benefits to the grades of the Milwaukee, the culverts that could be done away with and bridges that could be abandoned or shortened by reason of the drainage system. (R. 232). Risty says, that the board considered the bridges of the Milwaukee in arriving at its benefits. (R. 260).

The engineer of the board testifies that the Great Northern had 2.4 acres of right-of-way which the board considered benefitted; also a one-fifth of a mile of track, two bridges that would be protected and approximately 315 feet of bridge that might be abandoned. (R. 241).

As to the Omaha he says it had two and one-fourth miles of track 27 acres of right-of-way, two bridges that might be protected, and 405 lineal feet of bridges that might be abandoned by reason of the drainage project (R. 242); that the Milwaukee has 170 acres of right-of-way, 14.2 miles of track, two bridges that would be protected, one bridge that might be shortened one hundred feet, and another bridge 176 feet long that might be abandoned. (R. 241). Risty says, that there was a certain number of bridges on the Omaha that were protected by the drainage. (R. 263). According to Char-

nock the board considered how many bridges could be saved by the diversion of the water. (R. 233). Engineer Rettinghouse, testified as to Bridge P. 129 on the Omaha the Bridge P. 130 which were west of the city and east of the river, that he believed the drainage project would enable the company to abandon these bridges (O. 233); that on the Rock Island there were two bridges, which could be shortened 230 feet, that on the bridge southwest of town there could be a shortening of 120 feet, and the one in town could be shortened 110 feet, taking out one span. (R. 242). Risty testified that it was considered the bridge could be built smaller and that grades could be substituted for trestles. (R. 258). Rettinghouse, that the board considered the benefit to bridges, the possible shortening of same and the betterment or saving in the maintenance of the road bed. (R. 162).

On the other hand, Basset testified there would be no benefits from shortening bridges because the same openings would have to be left, and, therefore, whenever the Great Northern planned to shorten a bridge it did not take into consideration the existence of a drainage ditch. (R. 189).

Barlow says that if the evidence did disclose that from one-third to one-half of the water that comes down the river was diverted, yet it would not be a reasonable conclusion that at least part of the bridges could be done away with. (R. 170). Waite, if the bridge in the city were eliminated or shortened and a span taken out leaving the bridge 197 feet it would be something he would not dare to do (R. 178); that he would not consider it was reasonable engineering to eliminate any of this bridge (R. 179); and that he was willing to say this, though he has no information as to how much water the river carries, the slope of the land or the difference in its height. (R. 179). Hardimon, testified that in his judgment it would be unsafe to change the length of the railroad or other bridges in town. (R. 203). Bassett, that it would not be good engineering or safe to shorten the bridge which is now 615 feet long by more than 50

feet, under any conditions. (R. 190). Perkins, testifies the span could not be safely shortened, which he bases on the fact that he has had to enlarge openings several times (R. 182); but Barlow concedes that a former chief engineer of the Omaha did at one time consider the shortening of the bridge just east of the city. (R. 170).

The assessment was proceeded with under the advice of the engineer. Charnock says, the engineer figured the benefit to the road bed, culverts and the land owned by the railroads (R. 234); that all the various elements that the engineer had suggested as to the Milwaukee were taken into consideration in fixing the benefits as to that railroad (R. 163); that the engineer figured out for the board the saving to the bridges. (R. 234). The engineer advised the board that certain of the bridges could be shortened by having the water by-passed through the ditch (R. 162); and Risty says the board took into consideration that the Rock Island might build a shorter bridge. (R. 258).

AS TO THE POWER COMPANY.

Charnock says that in dealing with the Power Company there was considered the dam at Schodjt's which the board had put in to control the river water and also the gates or wiers at Thompson's, and cut-offs. (R. 232, 233). Risty, as to the plant the board considered the overflow at high water that would clog up the turbines and put them out of working order for a time, and the board had in mind the overflow in 1881 which spread out over the lumber yards in the territory of the Power Plant and took out a mill at the foot of the falls (R. 264); that there was considered several river cut-offs which had been put in in the river north of the city, and in determining the benefit to the power company there was considered the effect and influence of these cut-offs in hastening the water and shortening the time of floodage as to the Power Plant (R. 264); that the board considered high water backing up and filling up the gorge below the plant which resulted at certain

times the water power would not be serviceable and that it would cost more for fuel and other items (R. 259) — that the Power Company would be given a uniform flow in dry seasons and be protected at overflow seasons. (R. 159).

AS TO THE CITY.

Risty says that as to the streets and basements that flooded each year an estimate was made on how much it would damage a basement to have it filled with water (R. 158); that in dealing with streets and basements flooded yearly the board made an estimate as to how much it would damage the basement if filled with water (R. 158); and so of streets and parks. (R. 158). He again points out that all this might have been better adjusted if the assessed parties had ever come to a hearing. (R. 158). It was testified the board considered that one benefit to the city was keeping the water off and thus benefitting streets as well as abutting property. (R. 234). It was figured that if the water was kept off the road this made a benefit in so many dollars — and this was the basis of dealing with streets; they were not dealt with on the acre basis but on lot valuation. (R. 134).

Risty says that with reference to parks, water systems, highways and streets in the city, the board based its determination on the same facts it used with reference to all other property and estimated according to its judgment and on investigation of the benefits to the public and the loss it would suffer to highways, streets, parks and water systems suffered from annual overflow. (R. 155, 156).

AS TO THE UNIT METHOD.

The engineer of the board says that in arriving at the benefits to highways there was considered that a certain amount of annual maintenance was required and that it was greater under flood conditions; that the difference in the estimated cost of maintenance would capitalize to represent the benefit in a certain sum and the result was considered a real benefit, and after obtaining this result and making a great many calculations the board took into consideration the various locations and thus it was determined that some were benefitted more than others.

The board decided on its inspection trip with the engineer to select as a unit tract of land lying about three miles noth of the city and between the river and the ditch (R. 232); that in going over the territory he fixed on the location of a local particular unit as illustrative as could be found and therefore recommended the above unit. (R. 238). One member of the board testifies this unit was one acre of agricultural land. (R. 233). It was decided on the inspection trip that the acre adopted as a unit was worth $100. before the improvement and would be worth $125.00 afterwards. (R. 238, 239). The board determined that in its judgment this unit was benefitted twenty-five per cent or twenty-five dollars. (R. 162). After determining the value of this unit as aforesaid the board proceeded to equalize and fix the proportion of benefits among the other properties. (R. 162).

AS TO BENEFITS.

Risty testified that the Milwaukee extended almost the full length of the ditch and was adjacent to it; that in some places its track was right along the ditch and in others it runs pretty close, possible eighty rods distant where the ditch crosses the river at Renner. (R. 163). Nelson, that there was a place on the section of which he was foreman where the ditch is just outside of the Miwaukee right-of-way and he thinks it was diked four feet just outside of the right-of-way (R. 192); that from a point about four miles south of Baltic the ditch is on the west side of the Milwaukee and from that point down to Renner it runs close to the track, between the railroad and the river, both ditch and river being on the west side of the track. (R. 192). Bassett, that the Great Northern enters the city of Sioux Falls at a point about a mile and one-half from the mouth of the spillway. (R. 184).

Risty says the engineer explained to the board that the embankments, tracks and road beds of the Milwaukee were benfitted by being made more substantial and requiring less upkeep. (R. 163). Rettinghouse, that from his experience as a railroad engineer and the facts and data he has been able to gather, the benefits are direct benefit to the railroad company and their properties (R. 242); and so as to the Power Company. (R. 242). One thing the engineer advised the board was that some of of the bridges would be protected. (R. 162).

The engineer says that one element of benefit was the straightening of the river to a large extent between the upper end of the section clear down to a point near the Great Northern tracks and that this greatly increased the velocity of the water flowing through the river, thereby shortening the flood period. (R. 221).

Nelson says the flood in 1897 covered all the east side of the Milwaukee track and went through the track (R. 193); that in the flood of 1916 the flood water washed out a part of the track but not at the place where

the bridge is. (R. 193).

The engineer testifies that before this improvement was constructed the wells in the city were flooded by surface water and made unsanitary; witness recollects that notice was sent out that water should be boiled because not suitable for drinking, while another was sent out by the health officers that the water was perfectly sanitary and healthy. (R. 279, 280).

Hardimon admits Sherman park overflows pretty near every year. (R. 200). He says the city owns this park and it is kept for park purposes but it practically overflows every spring and that the water does not need to rise but a little, because the land is very low and the river forms a letter "S" just around it (R. 202); that possibly anything that tends to divert a portion of the water coming down the Sioux Valley and keeps it out of the river as it goes down the valley and as the river goes through Sherman Park would be a benefit to that park (R. 202); that another item considered was the benefit to the city water works (R. 243); that during flood conditions these works were out of commission and the board estimated that this was so a certain number of days in each year. (R. 242).

He says that it was taken into consideration that the city had about fourteen miles of streets and the benefits that would accrue to those and as well to county and town roads. (R. 242). He testified the river runs around the city some miles beyond the outlet of the spillway and it was a direct benefit and the same benefit that was received by lands further up the river to bypass this water on adjacent lands, starting at the north end of the city limits and around the city and going on until the ditch dumps the water back into the river (R. 242, 243), — and that from the diversion of the flood waters the annual maintenance of parks would be reduced. (R. 242).

Bassett testified for plaintiffs that on the Watertown and Sioux Falls line, a part of the Great Northern

system, they are flooded just south of the City pumping plant and at the top of the hill, that there the water comes out of a ditch and comes over the track and has done so every year since witness has been in Sioux Falls. This water gets to be probably six inches over the top of the track and stands in there sometimes for probably ten days. (R. 190).

The witness Nelson says that in 1916 at a point four miles south of Baltic the dam went out of the river and the river let the water in the ditch; that the ditch couldn't carry it and it went over the bank and washed out the dike; that a few miles further south it washed the track and let all the water out over the farms around, flooded them, and then washed back on the track; this water came from the ditch; the ditch is constructed with a dike and the water broke through the dike. The water that came into the ditch from the river went out and washed all the tracks as well as flooded the ground. (R. 192).

Knodt says there was a flood in 1897 that stopped taking trains out because the tracks were damaged on the west Sioux river bottom, just west of the city so that they could not cross; that the water was up to the rails most all the way on that side of the river; that there was one place in the road bed where an opening had washed out and the ties were hanging on the rails. a few ties were gone and it was quite difficult even to walk across; that there were two smaller bridges where the road bed was washed out, and ties hanging on the rails and that the track remained impassable for trains for ten days or two weeks. (M. 339).

At times water has been high enough around the penitentiary, where the Great Northern track runs, to flood this track some inches of water every year. (R. 192).

And Nelson says the points at which the ditch protects the Milwaukee track is about a half a mile south of Thompson's bridge, that the ditch comes to the right-

of-way at this bridge and runs nearly four miles down the track and the water comes into the ditch where this bridge is built. (R. 193).

There are many allegations, in effect, that the project did more harm than good (R. 9; N. 8; S. 8, 9; P. 9; M. 8; O. 8), and issue was joined on these in answer (S. 8, Denial 27; P. 8, Denial 29; O. 14, Denial 38).

The trial Court found that as a matter of fact no direct benefits to the property of the railroads within the City are shown. (M. 90, 91).

One witness considers there is great danger that the spillway as now constructed will work that the ditch must be closed and the water turned back into the original channel (R. 189); and Nelson says that if the dikes were raised a foot or so they would keep more water in than they do now. (R. 193).

Another witness says that since the construction he has lost more crops than he did before, and that his losses have been considerably more, since. (R. 204).

The City has practically abandoned Lien's Park as a Park since the spillway was built, though before the building of it the City had started to improve this Park, on account of flood conditions when the river overflowed from the spilway. (R. 183. And Hardimon speaks practically to the same effect. (R. 201).

In the opinion of Bassett, no benefit has resulted to the right-of-way, tracks, bridges, embankment and station grounds from the construction of the drainage project including the spillway. (R. 189). In the judgment of Link the Power Company would absolutely not be justified to expend any money for the ditch and spillway on the basis of benefits to the plant, and in his opinion there is no appreciable benefit to the plant. (R. 206).

Lots 5 and 9, inclusive, in block 25, of Phillips's

addition is used by the Rock Island for round house, and turntable, and this property is on the west bank of the river, eighteen or twenty feet above the surface of the water. (R. 196). Hardimon says that as you leave Sherman Park the most of the shore line is fairly level on one side but the other was higher and goes farther from the river and for several miles there was a high plain on the right hand side as you go down the river and the banks on the left side are fairly high in places. (R. 199). Spellerberg testified the high water does not affect Phillip's Park to amount to anything, that the Park is practically on high ground except a small flat area at one end at which point the ditch overflows and comes down to Covell's Lake. One witness admits that while at one point near the Great Northern bridge in the City of Sioux Falls, the banks of the river are well defined, that as the river goes through the town confined in a deep channel there is a greater chance of danger; that the channel is widened and banks not so steep. (R. 184). One witness says the tracks were on an elevation above high water mark. (R. 189). Another speaks to like effect concerning banks and embankments and tracks. (R. 177, 189, 191). At one point twenty feet, and about eight feet above level of Cherry Rock. (R. 183).

Link says the Power plant was designed to take care of maximum flood conditions and designed and constructed before the drainage ditch was, and it was built to take care of any flood condition, regardless of any drainage (O. 196); even against a flood as severe as the one of 1881. (R. 297, 298; R. 205, 206).

Holt testified that as against a flood "this ditch would be simply a wrinkle in the valley", that the ditch is useless against floods because when flood waters were highest they would cover up the ditch. (R. 198). And Link says it is his opinion that this ditch and spillway should not be taken into consideration at all as a means of resisting possible floods. (R. 208). But he concedes the improvement relieves flood water conditions to a certain small extent in certain stages of the river. (R.

207).

According to Reed, the Power Company plant was carefully designed to preserve the property against flood water of the Sioux River. (N. 244, 245). Another witness, speaking generally, testifies that in locating a line of railroad through the Sioux River valley the engineer would necessarily have in mind as one element of the cost of construction the making of embankment high enough to be safe from flood waters. (R. 197). And Nelson that the Milwaukee protected itself by putting in rip rap. (R. 193).

Holt says that in making the location it is part of the duty of the engineer to find the height of the flood waters of the various streams he crosses, and the grade line is usually established with reference to high water; he gets as much information as he can in regard to the elevation that the high water reaches in the valley, gets this partly from those who live there and partly from his observation of the high water marks; he then determines the height of the grade from experience as indicated by such information. (R. 196, 197).

Thompson says there was nothing that prevented all of the water that was gathered by these ditches 1 and 2 at the outlet or spillway from going over the hill. (R. 204). Geelan, that he cannot say there is any particular noticeable difference in regard to the water conditions at the bridge in the city of Sioux Falls before and after the construction of the new spillway. (R. 172).

One witness thinks the ditch had no effect. (R. 180). Another, that it does not drain "this section down here", at all. (R. 207). Still another says that matters are the same as they were before — that water has come out of the ditch every year since the spillway was put in, and that at a level side of the Great Northern the water has come out over its tracks through the dikes and the ditch; and at the City pumping plant. (R. 191). Still another says that it has made no appreciable difference in the flow of the river. (R. 192). Still an-

other, that there is no apparent difference as regards to flood waters of the river with reference to the line of the Omaha west of the City and east of the river, very little noticeable difference in water conditions along the Omaha line — and while he declines to say there has been more water in the bottoms west of the City and north of the Omaha track than there was before, to his knowledge, there is fully as much. (R. 172).

One witness gives it as his understanding that the construction of this project has worked no decrease in the section force employed which he says would be the determining factor in the saving of maintenance account. (R. 171).

There was a flood in 1916 but as against 10,000 per second feet in 1881 the water that came down the river in 1916 did not exceed 6,000 or 6,500 cubic feet per second. (R. 206, 207). But Nelson testified that in 1916 the old spillway went out and there was high water. (R. 193). Spellerberg, that in 1919 and 1920 the river came to the highest it had been to his knowledge and that the overflow condition continued longer than in any prior year. (R. 183).

The manager of the Power Company testified that the gorge north of the power house was full of water in 1919 and 1920. (M. 247).

Geelan says that the river never was any danger either before or after the construction of the spillway excepting in the year 1881, that that year an ice gorge formed in the southeastern part of the city and the gorge held the water back and when the gorge broke there was a flood which flooded the track of one of appellee's railroads about at the location where at present it has its station. (R. 172). Link, that in 1881 was probably the maximum as to floods and probably reached 10,000 feet a second (R. 206, 207); that he was up on the ground quite a number of times in 1920 and that then water was over the track of two railroads and there was a flood down almost to Russell street and from there

down to Covell's Lake (R. 200); that the water went over Minnesota Avenue although at this point not enough to amount to anything; it merely took a few loads of cinders to patch it up. (R. 200).

According to Nelson, the water in 1916 did not cover the abutting lands before going through the track and did not cover half as much ground as the one of 1897. (R. 193).

An agent of the Rock Island testified the river has never been out of its banks in the City since 1890. (R. 183).

Hardimon says the high water except that of '81 has done no damage to speak of that he knows of to City property (R. 200); that they have abandoned Lien's Park on account of the water which has practically cut out the park. It is a little north and east of the penitentiary and just a little west of the spillway (R. 202); that when this flood came through the city in 1881 it took all the bridges except one and swept the mills and the lumber yards on the east side, the only thing left on the east side was the Omaha railroad bridge; but that this flood was caused by the ice gorge. (R. 198). But none of Covell's Lake park was subject to overflow except a little piece which is by First Street bridge which he thinks would not cover more than one whole acre (R. 202); that in one place, except what was done by the flood of 1881, he knows of no damage to speak of done to City property. (R. 200). But he also testifies that the water around the City electric light plant and the pumping station was greater in 1920 than anywhere prior to that year except 1881 (R. 200); that during 1919 and 1920 the water in the river was the highest he can recall, and especially so around the city water plant and electric light plant, except 1881. (R. 203). He never saw the water on the west Sioux Falls road higher than in 1920 except in the flood of 1881. though at this point each street is two and one-half or three feet above natural ground; that in that year the water went up to First about where it would go over

and then the bridge carried it down. (R. 200).

Several witnesses say between them that neither track or embankment or bridges or right-of-way, have in the past been fooded, and that in the past these have not been troubled with high water. (R. 177, 191, 203). Some of these qualified it by saying that this is so so far as they know. (R. 179, 180, 189, 194). Another qualifies by saying that if the water has ever crossed the right-of-way the witness does not remember it. (R. 180).

Olsen has worked for the Milwaukee continuously since 1887 and has noticed no injury to railroad property from being covered by water during that time, and there was no such covering in Sioux Falls. (R. 193).

Pilcher, the local agent for the Rock Island at Sioux Falls, says that the Rock Island had never been washed by the river; that its right-of-way never had any water standing on it from the Sioux River ever since witness came there, since 1890. (R. 182). Another witness testified no water has ever been on the embankment or right-of-way of the Rock Island, to his knowledge. (R. 182). Still another speaks to the same effect. (R. 181). Perkins testifies that from January 1st, 1913, to June 1st, 1920, there never was any high water that ever threatened to damage the two Rock Island bridges. (R. 182).

Nelson never saw any water standing in the ditch along the side track of the Milwaukee track, on the ice house side (R. 194); that while in 1919 and 1920, water came out of the ditch in several places there was not enough to hurt the track, that the water went up the track and came to its bottom but didn't cut in much or wash. And there was none on the east of the Milwaukee track. And it was not injured in 1920. R. 193).

Dean was here in the high water of 1911, and there was no damage done that he knows of. (R. 181). But he also says that if the water were increased fifty per cent he does not believe the bridges would stand it. (R 181). Waite testifies that while he does not know what

would be the effect on the bridges in town if the water flowing down the river should be increased thirty to fifty per cent, he thinks that even then the bridge east of town would be all right, but is not sure about the one in town. (R. 179, 180; O. 280). And Holt, that if subsequent to the time he had a high water mark something was done to increase the spread of water at a certain point he would have to take that into consideration. (R. 198).

There is testimony that witnesses know of no damage being done by high water in a described addition of the City of Sioux Falls near the round house or east of it. (R. 194).

Woods is familiar with some of the lots involved which are near the railroad round house south and east of the town and now used for new yard tracks, he says the main line lies between the trackage of this yard and the river and these tracks are lower than the main track which was built in 1879. It has never been disturbed by high water. (R. 196).

Spellerberg testifies that only a very small part on one end of Phillip's park and about a half of Sherman's park and about one-half of Lien's park, situated a little east of the spillway, are affected by the high water. (O. 182, 183).

Shea says that after water goes over the Milwaukee tracks it would not take out the entire railroad bed, but just break through and make opening similar to what the company now has by means of arches and that this water going over the track would not necessarily take out the entire embankment; that usually it only cuts out a short piece, to the extent of what is necessary to carry the overflow from one side of the track to the other. (R. 193) — that on his experience and observation he thought the water standing along and against grades had no effect on their maintenance or on the stability of the track (R. 193); that even where the embankment is twenty years old or older no additional expense of up-

keep is occasioned by having water standing against it. (R. 195). Both the engineer, Rettinghouse, and Mr. Barlow, a witness for the defense, take issue on this, and the latter says that the water along an embankment which supports railroad tracks has a tendency to weaken that embankment and this necessarily requires a greater outlay to keep the bank in solid form, and that as a general proposition the more there is of the standing water the more of such effect it has. (R. 239, 240; R. 169, 170).

It is, however, also said that as to the Omaha embankment there would be no such effect because its embankment is very wide and deep, heavily overgrown with vegetation and sod and that in the vicinity of the river course where any washing has ever taken place there is thorough protection by rip rap. (R. 170, 171).

AS TO LACK OF BENEFIT TO THE POWER COMPANY.

Reed thinks the hydro-electric plant is about a half mile from the mouth of the spillway. (G. 245).

One witness says no part of the property owned by the Power Company has been flooded since 1900 and that at the time this ditch was first constructed no part of said property was flooded. (N. 244). Another says that during the flood of 1921 there was never a day that the Power Company did not go on as usual and during all that time it ran at full blast. (N. 246, 247).

Link prefaces all he says as to the Power Company lacking benefit, with "under present conditions". (P. 197, 198). On this premise he says that no diversion which would lower the flood level in the tail-race would increase either the capacity of the plant or the amount of power it could produce (P. 197, 198); that the generators could not pull any more load no matter what the wheels might or might not do because the generators have a fixed capacity which cannot be exceeded without burning them up. (R. 196). With said limitations he says no benefit arises to the plant from the diversion of

flood water from it. (R. 196).

Anderson says that the diversion of water by the drainage ditch is a benefit to the Power Company plant in that the arrangement of the turbine wheels in connection with the tail-race is such that the company gets the maximum benefit of the draft tubes or pipes at this stage in the tail-race, as exists in times other than flood times. (P. 295, 296). Rettinghouse testifies one element of benefit to the Power Company was that through the diversion of part of the waters through the ditch, estimated at some twenty-six hundred to three thousand feet a second, as against flood conditions running six to ten thousand feet per second, water was taken from the tail-race and the lowering the available head was avoided; in saying this witness is largely guided by a report of Link and on information and investigation by Shenehon who designed the spillway, and the lay of the land opposite the plant is such that all the flood water after passing over the dam must pass through the tail race. (R. 240, 241).

It is the opinion of Link that by-passing at a time of maximum flood would have no appreciable effect upon the "out put" of the plant and that operation could be maintained constantly. (P. 296, 297). He cannot see that the river or ditches would have any effect on the flow of the river to the Power Company plant at normal stages of the river, nor any effect from straightening. (P. 296, 297; R. 195). But Rettinghouse testifies that through the by-passing of the flood waters the Power Company would have a constant aggregate output of hydro-electric power, while, in other than flood seasons, the controlling works and dams would keep all the waters in the river that should be there and pass it to the Power Company's turbines, thus insuring a constant flow even at a low stage of the water in the river (R. 241); that the increased velocity of water flowing through the river produced by the straightening of the river, caused the total of water collected at the initial point of the cut-offs to hasten down the river past the Power Com-

pany plant. (R. 241).

Risty says several river cut-offs were put in the river north of the City, and in determining the benefit to the Power Company there was considered the effect and influence of these cut-offs in hastening the flood water and shortening the time of floodage on the power plant (R. 164); — and the board based the Power Company benefit, for one thing, on the fact that there was a stream to give a steady flow around the bend so that the water did not go over the spillway. (R. 159).

According to Link, all that had been done, including the controllers at Thompson bridge merely maintained the level of the water and would prevent the river water going into the ditch under a certain height, to-wit, when flood condition is reached, but all that this comes to is that it increased the head and so merely conserved water but without increasing the output — that all it came to was to conserve what the Power Company had a right to have — to give it the water which the ditch had taken away. (R. 250, 251).

Rettinghouse testified that his opinion as to benefits is based on the assumption that it is cheaper to produce current from a hydro-electric plant than from a steam plant and that therefore the company was benefited by the increased head. (N. 243). The manager of the Power Company says that when the water is low the company cannot put it over their turbines and must therefore produce it with steam; that there were times in the year when the water was not sufficient to produce current and it cost more to run by steam than by water as a motive power; that when the water has not sufficient capacity it is necessary for the company to have a steam plant to supply the demands of the city for current. (N. 246).

There was a plea of estoppel by way of affirmative allegation in each of the answers. (See O. 39; M. 44;

S. 39; N. 38; P. 39; R. 39). This affirmative plea was never met by a denial in pleading, if indeed met at all.

It is pleaded that stated things were done by the board, with notice to and actual knowledge, acquiescence, approval, and consent of the plaintiff City, its officers, agents, and servants, and of all others like situated; that appellees had during all the time the ditch, river cut-off, and spillway were being established, constructive notice and actual knowledge that payment was to be made by special assessment against the lands and properties of the plaintiffs affected thereby; that they had such notice and knowledge that there was no other provision or method of making such payment; that neither appellee took any steps to stop or prevent the establishment of or performing work upon said ditch, river cut-off, or spillway, or to stop the issuance of drainage warrants therefor, though they had actual notice and knowl edge that these warrants were to be taken up and paid only by said special assessment; and that the appellees are now and since 1918 have been receiving large and continuous benefits to their lands and properties affecten by reason of said reconstruction and construction of said drainage ditch, river cut-off, and spillway.

The things, the doing of which is so urged as an estoppel, were, among others, having knowledge that copy of the petition was transmitted to the state engineer; that there was inspection of the proposed route of the drainage project; that the board caused a survey to be made by a competent surveyor under the supervision of the state engineer; the making and filing of said report; the determination of the board of the exact length. line, and width, of said drainage improvements; the order and resolution of the board fixing time and place for hearing on the petition and the giving of notice as to such hearing; the establishment of the district by resolution and order upon said hearing; the giving of subsequent notice to all parties interested of the final establishment; having knowledge of all work done and performed on said ditches and river cut-offs, and of the

establishment and construction of said spillway.

It is averred that the City is estopped because it was one of the signers of the Blackman petition, the one upon which this improvement was constructed. (N. 39; M. 30, 31, 32, 33; O. 35).

The Rock Island delivered cement after there had been discussion whether the company was able to deliver freight to the place where the contract for the construction was being carried out. (R. 237). Boyce made arrangements with the officers or agents of the Milwaukee and of the Great Northern to have freight spotted or delivered at or near where the spillway was being constructed and several car loads of such freight were delivered near the spillway. (N. 275). He says he had certain steel reinforcing material delivered for the work. Some of it came in on the Milwaukee and some on the Great Northern. (N. 275). Some of the work was done with a machine shipped in over the Great Northern, and Larson arranged with the agent of the Great Northern to have it spotted. (R. 231). There was an arrangement with the Great Northern to deliver cement, the delivery to be made at the spillway. It was so delivered and the Great Northern was paid for the service. (R. 231). The Milwaukee delivered another machine and was paid for the freight. The ditch was about one thousand or fifteen hundred feet from the Milwaukee right-of way. (R. 231). On arrangement with its local agent the supplies were to be or, perhaps, were delivered along its track at the Schodjt's dam. The witness Jensen had a talk with this agent about the ditch and told him the board needed some assistance at the ditch and along the river. (R. 279). The Milwaukee transported men to this work, on arrangement with its agent. The agent was told help was needed and permission was gotten to make it possible to stop between stations. For all this transportation, bills were rendered the board for the tickets and these were paid with county warrants. (R. 279, 280).

One defendant had a talk with the superintendent of the Milwaukee and the latter looked over the water situation because a lot of track had washed out north of the city and told witness the latter could get anything he wanted to help control this water. (R. 280).

Pilcher, who was working for the Rock Island railroad in 1916, 1917, and 1918, then knew about this new ditch going in, saw the publication in the newspapers and saw the spillway in the course of construction. (R. 183).

The assistant engineer of the Great Northern saw the repairing of the ditch and the throwing up of embankments. He saw them building the spillway in 1917 and has been watching it. (R. 191).

During the construction of the spillway in 1917 and 1918, the electrical power used in construction was furnished by the Power Company, and its agents made the connections. The company rendered statements from time to time, these were presented to the board and paid by warrants to the Power Company. (N. 276).

The manager of the Power Company asked permission of one of the defendant members of the board to put in a dam to keep the water from going into the river from the ditch. (R. 280). He asked this member if the Power Company could not put in a temporary dam at Schodjt's and keep the water there; said the Power Company was losing, and the board did put in such a dam. Later, the manager asked for a longer one, and in 1919 and 1920, the board put in a dam together with the Power Company, and its manager drove in piling with a pile driver he had, and the board furnished some planks. They got teams and scrapers afterwards and filled up the dam and made it about 60 feet on the bottom and 40 feet on the top. (R. 280).

The mayor of the City and the auditor on authority from the City were signers to the petition that initiated this very project. (R. 210, 211). The mayor attended one of the meetings when these proceedings were institut-

ed and knew of the building of the spillway. (S. 245). The City furnished water for the construction of the spillway and put in a meter, and all water bills presented were paid by the board by warrants. (N. 275). The City commission was present in the fall of 1917 when work was going on. (N. 276).

While the Circuit Court of Appeals quite fully sets out what estoppel the appellants pleaded and gives some space to mentioning what actually occurred, it does very little with the question of what the effect of those acts should be. One illustration is the statement that it is claimed the City is estopped because of the action of its mayor and auditor in signing the petition which initiated this project. (R. 264). — Nothing further is said on this specific head.

The issue of estoppel is disposed of, mainly, on the ground that the various appellees had no notice at the time the acts constituting the alleged estoppel occurred that appellees were to be affected by the drainage construction or be assessed for the cost thereof, and therefore, the claimed acts of agents and officers of appellees did not constitute an estoppel. (R. 264).

All else that is said is an attempted distinction between those whose property was and those whose property was not within the area of the old ditch project. It is not indicated how it matters that one who by acquiescence should be estopped is not just as much estopped though he did not have property in the area affected by the old ditches. (R. 264).

OBJECTION TO JURISDICTION.

It is submitted that the District Court in which these suits were brought lacked jurisdiction and that, therefore, this court should reverse and direct said Court to dismiss the suits.

This, on the following grounds:

(a). Five of the six appellees had diversity of citizenship, but the amount in controversy was not high enough to give jurisdiction on that head.

(b). All of the appellees raise constitutional questions and made attack on the ground that there had been violation of the constitution of the United States. The trial court overruled these attacks. The circuit court of appeals limited itself to a holding that it was unnecessary to pass upon those attacks and that there should be an affirmance, even if there was no violation of the Federal Constitution — and both courts held that the Federal questions presented were substantial. But appellants submit that the record does not sustain this finding; nor the finding that the amount in controversy was more than three thousand dollars.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

(Figures in parenthesis, following A. refer to the number, of the basic assignment of errors — and the figures following these refer to the print page).

I.

Contrary to the interpretation by the highest court of the state of the statutes governing the very project at bar the circuit court of appeals based affirmance on holding that the statute law of South Dakota did not authorize the board to establish and construct a new drainage ditch over the line of two older ditches, though the new project contained a materially larger area than the combined area of such old ditches, and required cleaning out, widening, deepening and diking said older ditches and

doubling their former capacity, the construction of river cut-offs to accelerate the flow of water therein, and the installation of a new and larger spillway, all at a cost of more than double that of the original ditches. (3, 4-A; R. 269).

(1-a). The Circuit Court of Appeals gave the construction of the Constitution and statutes of South Dakota an interpretation opposed to that given them by the highest court of the state, since the District Court gave its decision. (1 A; R. 266).

II.

It was error to hold that such a new project was not authorized by statute; and the testimony shows without dispute that the proceedings of the board were such as were sufficient under the statutes to establish and construct such new drainage project and make an apportionment of the benefits for the payment of the costs thereof. (5 A; R. 269).

(2-a). It has been settled by the highest court of the state in construing the Constitution and statutes of the state, and in a way that is binding on federal courts, that appellant acted on full authority and complied with the requirements of said Constitution and statutes. (R. 273).

(2-b). There is no evidence that the board ever did anything other than what it was authorized to do by the statutes and Constitution of the State. (18 A; R. 273).

III.

There is no evidence of any fraud or subterfuge on part of the board or of anyone in establishing the new ditch. (4 A; R. 268-269). Which applies also to Power Company, City of Sioux Falls, and Great Northern.

IV.

Though appellees, City of Sioux Falls, Milwaukee Railway Company and Omaha Railway Company concede that the project at bar was the creation of a new

ditch and was a new project and though the highest court of the state has so declared, the circuit court of appeals held there should be an affirmance because there had been no compliance with statutes regulating the maintenance and repair of the ditches already established. (6 A; R. 269-270).

(4-a). Not only did said three appellees concede that this was a new and independent project and not a continuation or the repair of the old drainage ditch No. 1 and the old drainage ditch No. 2, but the highest court of the state in interpreting the statutes of the state has determined that these authorized the board to construct this very ditch at bar, and that corporate drainage districts therefore were not necessary. (10 A; O. 241).

V.

Though the testimony shows without dispute that the project entered upon was such new project as was authorized by statute dealing with new projects and was entered upon and carried on in accordance with such statute, the Circuit Court of Appeals held that the proceedings were in fact for repair and maintenance only. (5 A; R. 269; 4 A; as to O and M).

(5-a). The court disregarded the fact that the project was entered upon and carried out in compliance with relevant statutes; and based affirmance on the assertion that statutes not relevant had not been complied with. (6 A; R. 269-270).

VI.

The notice of date September 15, 1916, gave legal notice of the proposed formation of the new project and that it was about to be established, and advised of a hearing to be held on October 16, at which appellees could resist the project — and appellees waived such hearing with full knowledge that they were bound by subsequent action of the board that necessarily followed in the premises. (19 A; R. 273).

(6-a). There is no evidence that either appellee

was prevented from making a full and fair defense to the establishment upon the notice given; and unless so prevented the mere statement now that this project was established by and as a subterfuge cannot avail in this collateral attack. (4 A; R. 269. — Which applies to Power Company, City, and Great Northern.

VII.

What was sustained was an enjoining of what was in effect legislative action by delegation when there should have been no injunction had it been direct legislative action. The only difference between the two being that the board in exercising the delegated legislative authority was required to give certain notices and to grant a hearing before any assessment could become a lien, with which requirement the board, according to the undisputed testimony, complied. (9 A; R. 270).

VIII.

Though it is the construction of the Constitution and statutes of South Dakota by its highest court that such board as the appellant is are not limited in establishment of or an assessment for the drainage of agricultural lands, the Circuit Court of Appeals held that their power was thus limited. (2 A; R. 268).

(8-a). Even if it were the law that the power was thus limited it is the undisputed testimony that one object of the project at bar was to drain agricultural lands. (3 A; R. 268).

IX.

The court of appeals disregarded the fact that the proceeding at bar is one *in rem* for the purpose of taxation; that dealing with such proceedings involves rules of property as to which the courts of the state are final authority, and that, therefore, both resident and nonresident property owners must, at least in the first instance, exhaust the remedies provided by the statutes of the state in state tribunals to review controversies as to such proceedings, before they may enter either state

or federal courts, at all. (11 A; R. 270).

(9-a). It disregarded that while in cases where a resident may enter the courts of his state, one who has diversity and a controversy that involves more than $3,000. need not submit himself to the state courts but may enter the federal courts, yet in a proceeding *in rem* such as a drainage project, even the resident must first submit to administrative review provided by such statutes before he may enter the courts of the state — wherefore, the non-resident may not disregard the said statutes providing for such administrative review and may not enter the federal court before exhausting them — in other words a non-resident may enter the federal court in the first instance only in the cases where both a resident and a non-resident have the right to so enter the state court. (12 A; R. 271).

X.

The court disregarded that the notice of date September 15, 1916, and the hearing held pursuant thereto on October 2, which was notice to and opportunity to be heard on the formation of the new project, on whether appellee's property should be or was included in or was subject to the assessment of benefits, and to contest the establishment of the project, its legality, necessity, character, and purpose; and disregarded that there had been no appeal from the determination of the board had on such hearing — and it should have held that there having been no such appeal appellees are bound by said determination. (8 A; R. 270).

(10-a). The court disregarded the fact that the board was by statute given authority to determine the purpose and character of this project; that it had after notice and hearing determined that the same was for the benefit of the public health, welfare and convenience and was necessary and practicable for the drainage of agricultural lands; that from this determination no appeal was taken and that the highest court of the state has, in construing the statutes of the state, held that

where there is no appeal such determination is final. (7 A; R. 270).

XI.

The argument that appellees should not be compelled to appear at the hearing because it was before a body that had no authority to act, and that one should not be compelled to submit to a hearing before a mere trespasser disregards, first, that naked assertion the board was so without authority does not justify failing to appear at the hearing before it, and, second, it disregards the decision of the highest court of the state that the board was acting on full authority; that fact also being made to appear by the undisputed testimony. (13 A; R. 271).

XII.

If, as construed by the Circuit Court of Appeals the board so acted without authority as to be a naked trespasser, that very fact gave an adequate remedy at law in either federal or state courts, to-wit, to sue in trespass. (16 A; R. 272).

(12-a). If the board was not a trespasser and acted wholly within the law, then appellee was not entitled to any relief either in law or in equity. (16 A; R. 272).

XIII.

Assuming for the sake of argument that appellee had the right ever to enter the federal court, then it had a plain, adequate and speedy and complete remedy at law in that court by removing the entire controversy to the federal court. (17 A; R. 272-273).

(13-a). Appellee had at all times a plain, adequate, and complete remedy at law, by appeal to the Circuit Court of the State, and to the highest court of the state and ultimately, if need be, to sue out writ of error to the Supreme Court of the United States — or by another route through removal to the Federal court. (19 A; S. 291).

XIV.

The fact that appellees have failed to appeal and thus lost the ultimate remedy of writ of error to this court does not give original jurisdiction by injunction, because the failure to avail of a right which would give a remedy at law, if exercised, does not make a basis for chancery jurisdiction. (17 A; R. 272-273).

XV.

The hearing enjoined was for the purpose of equalization of a merely tentative estimate of benefits by the board; additional acts were required after such hearing before any tax assessment or servitude could become operative (14 A; R. 271-272); which means it can not be known how much was then in controversy.

XVI.

Appellees make no case under any head of chancery jurisdiction, and in essence based claim for relief upon the assertion that they were threatened with the exaction of an illegal tax. Any application for equitable relief was here premature and there could be no warrant for it until such time, if ever, as the threatened tax was about to be collected out of the property of the appellees. Up to then no more could happen than a threat to collect money on an illegal tax — and for such threatened wrong there is (if it be assumed it is needed) adequate remedy at law, either in the state or federal court or both. (15 A; R. 272).

XVII.

The Circuit Court of Appeals erred in holding that the proposal to hold such a hearing could cast a cloud on title; for other acts after the hearing were necessary before so much could be done as to finally fix an amount as being a tax, assessment or servitude. (R. 271-272).

XVIII.

The court erred in holding that the acts of the Board

could cause a multiplicity of suits against appellees; and on that point it is irrelevant that new suits might have been brought by other parties. R. 271-272).

XIX.

It disregarded that there was no testimony that irreparable injury to appellee would so arise.

XX.

Disregarded as to the City and the four Railway Companies appellees that this is so, because even if an assessment had been made and a tax had been levied, it would have created no lien on their property. (14 A; R. 271-272).

XXI.

As there was notice and opportunity to be heard and a waiver by not appearing, and as appellees stood by and without making objection to any of the proceedings, saw the expenditure of over a quarter million dollars with knowledge that same must be met out of the benefits apportioned on property which included that of the appellees, and as they actively aided and abetted said work as it progressed and made no protest — it was error to hold that appellees are not estopped from questioning the legality of said proceedings. (19 A; R. 273).

(21-a). And it was error to give the City of Sioux Falls the relief given it, because it was one of the signers of the petition — and not to hold that it was estopped to object being assessed in contribution to the cost of the construction and to challenge the project on the ground of unconstitutionality, or to assert that the laws of South Dakota had not been complied with — for it asked all to be done that was done. (21 A; S. 292).

XXII.

The District Court reserved from its decree such property as appellee Milwaukee and Omaha had within the assessment area of the old ditches and failed to

make the same reservation as to the property the City of Sioux Falls had in the same area. — And the Circuit Court of Appeals erred in affirming without modification making the same reservation as to the City of Sioux Falls. (22 A; S. 292).

XXIII.

The lower courts erred in holding that these suits were not prematurely brought.

XXIV.

It should have been held below that appellees had no right to be entertained on the chancery side of the court because they had failed to tender such amount as was due in any view.

XXV.

Aside from the fact that there was no right to entertain the complaints made by each of the plaintiffs because they declined to avail themselves of the administrative tribunals provided by the laws of the state, the sustaining of these claims was error because there was no evidence to support the complaints and it appears affirmatively and by the undisputed testimony that as a question of fact the said complaints were without foundation.

ARGUMENT.

AMOUNT IN CONTROVERSY.

It is elementary that jurisdiction will not be sustained unless it is affirmatively shown that the jurisdictional amount in controversy exists.

Johnson v. Wilkins, 7 Sup. Ct. Rep. 600.
Washington Railway v. District, 13 Sup. Ct. Rep. 64.
Green v. Fisk, 14 Idem, at 1193.
Citizens' Bank v. Cannon, 17 Idem, at 90.

While it will not suffice that the bill asserts that more than the jurisdictional amount is in controversy, it is certainly true there is no jurisdiction where the bill makes no fact allegation tending clearly to show that the amount is large enough. Here, there is first an allegation that as to this drainage project there was a design to drain 20,000 acres of agricultural land. It is not even said there were that many acres in the district, but we assume for the sake of the argument that this much *is* said. But when that is admitted it is still true there is no statement describing the quality of this land or what, if any, value it had. (M. 5; R. 6; N. 5; S. 5; P. 5; O. 5). True, there is testimony that in dealing with the railroads and with the Power Company the board took into consideration the value of rights-of-way, and compared these with adjacent lands (R. 256, 257); that in assessing it considered the land owned by the railroads, the railroad itself, and their culverts and bridges. (R. 253). It is shown what property of the railroads the board found would be benefited (R. 241, 142), — but that is all, and shows nothing as to amount in controversy.

In *Johnson's case*, 6 Sup. Ct. Rep. 600, one thing stressed is that the value of the lot is not stated in any of the pleadings beyond statement in petition for removal saying it is worth more than Five Thousand Dollars. In *Washington Railway v. District*, 13 Sup. Ct. Rep. 66, it is stressed, for one thing, that the number of

the company's cars is not shown except for the years 1883 and 1884.

It would not have helped if there had been, as there is not a statement as to what said lands and the other property in the district was worth — and the value of neither is the subject of the controversy.

In *Green v. Fisk,* 14 Sup. Ct. Rep. 1193, it is said:

> "There has been no order even for an accounting, and as yet we are not advised there ever will be one; much less that, if it should be made, a balance would be found due from the appellant sufficient to make the value of the matter in dispute, on an appeal by him, such as our jurisdiction requires. As the appellant, to sustain his appeal, must show affirmatively that more in pecuniary value than our jurisdictional requirement has been adjudged against him, he has failed to make a case for us to consider."

In *Washington Ry. v. District,* 13 Sup. Ct. Rep. 66, appeal was dismissed where the bill alleged complainant had refused to pay a certain tax, and that if same be held to be a lawful tax "the amount which would probably be computed and charged against the complainant by the said municipal authorities would reach nearly if not quite the sum of $5,200. besides interest, fines, and penalties".

Speaking to when a possible tax becomes a finality it is ruled in *Milheim's case,* 43 Sup. Ct. Rep. 698, that while some step is still to be taken such tax cannot be treated as finally adopted. The amount cannot be based upon any contingent loss including what may result from the probative effect of an adverse judgment however certain it may be that such loss may occur. — Ross, 3 How. 771, New England Co. v. Gay, 12 Sup. Ct. Rep. 816. — And as to the prematurity of attack upon proposed taxation it is held in *Western Union v. Howe,* (C. C. A.) 180 Fed. 53, 54, that there may not be relief

"against anticipated injury consequent upon anticipated assessment before the assessment was completed".

Starting with the premise then that the jurisdictional amount must be affirmatively shown, how can it be said that this was done here.

The appellant board established a drainage district and confessedly had power to raise the cost of its construction by assessment. As authorized by valid statutes it made a tentative apportionment of benefits. After this was done notice was required, and was given, of a hearing to be had on equalizing this tentative apportionment. These suits were begun after this notice was given, and as a result the appellant board was enjoined from proceeding further and thus restrained from having a hearing as to the equalization. This means that when these suits were begun it could not be known how much the proposed assessment would finally be; and appellants allege in their answer that they have no knowledge of the total in dollars that will be finally equalized and assessed against the properties of these appellees. (N. 37; S. 36; P. 38; R. 38). It may be conceded for the sake of argument that even if the proposed equalization had been had the appellees would still have been found subject to taxation in *some* amount; but it is not the affirmative showing required by law to indulge a presumption that after equalization the proposed assessment of the appellees would have exceeded three thousand dollars.

It is the settled law of the case as well as of the state of South Dakota, that no assessment can be made (and of course no tax can be made effective) until the benefits have been ascertained and equalized. The trial Judge so ruled. (M. 79, 80). The plain language of Section 8464, Revised Statute, is that there is first to be an apportionment of benefits and that this is tentative. It is beyond question that under this statute there is no real apportionment until after equalization. From which it follows that even the possibility of an assessment does not come into being until after the equalization had been made.

The trial Judge says in his opinion: "This statute seems to provide for this hearing for fixing the proportion of benefits before the ditch is constructed and before it is known what will be the actual amount of money expended". (M. 78).

Despite all this the Circuit Court of Appeals ruled that these suits were not prematurely brought. (R. 263).

Unless something which is purely tentative is final, no one could tell at the time these bills were filed how many dollars would ultimately be assessed against either appellee.

It is a truism to say that if it be demanded of one to show affirmatively how many dollars are in dispute he does not meet that demand by saying that he does not know how much, that there has been an estimate as to what amount may by possibility be later exacted, demanded, and disputed, but that still another step must be taken before it can be known what will become of the tentative estimate.

II.

The most that can be claimed by the appellees is that when they entered the federal court they were threatened by a potential undetermined and unequalized tax, which both before and after equalization constituted but a threat of the ultimate exaction of an illegal tax. We must speak elsewhere on whether there was jurisdiction in chancery because of such threat of such a tax. It suffices to say at this point that the right to entertain in chancery is not an important thing because so long as the *status* consisted merely of such threat there was no right to enter the federal court, either on the law or chancery side — that while this remained the *status* these suits are prematurely brought — the present point being, however, that there being no more than such threat it cannot be known what amount is in controversy.

Now, while the Circuit Court of Appeals rules with

us on the premises we have just stated it declines to follow them to the deduction that must inevitably be drawn upon them. The court holds that a future undetermined, unequalized and unspecified tax cannot be taken into consideration as to the amount in controversy, because the court may not engage in speculation as to such taxes. (R. 262). But it rules further that the jurisdictional amount existed because there is a mere threat that equalization may not lower the proposed assessment below the jurisdictional amount; and that as the tentative apportionment in the case of each appellee was in a sum larger than three thousand dollars there was such possibility, despite equalization, that each appellee will ultimately be assessed in a sum greater than three thousand dollars, as that there was sufficient certainty when the bills were lodged that the amount in dispute was above three thousand dollars. (R. 262, 263). We thus have a ruling that under the law the amount in controversy could only be arrived at by the *forbidden* method of indulging in speculation as to the amount of a yet unascertained tax, and, yet, that it affirmatively and effectively appears *by speculation* as to how much the tax may finally be; that when these suits were begun more than the jurisdictional amount was in dispute.

Our view of the law is endorsed and then disregarded by the Circuit Court of Appeals. Fortunately the law which the Circuit Court disregards, is generally affirmed and also followed:

> "A suit to restrain the collection of taxes not exceeding two thousand dollars in amount is not within the jurisdiction — and future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute." — *Holt v. Indiana Co.*, 20 Sup. Ct. Rep. 272.

> "It will not do to assume on a showing what taxes have been in certain years that they were for similar amounts in the years in question; the requirement to make jurisdiction affirmatively appear

in the bill is not supplied by such a conjecture." — *Citizens' Bank v. Cannon,* 17 Sup. Ct. Rep. 90.

"In the same case it is said that where a bill seeks to restrain certain tax officers from collecting taxes for specific years, if the amount of such taxes does not confer jurisdiction it is from the nature of things impossible for a court to forsee what, if any, taxes may be assessed in the future; and a mere conclusion of the pleader that the taxes assessed exceeded the jurisdictional sum will not suffice. Unaccrued or unspecified taxes cannot be included upon conjecture to make up the requisite amount. — Washington Railway v. District, 13 Sup. Ct. Rep. 66. So of hydrant rentals which had not yet accrued but might subsequently accrue. — City v. Farmers Loan Co., 12 Sup. Ct. Rep. 817. And the effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute." — *Holt,* 20 Sup. Ct. Rep. 273.

The Circuit Court of Appeals says:

"It has also been held that where the complaint alleges the amount in controversy to equal the jurisdictional requirement and the contrary does not appear to a certainty from the evidence that the jurisdiction will be sustained". — Citing Maffet v. Quine, 95 Fed. 199; Von Schroeder v. Brittan, 93 Fed. 9. (R. 262) — and

"If the proportion of benefits had been fixed subject to change by the board only if each appellee should convince them that their conclusion was erroneous, and in view of the claim in apparent good faith in each of the bills that the amount involved exceeded the jurisdictional amount, we hold, from a careful surfey of the entire record, that the necessary amount existed in each case to give jurisdiction to the federal court". (R. 263).

Coming to the cases cited by the court and some citations in the citations, we find that in the *Maffet* case, there *is* a statement the court is satisfied it is enough to sustain the jurisdiction that the complaint shows the amount in controversy to exceed in value the sum of two thousand dollars, and that the contrary of this does not appear to a legal certainty from the evidence. (95 Fed. 200). The most this comes to is a statement that where the bill *does* exhibit facts to sustain the jurisdiction, then jurisdiction is established unless the contrary is made to appear by the evidence, to a legal certainty. To say the least it admits of grave doubt whether the mere fact that a bill asserts the necessary jurisdictional facts will sustain the jurisdiction where the allegation remains unproved — whether the bill suffices unless the defendant takes the burden of overthrowing its allegations. Be that as it may, we repeat that, at any rate, the *Maffet* case cannot apply where, as here, the complaint *does not* exhibit the jurisdictional facts. It is added in the *Maffet* case that the jurisdiction need not depend upon said alleged rule, although its application is decisive of the question — a statement that alone makes all said by the court bald *dictum*. Not only this, another reason why the *Maffet* decision is *dictum* on what makes sufficient amount, is it appears that one of the things involved, to-wit, the value of a flume is in itself $2,000 (201), and it was admitted that at least $10.00 in addition to this $2,000. would be needed for repairs. And the court points out that the suit being in tort, exemplary damages might be awarded. Thus it was shown to a certainty that amount in controversy *was* above two thousand dollars. Where it is manifest that a sufficient amount is in fact in dispute, remarks as to what will create a sufficient amount, are not *decision*. Another case referred to by the Circuit Court of Appeals on this point, that of *Van Schroeder v. Brittan*, 93 Fed. 11, involves a finding that "from this testimony it appears to the court that the suit really and substantially involves a dispute or controversy in an amount properly within the jurisdiction of the court" — and the finding

is abundantly sustained by the record. The relief sought was a tearing down and re-building of a wall on defendants land alleged to encroach upon plaintiff's building on the enjoining land, which wall was out of repair, and recovery for injury caused to this complainant's building. Issue was joined on plea. It was proved that the removal and rebuilding of the wall would cost not less than nine hundred dollars, and complainant proved the damages to be at least $2,700.00 — it is held that in the absence of evidence showing the claim as to amount to be colorable or fictitious, the matter in dispute exceeded two thousand dollars.

In a word — if the evidence shows more than the required amount is actually in controversy the court has jurisdiction — something that, of course, there is no quarrel about.

Another reference, in the *Maffet* case is to *Barry v. Edmunds*, 116 U. S. 558, which simply holds that the court is not at liberty to dismiss a suit merely upon personal conviction that the amount involved is less than that required to give jurisdiction unless the facts on which the conviction is based are such as to create a legal certainty for the conclusions reached. It is added that in the case then before the court there was no conviction on part of the trial Judge resting on deduction from the evidence in the case that the amount in controversy was less than the jurisdictional amount; that the action of the court was based solely on the fact that the evidence failed to establish the allegation of the complaint as to the value of the subject-matter of the suit. What the decision comes to is that dismissal should not rest on personal conviction, and it is error to rest decision upon a failure of the evidence to establish the jurisdictional allegations where the record proves affirmatively that the amount in controversy was beyond the jurisdictional one. In the *Barry* case, the answer admitted the value up to the amount of two thousand dollars, and there was testimony tending to show that the property in controversy together with other property

had previously been sold for eight thousand dollars — and it is said it is a suit to restrain the commission of a tort and therefore, one in which exemplary damages might be allowed. It is added in the *Maffet* decision that the same doctrine is written down in *Wetmore v. Rymer,* 169 U. S. 1125.

III.

Now, it may be said that if this is so as to the right of appellees to enter the federal court the same trouble confronts us in entering this court. It is to be answered, first, that two statutes are independent. The three thousand dollar one deals with the situation when the suit is begun, the one thousand dollar statute with the situation when appeal to this court is taken. It is obvious there might be one thousand dollars involved at the time appeal is perfected though there is not three thousand dollars when the bill was filed. But passing that, it is plain on this record that so far as the present appeal is concerned there is more than one thousand dollars in controversy. The test now is how much has been adjudged to these appellees. — *Green v. Fisk,* 14 Sup. Ct. Rep. 1193. It is admitted no assessment has yet been made and not a dollar of tax as yet collected; there has been an expenditure of over $250,000; drainage warrants for that amount are outstanding, and they must be paid if at all by collecting the assessment that this injunction stopped. The tentative apportionment against the appellees is roughly, $112,000. (Page 13 in N.. P., R., S., O. and M.). But on the point under discussion little attention need be paid that fact. There is at this time more than One Thousand Dollars in dispute no matter how this $112,000.00 is treated. Be it tentative or final the appellants will never receive any part of it, if there be an affirmance. We might well claim that this fact alone supplies the jurisdictional sum for this appeal. But this $112,000 can be eliminated from consideration and there will be still more than One thousand dollars involved. The drainage project has been practically completed at a cost of something over $250,000.00. It has

all been financed by drainage ditch warrants in the hands of intervenors. No part of these warrants has been paid. The only way in which they can be paid is by assessment. No matter whether any part of this assessment falls on the appellees, the board must still raise above $250,000. If there be an affirmance it will be settled against appellants that the drainage project at bar has no standing in law and that, therefore, no assessment to pay for its construction is authorized. Whether or not there be now the right to assess these appellees is at this point unimportant because it is definite and certain that, unless there be a reversal, the decision of the Circuit Court of Appeals has taken from the appellant board the power to raise by assessment, or at all, the sum expended, or $250,000. It is obvious, therefore, that by reason of said decision there is now more than One Thousand Dollars in controversy, no matter how much or how little was in dispute when these suits were begun.

In addition to what has just been said we are fortified by the decision of this court in *Butte v. Clark*, 39 Sup. Ct. Rep. 233. In that case this court said that an averment that more than $50,000 was involved was explicit and that it may assume this averment had a purpose — and adds:

> "But appellees do not wish to be taken at their word. The confidence they thought and expressed when invoking the power of the court in the first instance — and providing, we may assume, for review in case of an adverse decision — they now recant, and urge that it should not be used to question or disturb their success or become an avenue of relief to their antagonist. This is not unusual and counsel has cited prior examples and the action of the court therein".
>
> "The principle of decision which the court then announced is familiar. It is that the ground of

jurisdiction in the District Court and ultimately in this court on appeal from the Circuit Court of Appeals, is the statement of the suing party of his cause of suit".

It will be noticed that the decision in the Clark case says not only that the statement of the suing party of his cause of suit is the test for entering the Supreme Court on appeal, but also that it is the test of the jurisdiction in the District Court. This latter is *obiter*. The question before the court was not what amount would permit entering the trial court but the amount necessary to enter the Supreme Court on appeal. There was no occasion to argue and there was no presentation upon the conditions precedent to the jurisdiction of the trial court. And in the teeth of the statute and very many decisions in this court it can hardly be claimed seriously that it was intended to hold in the Clark case that the District Court of the United States obtained jurisdiction merely because some one brought suit for more than three thousand dollars and stated as a conclusion that more than that sum was in controversy. Indeed, this is made clear because the court says in the Clark case that of course there must be more than mere verbal assertion. While *we* may raise that there is no substance in the claim that more than three thousand dollars was in controversy when the suits were brought, of course it does not lie in the mouth of appellees to say that their allegation as to value was not made in good faith and lacked substance. What the Clark decision *decides* is that a victorious appellee who has at all times asserted that more than three thousand dollars was in dispute is estopped to deny that assertion when the defeated party appeals to this court; that the victor cannot treat his statement of claim merely as something that permits him to appeal if he encounters an adverse decision; that he may not so use his claim, and then "recant and urge that it should not be used to question or disturb their success, or become an avenue of relief to their antagonist".

We submit the District Court lacked jurisdiction be-

cause it not only is not affirmatively shown that when suit was brought there was more than $3,000 in dispute — but it appears affirmatively that at said time it could not be known how great a sum *was* involved in controversy.

We submit further that when these appeals were allowed and perfected a sum greater than one thousand dollars would be gained if there be reversal and lost if there be affirmance.

III-1

IS NOT A CONTROVERSY OF MORE THAN THREE THOUSAND DOLLARS REQUIRED EVEN IF A CAUSE DOES PRESENT A CASE ARISING UNDER THE CONSTITUION OR LAWS OF THE UNITED STATES.

We have first to consider the first section of the Act of March 3, 1887, as corrected by the Act of August 13th, 1888. (25 Stat. 433, c. 866). It gives the trial federal courts jurisdiction of all suits of a civil nature where the matter in dispute exceeds a stated sum providing they are suits "arising under the Constitution or laws of the United States". As to this, *Holt v. Indiana Company,* 20 Sup. Ct. Rep., at 273, 274, construes *United States v. Saywards,* 160 U. S. 493, to hold, "that the sum or value named was jurisdictional; and that the Circuit Court could not under the statute take original cognizance of a case arising under the Constitution or laws of the United States unless the sum or value of the matter in dispute exclusive of costs and interest, exceeded (the required sum)". It is said in the *Holt* case, that the *Sayward* decision was reaffirmed in *Fishback v. Telegraph Company,* 161 U. S. 96, 99.

So far then as the act of March 3, 1887, corrected by the Act of August 13th, 1888, is concerned, the District Court had no jurisdiction unless in addition to a case arising under the Constitution or laws of the United States more than three thousand dollars was in controversy.

It is true the Act of March 3, 1891, "was to do

away with any pecuniary limitation on appeals directly from the Circuit Courts to this court". So says the *Holt* case, 20 Sup. Ct. Rep. 274. It is obvious that the Act of 1891 applies only where there is direct appeal from the trial court to the Supreme Court. Wherefore, the *Holt* case rules that the Act of March, 1891, does not change that in all cases where there is not a direct appeal from the trial court to the Supreme Court it is still necessary to the federal jurisdiction that there be first a substantial federal question in a case arising under the Constitution or laws of the United States, and that in addition the amount in controversy be above the required sum.

True, there are constitutional and statute provisions regulating what will be entertained in the Supreme Court of the United States on writ of error to the highest court of the state. But it is self-evident that these provisions can have no application here.

It follows that if here there was not the required amount in dispute it will not save the jurisdiction if it be assumed the case presented a substantial federal question.

But we submit that at all events there was no such question though the lower courts found there was — which will be elaborated later — and we submit further, that if the fact that the South Dakota statute law was unconstitutional were a material fact here, that they are not violative of the Constitution. — Which brings us to the question:

III-2

DO THE RELEVANT STATUTES VIOLATE THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION?

So far as violating the due process clause is concerned, surely no elaborate presentation is demanded of us. It was for the appellees to obtain an affirmative holding that the Dakota statutes were unconstitutional. Instead, as will presently appear, the trial court ruled that these statutes did not conflict with the due process

provision and the Circuit Court of Appeals found it unnecessary to say whether this was or was not true. No one has appealed from this particular ruling of either the trial court or the Circuit Court of Appeals, and the appellees have against them a finding of the trial court that they had not sustained their claim of unconstitutionality; and were not relieved by anything that the Circuit Court of Appeals says. At the very best for appellees, they have up to this time failed to secure a finding that their assertion of unconstitutionality was tenable, and not having appealed are in no position to have that fatal condition of affairs remedied.

Coming then briefly to the substance of the question, we have to say Section 8461, Revised Code of South Dakota, 1919, has the following provisions:

> "The Board shall fix a time and place for the hearing of the petition and giving a described notice of the hearing."
>
> "The notice shall describe the route of the proposed drainage and tracts likely to be affected, in general terms."
>
> "This notice is to advise all affected to appear at the hearing and show cause why the proposed drainage project should not be established and constructed."

The trial court so held (M. 77), and it declared:

> "We find that all of the objections center about the criticism that no notice is (therefore) provided the owners of land affected by the drainage ditch except the general notice, and in fact, no personal notice until the date fixed by the board for the equalization of proportional assessments for the various tracts of land benefited by the drainage" (M. 79, 80).
>
> "In my judgment the South Dakota statutes, enacted in the light of that provision of the Con-

stitution of the State providing for the drainage of agricultural lands, is constitutional". (M. 83).

We respectfully submit that the drainage statute of South Dakota does not in fact violate the due process clause, and that, moreover, it is the settled law of the case that they do not.

(Citations for this will be put into the summary of the argument, which will follow the argument).

IV.

AS TO THE CONTENTION THAT THERE HAS BEEN A DENIAL OF THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE CONSTITUION OF THE UNITED STATES.

On this issue develops inquiry as to whether (a) there is plea that the statutes involved violate the provision of the Constitution of the United States that equal protection of the laws shall not be denied. — In other words, whether it can be told from the pleadings whether it is an infraction of the *Federal Constitution* that is charged; (b) whether aside from challenging the validity of said statutes there is clear pleading that what appellant board did violates the *Constitution of the United States;* (c) whether there is decision in the lower courts on whether there has been a denial of the equal protection of the laws such as is guaranteed by the Federal Constitution.

Our first position is that whatever infraction of Constitution is charged on this head, the plea is such as that it does not present definitely what Constitution the pleader refers to; that the plea is merely that certain things are in certain named respects "unconstitutional and void" — and that the pleader may well be referring either to the Federal Constitution or the Constitution of South Dakota. In other words, the Constitution of the State forbids denial of the equal pro-

tection of the laws in practically the same words in which the Constitution of the United States forbids, and that for all that appears nothing may be charged except an infraction of the Constitution of South Dakota The allegations in question are first made in the bills. In them it is said, first, that the statutes involved are unconstitutional and void, and that they violate a certain provision of the Constitution of the State of South Dakota and as well the Fourteenth Amendment of the Constitution of the United States — a clear plea that each of these constitutions are being violated by what is complained of. Then follows an allegation merely that said statutes are "further void and unconstitutional". It is not said at this point, as was done earlier in the plea, what Constitution is being violated. The allegation last spoken to is this:

> "Said statute, Exhibit "A", is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies and other corporations and upon the property of municipal and quasi municipal corporations and upon plated property in cities and villages. * * *". (R. 15; S. 14; N. 13, 14; P. 15; O. 15, 16; M. 15).

We repeat that so far there is a charge which for all that appears may be addressed either to the Constitution of the United States or that of the State; and submit that under well settled principles of pleading federal questions this fails sufficiently to present one.

As distinguished from attacking the constitutionality of the statutes of South Dakota there is allegation which makes attack not upon the statutes which authorize action but upon action taken.

It is charged in the Rock Island bill, only, "that the said equalization of benefits is so arbitrary and discriminatory against the property of the plaintiff as * * * * to deprive the plaintiff of the equal protection of the laws". (R. 15). This does not so much as mention any Constitution, and while it is true that depriving one of the equal protection of the laws is forbidden by the Constitution of the United States, it is also forbidden by the Constitution of South Dakota. But each of the plaintiffs filed an amendment. This amendment is this:

> It first sets out the number of units out of the total which was tentatively apportioned to the plaintiff, and with this a statement of what this tentative apportionment comes to approximately in dollars. Then it is said:
>
> "That said equalization of benefits is wholly speculative, arbitrary, unjust, illegal and discriminatory and was made by the board without any reasonable or rational basis therefor, and is not in proportion to any benefit which the property of the plaintiff has received or ever can receive by reason of the rebuilding of the spillway, the cleaning out, repairing and maintaining of drainage ditch No. 1 and drainage ditch No. 2, as set forth herein; that the property of the plaintiff has not been and never can be benefited by the work performed by the board as herein set forth to the extent of (the approximate sum in dollars and cents charged to be the equivalent of the tentative apportionment of benefits) or to any extent whatever, and that the assessment sought to be collected from the plaintiff as above set forth is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the city of Sioux Falls. That the said equalization of benefits is so arbitrary, and discriminatory against the property of the plaintiffs as * * * to deprive the plaintiff of the equal protection of the laws." (R. 80, 81; O. 66; S. 65, 66; P. 79, 80; N. 78, 79; M. 72, 73).

We submit that no plea presents that the action of the board was in violation of the Constitution of the United States.

The trial Judge states in his opinion that specified acts are complained of and that there is claim "that the plaintiffs are therefore deprived of the protection of the laws which must be extended to all". (M. 84). This, too, makes no mention of any Constitution. Then the trial Judge proceeds as follows:

> "The proofs overwhelmingly (Show) * * * * that the taxation that is imposed upon each of the plaintiffs is a much higher rate, and upon a different basis then the tax upon land lying within the district. As a matter of fact, no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiff's property were upon no standard that would properly produce results approximately the same as those upon the land in the drainage district. Taking for instance the tax upon one of the plaintiffs, the City of Sioux Falls, for its miles of streets, with no pretense that there is any method of taxation or measuring a benefit or a gain, that would produce even approximately correct general results, when considered with benefits to the lands in the district. Simply a vague, indefinite generality, indulged in by the engineer and adopted by the board. Benefits purely fanciful with no substantial basis. Take the railroads * * * * there is no pretense that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners". (M. 90, 91).

In effect this is a holding that plaintiffs received no direct benefits and that the method of seeking to ap-

portion benefits to them was arbitrary, unreasonable and fanciful, and that the assessing board discriminated as between these plaintiffs and those within the district who owned lands. There is not a word said by the trial Judge about any Constitution. His assertion on the findings of fact just referred to is:

> "I find that such difference clearly produces manifest inequality. There is an absence of the equal protection of the laws that must be extended to all". (M. 91).

This may well mean that a common law right to the equal protection of the laws has been infringed upon, or that the guaranty of the Constitution of the State of South Dakota that no one shall be deprived of the equal protection of the laws has been violated — and of course it may mean, too that the facts found constitute a violation of the Constitution of the United States. But what is required is a record, showing a decision that the Fourteenth Amendment has been disregarded.

After thus stating his conclusion the trial Judge to some extent, in substance, repeats what he has already said. He added "that the attempt to assess the property of these plaintiffs was an afterhtought". He repeats plaintiffs could not be benefited, says "there is no reasonable ground upon which the action of the board could be predicated", that "there is no pretense in this record that the railroad companies were treated like the owners of agricultural lands; says the discrimination is palpable, and the amount assessed simply an arbitrary assessment." One illustration the Judge makes is to say that the Power Company was assessed $50,000.00, or one-fifth of the entire expense "although there is included in the pretended district agricultural lands something like twenty miles in length and several miles in width". At this point the court overlooked that there was no showing whatever as to what the property of the Power Company was worth nor what these agricultural lands were worth. The opinion continues that the injustice of what was done to the Power Company is ap-

parent when it is noted the record shows it was located on the rapids of the Sioux River in the City of Sioux Falls, has been located there for many years and was therefore entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business. (M. 91). As said, this is in effect a repetition, and the conclusions of the court noted herein earlier and stated before this repetition are not repeated. But in fairness it may be said to embrace what is said following the statement of said conclusion.

As has been said, these appellees had the burden of obtaining from the courts a finding that what had been done denied the provision of the Constitution of the United States that no one should be deprived of the equal protection of the laws. We have pointed out that no such issue was raised and that no such decision was obtained below. We have also pointed out before, that the Circuit Court of Appeals left the matter where the trial court placed it and declined to find that the equal protection clause of the Constitution of the United States had been violated — thus, as we contend, leaving the appellees without either plea or decision that there had been any infringement of the equal protection clause of the Fourteenth Amendment.

V.

IF IT BE ASSUMED A SUFFICIENT SUM IS IN CONTROVERSY, STILL NO SUBSTANTIAL FEDERAL QUESTION WAS PRESENTED.

Though neither of the lower courts gave the appellees any relief on the ground that there had been a violation of the Constitution of the United State, the question remains whether though in fact the Constitution had not been violated there was reasonable ground for asserting that it had been. Each of the lower courts held that a substantial federal question had been presented. And what we have now to deal with is whether these findings ought to be sustained here. The test is in a way a matter of degree. It a party sought to enter the federal court by taking a position which this court had time and again held to be untenable all would concede that no substantial federal question was being presented. If to find the question to be unsubstantial resort must be had to complicated analysis it would be held that the question presented was substantial though such analysis might demonstrate that it was not. Somewhere between trese two illustrations lies the test which is, after all, whether reasonable men and practitioners versed in the law may reasonably differ on whether the assertion is or is not well made. If there may be such difference, there is a substantial federal question.

To apply this test it is necessary to examine what the assertion is. First, is the statement of the following naked conclusion:

> "The 'purported' statute of the state of South Dakota 'is unconstitutional and void' in that the same is in violation of Section two of Article Six of the Constitution of the state of South Dakota, and in that the same is in violation of the Fourteenth Amendment of the Constitution of the United States." (R. 15).

Next comes an allegation which is practically a naked conclusion, to-wit:

"If said apportionment of benefits be made as threatened by the board and as is provided in the notice given 'the same will constitute the taking of the property of plaintiff and of the other property owners affected by said notice without due process of law'." (R. 15).

Then follows specific complaint:

"Said statute is 'further unconstitutional and void' in that the same provides for an assessment against property without the right of the property owners to be heard thereon and without notice of any character to the property owners." (R. 15).

"Said statute is 'further void and uncontitutional' in that the same provides for no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners, and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies and other corporations and upon the property of the municipal and quasi municipal corporations and upon platted property in cities and villages." (R. 15).

"Each plaintiff filed an amendment to its bill, alleging that the apportionment of benefits assessed and the amount of such assessment in dollars and cents 'is wholly speculative, arbitrary, unjust, illegal, and discriminatory and was made by the board without any reasonable or rational basis therefor'."

"That the said equalization of benefits is so arbitrary, and discriminatory against the property of the plaintiff as to deprive plaintiff of its property without due process of law and to deprive it of the equal protection of the laws." (R. 80, 81).

"That the property of the plaintiff has not been and never can be benefited by the work per-

formed by the board as herein set forth to the extent of the amount in dollars assessed, or to any extent whatever".

"And it is not in proportion to any benefits which the property of plaintiff ever received or ever can receive by reason of the rebuilding of the spillway, the cleaning out, repairing and maintaining of drainage ditches No. 1 and No. 2 as set forth herein".

"The assessment sought to be collected from the plaintiff as above set forth is all out of proportion to the assessment sought to be collected from the agricultural land situated north of the City of Sioux Falls."

Aside from statement of naked conclusions we have a claim (a) that the statutes provide for an assessment against property without notice to or right of the property owners to be heard thereon; (b) that a threatened apportionment of benefits will constitute a taking without due process of law; (c) that the statute provides for no fixed or determinable method or rule for the apportionment of benefits; (d) that this is especially so as to apportioning benefits on the property of railroads, other corporations and of municipal and *quasi* municipal corporations, and on platted property in cities and villages. (R.15); (e) that the tentative benefits assessed are "wholly speculative, arbitrary, unjust, illegal, and discriminatory, and made without reasonable or rational basis; (f) the the proposed equalization of benefits is so arbitrary and discriminatory against the property of plaintiff as to deprive it of its property without due process of law and to deprive it of the equal protection of the laws; (g) that the property of plaintiffs has not been and never can be benefited by the work performed by the board to the extent of the proposed assessment or to any extent; (h) that the tentative apportionment of benefits is not in proportion to any benefit which the property of plaintiff has received or ever can receive from the rebuilding of the spillway, and the cleaning out, re-

pairing and maintaining of the new drainage ditches; (i) that the assessment sought to be collected is entirely out of proportion to that sought to be collected upon agricultural land situated north of Sioux Falls. (R. 80, 81.)

The only further attempt to charge unconstitutionality (if it be that) is found in certain allegations which each of the lower courts found to be true, to-wit: that the formation of the so-called new ditch was simply a pretense and subterfuge resorted to for the sole purpose of attempting to burden plaintiffs with the cost of maintaining the old ditches; (M. 89); that there was merely assumption to institute a new drainage district and to assess benefits to the property of the plaintifls that was located in the City of Sioux Falls; (R. 255); that what was in fact done is a subterfuge for the purpose of obtaining money for mere maintenance and that the statutes governing assessment for maintenance were not followed; (M. 87); that the proceeding was not an independent project but was an attempt to maintain and repair existing ditches or to take care of conditions that resulted from the imperfect and inadequate construction of the old ditches; (R. 257); that instead of charging the repair and maintenance to those who were responsible for the defective construction and proceeding under statutes authorizing levy for repair and maintenance the board assumed the right and authority to construct a new drainage district without abandoning any of the old ditches, with no thought of using a new and different drainage and with the sole purpose to maintain and perfect that which had in the past been inefficiently constructed; that there was no thought or purpose except to repair the damage that had already been done and prevent further damage (M. 89); — and that there is no statute authorizing the board to take in other lands to help bear assessment of burden created in maintaining the original drainage; that the only authority was to provide payment for maintenance and repairs of the old ditches. (R. 255, 256).

We feel clear that this assertion of subterfuge is not charged to be a violation of the Constitution of the United States and that there is no decision below holding that the subterfuge so called would violate any such provision. But we have thought best to set forth all there is on this head so that our discussion of whether there was a substantial federal question may cover all that by possibility can be claimed to be the assertion of a federal question.

First, then we have questions of fact, to-wit: (a) is it true no notice or hearing is provided for the property owner; (b) or that there is no provision for a fixed or determinable method or rule for the apportionment of benefits; (c) or that the tentative apportionment is speculative, arbitrary, unjust, illegal and discriminatory, and made without reasonable or rational basis; (d) or that the plaintiffs derived no benefit from the improvement equal to the proposed assessment or indeed any benefit; (e) does the proposed assessment unduly discriminate in favor of agricultural lands; and (f) was the establishment a pretense and subterfuge.

V-1.

As to notice and right to be heard. — Section 8458, Revised Code of South Dakota, 1919, provides that the board of County Commissioners may at any regular or special session establish or cause to be construct *any* ditch or drain. Section 8459, that the board shall act only on a written petition signed as required by statute and that such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points, its general course or its exact course in whole or in part, and also a general statement of the territory likely to be affected thereby. Section 8476, that no proceedings affecting the rights of persons in the establishment of the drainage district shall be had except upon notice prescribed by statute to be given as to the construction of

drains. Section 8461, that there shall be a time and place for the hearing of the petition, that notice shall be given thereof by prescribed publication; that such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby, in general terms, and the notice shall further refer to the files in the proceedings for further particulars. It is to summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed. Section 8462, provides that at any such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report required and may contest the findings of the board as to width and route; and the petitioners may be heard in like manner in support of the petition. It is after full hearing that the drainage may be established along the lines set forth in the petition or in the finding of the board prior to hearing; and the action on the petition is had at the time named in the notice. (8461). The Circuit Court of Appeals finds, as it was bound to do under undisputed testimony, that the foregoing general notice addressed to all who were affected had been given. (R. 250, 251). — And the trial court ruled (and that is still unchanged) that such notice obviated violation of the federal Constitution.

Proceeding under Section 8462, if the board after full hearing and consideration finds the project sought to be established is conducive to the puplic health, convenience, or wellfare, or necessary or practicable for drainage of agricultural lands, it establishes the project. Not only is there this notice and opportunity to be heard before the petition is acted on but after the drainage system has been established, when the board enters into the statutory duty of apportioning benefits; Section 8463 requires that it shall appoint a time and place for equalizing same; that it shall give notice of the proposed equalization in a described manner; that such notice shall state the route and width of the drainage project established, giving description of each tract of land af-

fected by the proposed drainage, and the names of the owners of the tracts involved as they may be found in the records of the office of the Register of Deeds at the time the petition was filed. The notice must further state the proportion of benefits fixed for each tract, taking any particular tract as a unit. It is to notify all such owners to show cause why the proportion of benefits shall not be assessed as was tentatively done — and the statute further provides a hearing for the purpose of equalizing the proportion of benefits tentatively apportioned which shall be a final equalization and shall fix assessment according to benefits received.

It is provided by Section 8463, that:

> "Benefits to be considered in any case shall be such as accrue directly by the construction of said drainage or indirectly by virtue of such drainage being an outlet for connecting drains that may be subsequently constructed".

After equaliation, the statutes open wide the doors of judicial review.

Under Section 8469, any one deeming himself aggrieved by the action of the board of equalization may appeal to the Circuit Court of the state, and any number of persons interested may join in the same appeal. On that appeal there may be review of the fixing of the proportion of benefits, the acceptance of the drainage, and of whether the project is conducive to the public health, convenience, or wellfare, and whether it is necessary or practicable for the purposes of draining agricultural lands. The scope of the review in court is so broad as that the statute requires certifying to the court the petition and all other papers and records in the matter. Relative benefits and whether the tract taken as a unit is or is not benefited and if benefited to what extent, may be inquired into by the court. The matter shall be heard in the Circuit Court as an original action. (8469) — and if the defect is substantial the court shall of its own motion determine the rights of the parties,

validate the proceedings as justice may require and if it shall find cause for such validation or such action should have been taken in the first instance, providing all parties interested are before the court. (8488).

It would seem clear, then, that the statutes do not provide for an assessment without notice to or right of the property owners to be heard; and it is without dispute that everything required by valid statutes with reference to notice or opportunity to be heard was complied with.

It seems equally clear that the statute does not have the vice of failing to provide for a fixed or determinable method or rule for the apportionment of benefits. Is this court warranted in following the lower courts by holding that the learned counsel who prepared the bills had the right to believe, or indeed, did believe, that the South Dakota statute so operated to deprive of due pro cess and of the equal protection of the laws as to be violative of the Constitution of the United States. At the time the bills were framed the reports of this court and of most of the courts of last resort of each of the states were filled with decisions that statutes in substance like those of South Dakota were not open to the objection of running counter to the federal Constitution. These reports were full of decisions that where, as here, administrative tribunals were provided to hear objections to a drainage project, both as to validity and reasonableness, and where judicial review of the action of these tribunals was provided, no federal question arose, especially where, as here, there was a failure to invoke the action of said tribunals, or where, if invoked, resort to the courts that was permitted was, as here, not availed of. It would be both impossible and useless to give even as much as a reference to those almost innumerable decisions. Something in the way of support we will enter upon here. And the summary or brief will exhibit what little else in the way of citation of authority we may exhibit without being guilty of pedantry.

The trial court finds in its decision that the statutes at bar are not unconstitutional. And it puts it thus:

> "It is universally held 'that a law that provides for notice and an appearance and the right to contest the amount of the tax, and to contest the right to tax at all, with the right of appeal therefrom, as given to the land owners prior to the time that a tax is levied and becomes effective, is due process of law'." (M. 80).

The opinion cites authorities in this court and in other courts of last resort to the effect that there is no violation of the federal Constitution where notice is given at some time; where a hearing is provided in which everything involved may be contested, and especially if review in the courts is provided after the administrative tribunals have been exhausted. (M. 80, 81, 82).

And it decreed that all required to keep out of conflict with the due process clause, had been done. It finds that the legislature has provided no tax can become effective, and no assessment can be made, until the benefits have been ascertained and apportioned; and before this can be done a definite day must be named by the board and land owners are given notice. (M. 80). It finds the day was named and the notice given.

It is held in *Soliah v. Heskin,* 222 U. S. 522:

> "Neither does that amendment invalidate an act authorizing an appointed board to determine whether a proposed drain will be a public benefit and create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owners before the assessment becomes a lien against his property".

And again this Court said:

> "The motion to affirm the judgment should, however, be granted if the question on which the

decision depends are found to be so wanting in substance as not to need further argument." Milheim, 43 Sup. Ct. Rep. 696; Hodges, 43 Sup. Ct. Rep. 435.

Surely, ample notice and opportunity was given; and given when no assessment yet existed.

We repeat that no lawyer was justified in thinking that the South Dakota Statutes violated any guaranty of or right given by the Constitution of the United States.

V-2.

We have set forth heretofore the claim that the establishment of the project at bar was a mere subterfuge, an allegation which might by possibility be interpreted to charge a fraud if some elements that do not exist, existed. That is to say, if the plaintiffs were prevented from protecting themselves against such a fraud such subterfuge might possibly be a basis for invoking the aid of the federal courts, provided of course, the requisite amount was in controversy. But here, in no view is such a charge of fraud, because the record shows without dispute and the framers of the bills must have known that provision was made for such notice and such hearing thereon as would enable the plaintiffs to resist assessment on the ground that the project was not of a character which authorized assessing them. Nor do we overlook that if it were granted the federal court had jurisdiction it had power to pass on the question of whether there had been such subterfuge even though that is not a federal question.

We shall later assume for the sake of argument that there was power in the court to determine whether or not there was the alleged subterfuge. We shall deal with it by attempting to show that in truth the charge of subterfuge is unfounded. Wat concerns us now is whether the pleading of this subterfuge creates a sub-

stantial federal question, or any such question. Surely, it will be conceded that the federal court cannot obtain jurisdiction by a charge of fraud when there is no claim made that the fraud violated any federal constitutional provision, or law. And that is this case.

What is in Paragraph Nineteen of the bill of the Appellee Rock Island sets forth both generally and specifically all things that are asserted to be an infraction of the Constitution of the United States. The bill of each appellee is identical on this point with that of the Rock Island. And not so much as a mention of subterfuge or fraud of any sort may be found in the allegations of the bill that attempts to present a federal question.

VI.

DELEGATION BY LEGISLATURE.

The view taken by the legislature as to what is prudent and comports with propriety and justice in fixing a drainage tax district, or in declaring how much tax shall be raised and the method of raising and distribution, cannot be reviewed by the courts, though the legislature may have erred. — *Spencer's* case, 8 Sup. Ct. Rep. 926.

If then the project at bar had been created by direct action of the legislature any provision of the act declaring what property is benefited or specially and peculiarly benefited would be beyond all judicial review, and would not be affected by the Fourteenth Amendment. — *Milheim's* case, 43 Sup. Ct. Rep. 698; *Spencer's* case, 8 Sup. Ct. Rep. 925, 927. This has been said even where the view that there was a benefit was based on the thought that the drainage would tend to increase the traffic of a railroad taxed. — *Thomas,* 277 Fed. 711. So of claims that an act of assembly creates over-taxation. — *Milheim's* case, 43 Sup. Ct. Rep. 698. So of the amount to be raised. — *Spencer's* case, 8 Sup. Ct. Rep. 925, 927; *Martin's* case, 27 Sup. Ct. Rep. 442, and cases cited. — All this, though the result accomplished be unjust. — *Spencer's* case, 8 Sup. Ct. Rep. 925. It follows, of course, that the legislative determination as to what is benefited and therefore what should be included in the district is beyond judicial review. — *Bush's* case, 251 U. S. 190; *Thomas,* 277 Fed. 711; *Spencer's* case, 8 Sup. Ct. Rep. 926.

All these things that the legislature may do and which are beyond judicial review when done by it, it can delevate, say, to commissioners. — *Spencer's* case, 8 Sup. Ct. Rep. 925, 927. In the case of *Embree,* 36 Sup. Ct. Rep. 319, what the legislature might have done for itself in the premises was delegated to the County Court, and there was held to be committed "to the judgment and discretion of that Court whether there is need for the

district and if so what lands should be included and what not included".

True, the project at bar was not created by direct action of the South Dakota legislature; equally true, that general statutes gave appellant board all such powers in the premises as the legislature could exercise by special and direct action. That this board could on the authority of the general statute do all that the legislature could do by special act is beyond question. But there is one difference. Had the establishment been made by special act no notice to those affected was required and there could be no judicial review. But when the legislative authority is exercised on delegation, action is invalid unless the statute under which the one proceeding under delegated authority acts makes provision both for proper notice by the board, adequate hearing before it, and some method of review on direct attack. — See *Spencer's* case, 8 Sup. Ct. Rep. 927. In the case of *Fallbrook v. Bradley,* 164 U. S. 112, this Court said:

> "The legislature not having itself described the district, has not decided that any particular land would or could possibly be benefited as described, and, therefore, it would be necessary to give a hearing at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed. If such a hearing were provided for by the act, the decision of a tribunal thereby created would be sufficient".

While perhaps that has not been specifically settled, it is probable that the review on direct attack should include some hearing in a court of competent jurisdiction, and, possibly, in a proper case, a hearing in this court on writ of error to the highest court of the State.

We have already shown that required and sufficient notice and opportunity to be heard are provided by the South Dakota statute, and were given, and that ample review is provided.

VII.

THOUGH FIVE OF THE APPELLEES HAVE DIVERSITY AND THOUGH IT BE ASSUMED FOR THE SAKE OF ARGUMENT THAT THERE IS A SUFFICIENT AMOUNT IN CONTROVERSY AND THAT A SUBSTANTIAL FEDERAL QUESTION HAS BEEN PRESENTED, STILL THERE IS NO RIGHT TO ENTER THE FEDERAL COURTS WITH THIS COLLATERAL SUIT, BECAUSE THE APPELLEES HAVE NOT EXHAUSTED THE ADMINISTRATIVE TRIBUNALS TO WHICH THE STATUTE OF THE STATE HAVE GIVEN THE POWER TO CORRECT ALL THAT APPELLEES COMPLAIN OF, BEARING IN MIND ALSO THAT THE HIGHEST COURT OF THE STATE HAS DETERMINED THAT SAID TRIBUNALS HAVE SAID POWER.

See for illustration, *Bagley v. Butler,* 24 S. D. 426.

We are not unmindful it is the settled law that one who *does have* the right to enter the federal courts cannot be kept out of them by any state statute or state action, direct or indirect, and that where he *does have* the right to enter he is not bound to observe statute provisions making it a condition precedent that he first exhaust such tribunals as the state has provided. But to aply this, in a way, begs the question. When the inquiry is *whether* one has the right to invoke the aid of the federal courts there may not be applied rules which govern only where it is the fact that he does have the right to invoke it. Passing that, one who has diversity or sufficient amount in controversy and a substantial federal question is relieved from exhausting the state tribunals, only, where the resident citizen may enter the courts of his state. If before beginning suit in state court the citizen of the state must first exhaust certain administrative tribunals, then the non-resident of course cannot enter the state court without having so exhausted. And if neither can enter the state court before final action by the provided administrative tribunals, neither

may enter the federal court without first exhausting those tribunals. It is well said in *Regan v. Farmers Company*, 154 U. S. 362, 14 Sup. Ct. at 1052:

> "A state cannot tie up a citizen of another state having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts".

In other words, the rule just stated involves no attempt by a state to keep a non-resident out of the federal courts. Such rule is not a matter of state law at all. It is general law, and asserts no more than that no one may enter the federal courts, in the first instance, if no one may obtain in the state courts what is sought in the federal court without first exhausting the power of administrative boards which the state has provided for its own citizens and which the citizen of the state must first exhaust before he may enter the courts of the state with a civil suit; especially suit seeking an injunction to stop the operation of the taxing power. It would be remarkable doctrine that when *the citizen of the state* claims that the taxing power is as against him proceeding in violation of state or federal constitution or both, or is otherwise acting illegally, that *he* may not resort to civil suit until he has obtained the final decision of the administrative boards provided and having presented and redressed his grievances, — but that the mere fact that the one who suffers from the identical acts from which the citizen of the state suffers can by reason of his residing in a place other than where his property lies override the conditions precedent which the state in which such property lies insists upon before opening the doors of the court *to its own citizens.*

2.

There is of course no question that here is a collateral suit; that the appellees have never attempted to

avail themselves of said machinery for administrative relief; relief from tribunals acting *quasi* judicially. It remains to discuss whether this machinery has power to redress what is complained of in the collateral federal court suit. And whatever the highest court of the state has ruled as to what those powers are is conclusive here, and said court has so spoken.

We submit the state of South Dakota not only has provided ample power in certain administrative bodies to redress all that appellees complain of, but in addition has provided for judicial review for cases where the taxpayer feels himself aggrieved by the final action of the administrative boards.

Curtis v. Pound, 34 S. D. 628-632.
Milne v. McKinnon, 32 S. D. 627.
Revised Code 1919, Sec. 8462, 8459, 8469.

By way of introduction, it was affirmatively pleaded there are special tribunals that have not yet acted in the premises and that therefore the Federal Court has no jurisdiction (R. 26, 27; M. 25; N. 25; O. 26; S. 24; P. 26) — and as said, that is not and cannot be disputed. The Court overruled a motion to dismiss, which asserted:

> "The record shows the defendant Board is charged by the law of the State with executing the provisions of its drainage law and has jurisdiction to proceed with respect to the property within said drainage area, including that of the plaintiffs. If there have been any errors in administering said statute law, that does not involve the jurisdiction of said special tribunal. The record shows the opportionment of benefits and assessment to be made as provided by the laws of the State and as applied by the Board was based on its judgment as to values and benefits; that in these cases there is a standard method of apportionment which will probably produce substantial justice generally and the proba-

bility is the parties will be taxed proportionately to each other and all others upon whom benefits are conferred by the method provided and employed, and that probably approximately general results will be produced." (R. 210).

"It is moved to dismiss for the further reason the record shows that notice and opportunity to be heard were given as to the amount or proportion of benefits plaintiffs have received and they have a plain, adequate and speedy remedy at law." (R. 209).

This motion, which had been overruled pro forma (R. 210), was renewed at the close of the plaintiff's cases in chief (R. 254), and again overruled.

Whatever variance there may in fact be between the tentative assessment and the amount of benefits to be received, is to some extent due to the fact that appellees refrained from giving the Board any information they possessed which bore upon and might favorably have affected even the tentative apportionment, to say nothing of affecting it when equalization would be entered upon. It is in testimony without dispute that the Board felt the tentative apportionment might not be what the actual benefit to be received was because, for one thing, no equalization herein was permitted and because appellees at no time appeared before the Board and helped it by presenting their views on that subject. (R. 155, 156).

In such circumstances, the only duty of the Board was to exercise an informed and honest judgment in fixing the values for the purposes of taxation. — *Southern Railway Company v. Watts, et al,* 260 U. S. 519, 43 Sup. Ct. Rep. 196.

We will assume for the purposes of present statement that the Board did act honestly and used all due care. Indeed, there is an abundance of testimony that this care was used. For one place, see Pages 155, 156, Rock Island transcript.

No appeal was taken from the order of establishment or from any other act of the Board. (R. 250, 251).

> "The ultimate test is that there be some tribunal specially vested by statute with the power of equalization, which power it may assert at the instance of any one aggrieved." *First National Bank vs. Board,* 264 U. S. 454, 44 Sup. Ct. Rep. at 387.

This brings us to what powers of redress the statutes of South Dakota provided. We submit they are broad enough to afford redress for all that appellees complain of, and provide adequate judicial review where the taxpayer feels himself aggrieved by the final judgment of the administrative tribunals provided by statute. We submit in addition there is a presumption that any just grievance would have been redressed by these administrative tribunals.

We concede, of course, there was no obligation to resort to these tribunals if they lack the power to proceed with a drainage project, including lack of power to assess and levy. — *Ward v. Alsup,* (Tenn.) 46 S. W. at 576. We concede also that if some fraud had prevented resort to these administrative bodies, failure to resort to them would not be a bar to these suits. But we have to say it cannot seriously be questioned that the appellant Board did acquire jurisdiction as to this drainage project and that there is no pretense that fraud or anything else prevented resort to those tribunals.

It is not only shown by this record and the exhibiting of the South Dakota statutes that the Board had full jurisdiction, but the highest Court of the State had before it the very drainage project, and it was contended the Board had not acquired jurisdiction. The Court declared that jurisdiction had been duly acquired. True, the constitutionality of the law under which the project was carried out was not challenged, but acquisition of jurisdiction was. From the decision of the Supreme Court of South Dakota a writ of error was

taken to this Court and same has since been dismissed. — *Gilseth v. Risty,* 46 S. D. 374.

In the Gilseth case it is stressed by the Supreme Court of South Dakota that there was no appeal from the order of establishment, and that therefore injunction would not lie to stop the carrying out the work contemplated by the petition.

It is true the Supreme Court also found that Gilseth was estopped among other things by delay in instituting his suit, but that was a pure cumulative holding, and the slightest examination of the opinion will disclose there was no thought of resting the decision on this estoppel, and that the main purpose of the decision was to settle whether or not the ditch establishment and the proceedings of the Board were valid, and on jurisdiction. And if it were the fact that the decision on jurisdiction and that on estoppel were of equal rank, it would not detract anything from the binding force of either.

In *First National Bank v. Board,* 264 U. S. 455, 44 Sup. Ct. Rep. at 387, it was contended that the decision in a certain case turned upon the point that plaintiff had an adequate remedy at law, and not that it had lost its right by neglecting to seek an administrative remedy, and the Court says:

> "It is true the court after the statement quoted above proceeds to say that plaintiff can not have relief in equity, but this seems to be put forth as an independent ground for affirming the judgment below. It follows the unqualified statement that plaintiff, having refrained from seeking the administrative relief open to it, 'may not now complain'." It introduces the next following, with the words "But apart from this":
>
> "It is not suggested that in so doing the requirement, already broadly recognized, that administrative remedies must be exhausted as a necessary pre-requisite to a judicial challenge of the tax, could be dispensed with; and, accepting the decision of

the state court that such remedies were in fact open and available under the Colorado statutes, it could not be dispensed with".

A decision denying the force of an objection to a statute which is raised by the record and argued by counsel is not *dictum*, because the statute is held invalid on other grounds.

Carstairs v. Cohran, 95 Ind. 488; affirmed 193 U. S. 10.

It is said in 15 Corpus Juris, 952:

"This is so even though by reason of other points in the case the result reached might have been the same if the Court had held, on the particular point, otherwise than it did. An adjudication on any points within the issue presented by the the case cannot be considered a *dictum*."

"Accordinly, a point expressly decided does not lose its value as precedent because the disposition of the case is based upon other grounds." — Citing cases in the Supreme Court of the United States, Federal Courts, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Tennessee, Washington, and England.

It is said in 15 Corpus Juris, 953:

"Where a case presents two or more points, any one of which is sufficient to determine the court issue, but the court actually decides on such points, the case is an authoritative precedent as to every point decided and none of such points can be regarded as having merely the status of a *dictum*."

Supported by citations of the Supreme Court of the United States, Federal Courts, California, Iowa, New York, Oregon, Tennessee, Texas, Washington, and Wisconsin.

"Though both were grounds of decision, to-wit, that the decision was not based alone on actual

knowledge of what property was intended to be taxed but upon the sufficiency of a description to identify the land in connection with the notice given to appellant — this does not constitute *dictum.*"

Ontario v. Wilfong, 233 U. S. 543, 32 Sup. Ct. Rep. at 333, 334.

"Where an appellate court places its decision on two or more distinct grounds, each is as much an authoritative determination as the other, and neither can be disregarded as *dictum.*"

King v. Pauly, 159 (Calif.) 549.

"Where a decision is based on two individual lines of reasoning, neither one is a *dictum.*"

Pugh v. Moxley, 104 Calif. 374.

"It cannot be said that a case is not authority on one point because, although that point was properly presented and decided, in the regular course of consideration of the cause, something else was found in the end which disposed of the whole matter."

Railroad Co. v. Schutte, 103 U. S. at 119.

"The case is of equal authority upon each of two distinct and sufficient grounds upon which an appellate court rests its affirmance of a judgment although only one of those grounds was considered in the court below."

Union Pacific v. Mason City Ry., 199 U. S. 160, 26 Sup. Ct. Rep. 19.

3.

We recur to what grievances the board of equalization could under the law correct.

Relief could be given as to the finding on any matter alleged in the petition seeking establishment. — *People v. Hagar,* 52 Calif. 183, citing *Freeman Judgments,* Section 523; *Bigelow, Estop.* page 142; *Ward v. Alsup,*

(Tenn.) 46 S. W. at 575, 576; such board has "ample power to pass upon and rectify their individual grievances." — *Idem.*

The trial Judge held there was notice and opportunity to try out why the proposed drainage system should not be established and constructed. (M. 77).

The board had power to pass on whether the assessment district was of proper extent — *Hennessy v. Douglas County,* (Wis.) 74 N. W. 985; there was power to determine whether the lands of a given owner should be included within the district. The trial Judge so held (M. 76), — the board had power to pass upon whether the proposed assessment was valid and just. (M. 82, 83). That is the holding of *Londoner v. Denver,* 210 U. S. at 379, and of *Farncomb v. Denver,* 252 U. S. 7, 40 Sup. Ct. at 272, and of *McGregor v. Hogan,* 263 U. S. 234 at 238, 44 Sup. Ct. at 52.

He held the board had power to pass upon whether there was the right to tax at all. To pass upon what the total tax should be; he so held on the authority of *Soliah v. Drain Commissioners,* 222 U. S. 522; 13 Sup. Ct. 103, and *Paulson v. Portland,* 149 U. S. 30; 13 Sup. Ct. 750. (M. 81). There was power to pass upon what the amount of each owner's assessment should be. — *Londoner v. Denver,* 210 U. S. 379; *McGregor v. Hogan,* 263 U. S. 234, 44 Sup. Ct. at 51. To determine whether the assessment is unjust. — *Petoskey v. City,* (Mich.) 127 N. W. 345; *Michigan Bank v. City,* 107 Mich. 246. Power to determine whether property has been improperly assessed. — *First National Bank v. Board,* 264 U. S. 450, 44 Sup. Ct. at 386, 387. Whether the assessment is improper. — *First National Bank v. Board,* 264 U. S. 450, 44 Sup. Ct. at 386, 387; *Ward v. Alsup,* (Tenn.) 46 S. W. 575. Whether the assessment is illegal. — *Ward v. Alsup,* (Tenn.) 46 S. W. 575; or is unfair. — *First National Bank v. Board,* 264 U. S. 450, 44 Sup. Ct. at 386, 387. The trial Judge ruled the board had power to determine what the proportion of benefits should be after equalization. (M. 78). There was power to determine

whether the assessment was excessive. — *Southern Railway v. Watts,* 260 U. S. 519, 43 Sup. Ct. at 195; *Ward v. Alsup,* (Tenn.) 46 S. W. 575. Whether there had been an excessive assessment through overvaluation. — *Stanley v. County,* 121 U. S. 535, 7 Sup. Ct. at 1238. Whether it was illegally excessive. — *Idem,* at 1239. Whether it was irregular and excessive. — *Ward v. Alsup,* (Tenn.) 46 S. W. 575. Whether is was unequal and excessive. — *Idem; Township v. Rose,* (Mich.) 55 N. W. at 928. Whether the assessment was discriminatory by means of overvaluation. — *Keokuk v. Salm,* 258 U. S. 122, 42 Sup. Ct. at 207, 208. — And in such case the board of review must have the claim presented. — *Idem,* at 208. And relief in equity depends upon having sought correction from this board and having failed to secure redress. — *Idem.* This board has power to determine whether there has been a willful disregard of law requiring uniformity in the valuation of property for taxation. — *Western Union v. Missouri,* 190 U. S. 412, 23 Sup. Ct. at 734. And where the power that this board has is given to a county court then in suit in that court it may be determined whether the assessment was or was not deliberately or fraudulently discriminatory. — *Keokuk v. Salm,* 258 U. S. 122, 42 Sup. Ct. at 208. There is power to determine whether the general rule of equality and uniformity of taxation required by constitutional or statutory provisions has been disregarded. — *Stanley v. County,* 121 U. S. 535, 7 Sup. Ct. at 1239; *Western Union v. Missouri,* 190 U. S. 412, 23 Sup. Ct. at 734 — wherein it is held that the action of such board cannot in this regard be collaterally attacked because the proceeding is *quasi* judicial. Without submitting to the board one may not even complain that the assessment is unconstitutional. — *Milheim v. Moffat,* 262 U. S. 710, at 723, 43 Sup. Ct. at 699. It may pass upon what proportion of benefits should be put upon any particular owner. The trial Judge so held on the authority of *Paulson v. Portland,* 149 U. S. 30, and of *Soliah v. Drain Commissioners,* 222 U. S. 522, 13 Sup. Ct. 103. (M. 79, 81), (82). That is the holding of *Spencer v. Merchant,*

125 U. S. 345, 8 Sup. Ct. 921. There is power to determine whether the proposal will be a public benefit and whether land included should be found to be benefited. So ruled the trial court on the authority of *Soliah v. Drain Commissioners,* 222 U. S. 522, 13 Sup. Ct. 103, and *Paulson v. Portland,* 149 U. S. 30, 13 Sup. Ct. 750. (M. 81). It ruled a hearing was provided wherein the owner might contest the amounts of the benefits or even urge that none are derived. (M. 79). — *Hennessy v. Douglas County,* (Wis.) 74 N. W. 985. There is power to determine whether there is any benefit. — *People v. Hagar,* 52 Calif. at 182, 183, citing Freeman Judgments, Section 523; *Bigelow, Estop.* page 142 — *Milne v. McKinnon,* 32 S. D. 627. The board of equalization can give relief against arbitrariness of assessment. — *Milheim v. Moffat,* 262 U. S. 710, 43 Sup. Ct. at 698. The highest court of South Dakota holds in the *Milne* case, supra, that if this is honestly determined the only review is on appeal, and it may not be obtained in a suit in equity to restrain the collection of the assessment. The trial court held there was provision for having the board of equalization determine whether the benefits will or will not exceed assessment. (M. 76). The board of equalization may review whether the property has been fraudulently assessed. — *First National Bank v. Board,* 264 U. S. 450, at 455, 44 Sup. Ct. at 387. Of course it is true that some kinds of fraud excuse submitting to this statutory board. — *Ward v. Alsup,* (Tenn.) 46 S. W. 575, 576. But that must be the same kind of fraud that will set aside a decree, that is, it must appear that the fraud charged prevented the complaining party from making full and fair presentation of his side. — *Toledo Scale Co. v. Scale Company,* 261 U. S. 399 at 423, 43 Sup. Ct. at 464. There is of course no claim of such fraud, or indeed of any fraud. And the Supreme Court of South Dakota held in the *Gilseth* case that there was none, 46 S. D. 374. There is this power of review even where there is provision for paying under protest and recovering back. — *Ward v. Alsup,* (Tenn.) 46 S. W. 575. And no objection to unconstitutionality may be

raised where the board of equalization is ignored. — *Milheim v. Moffat,* 262 U. S. 710 at 723, 43 Sup. Ct. at 699.

What it all comes to is that making no complaint before the reviewing boards provided by law amounts to an admission that the action of the assessing board was correct. — *Hinds v. Township,* (Mich.) 65 N. W. at 546; that if there be no resort to the board of equalization collateral attack on the action of the assessing board will not lie because such action is *quasi* judicial. — *Stanley v. County,* 121 U. S. 535, 7 Sup. Ct. 1239. The *Ward* case (Tenn.) 46 S. W. 575, approves the statement of Cooley on taxation that "the statutory remedy of equalization was supposed to be adequate to all the requirements of justice and the party's folly if he fails to avail himself of it". If he fails to avail himself of the power given the board of equalization to pass all complaints against tentative assessment he has according to the *Milheim* case, *supra,* no sufficient ground of complaint including even the complaint that the assessment is unconstitutional, and having failed to object to a tentative ad valorem assessment adopted by the commission, failure to seek modification or correction before the board of equalization before the tentative basis has been finally adopted, left the party with no sufficient ground of complaint. — *Milheim v. Moffat,* 262 U. S. 710 at 723, 43 Sup. Ct. at 699.

It is the inevitable implication of the opinion of the Circuit Court of Appeals that the absence of benefits will justify injunctive relief. (R. 263).

But is is said in *First National Bank v. Board,* 264 U. S. 450 at 545, 44 Sup. Ct. at 387:

> "We cannot assume that if application had been made to the commission, proper relief would not have been accorded by that body in view of the

statutory authority to receive complaints and examine into all cases where it is alleged that property has been fraudulently improperly or unfairly assessed".

"The fact, 'that such remeny were in fact available is controlling here'."

"The question whether an assessment is excessive is not for the courts to try and the board of review is the only tribunal to try and determine that question." — *Township v. Rose,* (Mich.) 55 N. W. 928.

The Supreme Court of South Dakota said in *Bagley v. Butler,* 24 S. D. 429:

"When a party whose property though assessed at less than its value is assessed much higher than that of other taxpayers, shall have requested the several boards to equalize taxes in the manner fixed by statute, to-wit, by raising the assessment of all property to its actual value — and such board refuses or fails to do their clear duty under the law, then, and only then, let such party apply to the courts for relief".

"Error if any in the method of assessing benefits for the construction of a drainage ditch by which a wrong result may have been reached is a matter to be considered on appeal from the determination of the board levying the assessment, and not a suit to restrain its collection."

Milne v. McKinnon, (S. D.) 144 N. W. 117, 32 S. D. 627.

"It follows that if the commissioners exceeded their jurisdiction in the length of the ditch and size of tiling, it's only effect so far as appellants were concerned was to increase the amount assessed against them above the amount that it should have assessed. This is a matter which should have been settled at the time of the assessment of benefits and

expenses of construction and appellant's remedy for an unjust or unwarranted assessment was through an appeal to the Circuit Court from such an assessment." — *Curtiss v. Pound*, 34 S. D. 628-633.

Where there is a conflict as to benefits it is enough for the complainant that there is such conflict especially where the assessing board has made personal inspection. — *Pittsburg Railway v. Backus*, 154 U. S. 421, 14 Sup. Ct. at 1120, 1121. And in that case this court said:

> "Is testimony that the value placed by the board was excessive together with testimony that portions of the road outside of the state were of largely greater value than any similar length of road within the state, unaccompanied with evidence that the board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the state, sufficient to impeach its determination? This question must be answered in the negative. No determination of a special board, charged under the law with the duty of placing a value upon property, can be successfully impeached by such meager testimony."

IX.

THESE SUITS WERE PREMATURE.

The trial Judge says in his opinion that under the South Dakota statutes there may not even be an assessment until after equalization, and the injunction stopped the making of any assessment. (M. 78). The opinion declares further that no assessment can be spread by the auditor until the benefits are finally fixed. (M. 78). Section 8463 of the South Dakota Revised Statutes obviously makes the first apportionment of benefits tentative and subject to the later equalization. And Section 8464 provides that no assessment shall be made until after the equalization has been completed. Whatever may be the law as to the right to have injunction where a tax has been finally fixed and is sought to be enforced surely there is nothing to enjoin when it is not even known what amount the tax will finally be. The Circuit Court of Appeals concedes that when the suits were brought it was not known what the final benefit apportionment would be, but it avoids this with the rather remarkable statement that the suits were not premature since the total expenditure was known and that, therefore, the amount of the threatened assessment was merely a matter of mathematical deduction. (R. 262). The trouble is that knowing what the total is that must be raised by taxation does not give the slightest basic for ascertaining what part of the total a given property owner must bear, or for ascertaining what his share of contribution will be after equalization.

> "An attack which seeks relief 'against anticipated injury consequent upon anticipated assessment, before the assessment was completed' is premature."
>
> *Western Union v. Howe,* (C. C. A.) 180 Fed. at 53, 54.

As is well said in *Western Union v. Howe,* (C. C. A.) 180 Fed. at 53, 54, the effect of an injunction obtain-

ed to relieve against anticipated injury consequent upon anticipated fraudulent assessment, before the assessment is completed, is to take away from th tax commission all right to exercise discretion and judgment in arriving at a fixed and proper valuation — that it is not permitted to bring such injunction suit "before the board had an opportunity to complete the exercise of its *quasi* judicial discretion by equalizing the various assessments throughout the state and completing the assessment of this property" and that therefore "the result is that this suit was prematur[illegible]".

X.

ASSUMING FOR THE SAKE OF ARGUMENT A SUFFICIENT AMOUNT IN CONTROVERSY AND OTHER ELEMENTS REQUIRED TO GIVE THE FEDERAL COURT JURISDICTION, IT ERRED IN ENTERTAINING THE CAUSES ON ITS CHANCERY SIDE.

1.

It cannot be seriously questioned, and the testimony shows without dispute, that these appellees owed contribution to this drainage project in *some* amount. They tendered nothing. This fact was pleaded as constituting a waiver of the right to have any relief. We need not at this time go so far as that. It suffices to say that this failure to offer what at all events was due is a bar to relief in equity. — *City v. Hall,* 19 S. D. 663, 104 N. W. 470. Even where over-valuation has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction and operates unequally on a large class of individuals or corporations the party aggrieved has no right to restrain the collection of the assessment unless he pays or tenders what is admitted to be due. — *Stanley v. County,* 121 U. S. 535, 7 Sup. Ct. at 1239.

2.

AS TO THE CLAIM THAT THE PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW.

As required by law, the defendants raised in the trial court an issue on this allegation and averred affirmatively that there was an adequate remedy. (R. 23; N. 22; S. 20; P. 23; O. 22; M. 22).

The Circuit Court of Appeals declares that appellees did not have an adequate remedy at law. (R. 257). This is so if there was no remedy at law which was as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity; one as complete, efficient and practicable as the equitable remedy and as efficient both as to final relief and mode of obtaining it. We concede there must be an adequate remedy on the law side of the federal court and that it does not suffice there is such remedy in the state courts. Our contention is that there *was* such remedy on the law side of the federal court.

It was ruled below that the board were naked trespassers because the alleged new ditch project was in law never in existence. (M. 84, 89, 90; R. 255, 256). Both the trial court and the Circuit Court of Appeals base this ruling, for one thing on the ground that the proceeding should have been dealt with under statutes governing the abandonment of existing drainage systems and that the board acted without authority because it did not follow those statutes.

The Circuit Court of Appeals found an exception to the general rule governing equity jurisdiction in the fact that the proceedings of the board were without authority. (R. 252, 253). The trial court held that though the board was a mere trespasser the plaintiffs could get no relief on the law side of the federal court. (M. 83). And indicates that such a distinction is made in *Milheim's* case, 262 U. S. 710; 43 Sup. Ct. 694. (R. 261, 262). We are unable to find such a distinction drawn

in that decision. There must of necessity be a remedy on the law side for resisting a non-constitutional tax, or a tax invalid for any other reason. For it has been held that the tresspass resulting from proceedings to enforce an unconstitutional tax cannot be restricted by injunction unless irreparable injury or other ground for equitable interposition is shown to exist. — *Shelton v. Platte*, 139 U. S. 591, 11 Sup. Ct. 649. It is said in *Boise Company v. Boise City*, 213 U. S. 276; 29 Sup. Ct. 427:

> "It is obvious that the rights of which the company seeks to avail itself are rights cognizable in a court of law, and not rights created only by the principles of equity. The sum of the company's contentions is that the imposition of the license fee was illegal, unconstitutional and void; all these contentions are open in a court of law. As complete as inequity." — *Walla Walla*, 19 Sup. Ct. Rep. 77.

It is held in *Dows v. Chicago*, 11 Wall,-80, that no relief may be had in equity against an effort to tax which because of invalidity of the tax amounts to a common trespass.

Surely, one is not without *any* remedy against such a tax, and since it is not to be had in equity it must of necessity exist at law.

In the *Shelton* case, 139 U. S. 591, 11 Sup. Ct. 648, 649, it was claimed for Allen v. Railway, 114 U. S. 311, Osborn v. Bank, 9 Wheat. 738, Cummings v. Bank, 101 U. S. 153, and Dodge v. Wolsey, 18 How. 331, that a court of equity has jurisdiction to restrain a collection of a tax when same is wholly illegal and void. But the court says that in those cases the jurisdiction will be found to have rested on grounds other than merely the unconstitutionality of the taxes involved.

And it is held in the *Shelton* case, 139 U. S. 591, 11 Sup. Ct. 647, if the tax was illegal the taxpayer had, for one thing, the right to prosecute for damages — an action that of course can be entertained on the law side of the federal court.

3.

In *Shelton v. Platte,* 139 U. S. 591, 11 Sup. Ct. 648, it is ruled an allegation is a mere matter of inference which recites that if seizure be made by the sheriff it will greatly embarass the plaintiff in the conduct of its business and will subject it to heavy loss and damage and the public served by it to great loss and inconvenience. The allegations at bar are in worse case. It is said that the threatening apportionment of benefits will cause a multiplicity of suits. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 25). This is denied. (M. 22, 23; R. 23, 24; O. 23; N. 22, 23; S. 21; P. 23, 24). Next, that said apportionment will cast a cloud on the title of the appellee to their real property — and no appellee, other than the Power Company, has any real property which may be seized or have a lien fastened upon it. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15). Next, if said apportionment is carried out the plaintiff will suffer immediate and irreparable injury — how, is not stated. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15). Finally, if said apportionment is carried out plaintiff has no plain, speedy, and adequate remedy at law. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15). Defendants plead in bar that plaintiff does have such remedy. (M. 22, 23; R. 23, 24; O. 23; N. 22, 23; S. 21; P. 23, 24). They plead further that the bill states no matter of equity entitling plaintiff to the relief prayed for because it has such remedy at law. (M. 22; P. 23; S. 20; O. 22; N. 22; R. 23). Then follow certain pleas in avoidance. First, that plaintiffs are not entitled to the aid of a court of equity because they have neglected and refused to tender the amount of actual benefits received. (M. 29; O. 22). It is held in the case of *Milheim,* 262 U. S. 710, 43 Sup. Ct. 698, that appellees did have an adequate remedy at law because of the provisions for contesting the apportionment; to the same effect is *Indiana Manufacturing Co. v. Koehne,* 188 U. S. 681; 23 Sup. Ct. 452.

In *Union Pacific v. Commissioners,* (C. C. A.) 217

Fed. 456, it was urged there was no adequate remedy at law in such a case as this because injunction "could be issued in a shorter time than would be necessary to pay the taxes and begin an action at law and prosecute to judgment for the recovery of the money". The court said, "but if this reasoning is sound the unlawful resort to equity becomes the very ground of equitable jurisdiction", — and, "if the position were sound every decision of the Supreme Court reversing a decree in equity because the remedy at law was adequate, would be wrong.". And following the case of *Buzzard v. Houston*, 199 U. S. 347, that Section 723, Revised Statutes, can be given effect in no other way than by the dismissal of a suit brought in violation of its provisions.

4.

There is great and proper reluctance on part of the federal courts to interfere with the collection of taxes.

> "The evil caused by suits in equity to restrain the collection of taxes is grave and has often been set forth by the courts".
>
> *Union Pacific v. Commissioners,* (C. C. A.) 217 Fed. 543.

It is said in *Shelton v. Platte,* 139 U. S. 591, 11 Sup. Ct. 648, that legislation restricting the issuance of such injunction has been called for by the embarrassment resulting from the improvident employment of the writ in arresting the collection of the public revenue, and that resort to the court of chancery ought not to be interposed in that direction, except where resort to that court is grounded upon the settled principles which govern its jurisdiction. In *Boise v. Boise,* 213 U. S. 276, 29 Sup. Ct. 428, it is held that while the state is at liberty to permit injunctions resisting the collection of taxes, "very different considerations arise where courts of a different though paramount sovereignty impose in the same manner and for the same reason". — And that "the decisions of this court show a reluctance to interfere in

all cases where the federal rights of the persons could otherwise be preserved unimpaired." Upon this principle is grounded the declaration of the Circuit Court of Appeals in the case at bar that the right to establish relief must be clear where it is sought to restrain the collection of a state tax. (R. 259).

The Circuit Court of Appeals holds that though equalization of benefits is provided, as the matter stood when the suits were brought each appellee was threatened with levying of a tax for more than the jurisdictional amount. (R. 259, 263). Surely, this asserts no more than the threat of a illegal tax. — *Union Pacific v. Cheyenne,* 113 U. S. 516, 525, 526, approves the statement of Judge Cooley that "the illegality of the tax alone, or the threat to sell property for its satisfaction cannot of themselves furnish any ground for equitable interposition". Indeed, though the Circuit Court disregards it, it expressly approves of said text. (R. 259, 261). And does so on the authority of *Union Pacific v. Cheyenne, Supra,* and of *Hannewinkle v. Georgetown,* 15 Wall, 547, 548. (R. 262, 263).

We show elsewhere that the federal court has no jurisdiction to interefere by injunction against the collection of what is an excessive tax. Under all the undisputed testimony it is not open to challenge that the most which is sought to be restrained is the possibility that an excessive tax may ultimately be collected. (R. 159, 177, 196, 200, 241).

It is perhaps made as clear what equity does not have jurisdiction of by the decisions which find that equity did have.

In the *Ohio Tax* cases, *v. Dittey,* 232 U. S. 576, 34 Sup. Ct. 374, there was involved removing a lien that constituted a cloud. In *Tyler v. Savage,* 143 U. S. 79, 12 Sup. Ct. 345, the relief sought was discovery and discovery was warranted. So of *Sullivan v. Railroad,* 94 U.

S. 807. In *McMullen v. Strother,* 136 Fed. 301, accounting was sought.

Equitable jurisdiction was upheld where the ingredients to support the jurisdiction were discovery, accounting, fraud, and misrepresentation. — *Jones v. Bolles,* 9 Wall, 364, 369. In *United States Insurance Co. v. Cable,* 98 Fed. 763, the concellation of policies was involved. In *Hopkins v. Walker,* 244 U. S. 486, 37 Sup. Ct. 712, the cancellation of a location certificate which was a cloud on title, and where it further appeared that without the interposition of the court the plaintiff might suffer injury. In *Coler v. Board,* 89 Fed. 260, there was an attempt to impress a trust. In *Cummings v. National Bank,* 101 U. S. 153, the plaintiff had standing as a fiduciary and trustee seeking to protect his trust. In *Boyce v. Grundy,* 3 Pet. 215, and in *Green v. Railway,* 244 U. S. 522, 37 Sup. Ct. 682, there was present the element that if the chancery court dismissed the suitor the law court would only give him partial relief thus affirming the rule that where equity can attach at all it will give complete relief. In *Shelton v. Platte,* 139 U. S. 591, 11 Sup. Ct. 649, there was in fact a threat of irreparable injury and of multiplicity of suits. And in *McConihay v. Wright,* 121 U. S. 201, 7 Sup. Ct. 941, where the plaintiff sought to compel defendant to assert what right and title in reality he claimed, the court held that equity had jurisdiction because such suit afforded a better remedy than would ejectment.

5.

As before said the Circuit Court of Appeals agrees that mere illegality of a tax will not base the chancery jurisdiction. (R. 261, 262, 263). That is thoroughly settled by the decisions to which the Court refers.

> "A federal court is not vested with jurisdiction of a suit in equity to enjoin the collection of a state tax because the case is one arising under the constitution and laws of the United States within the meaning of the judiciary act of Aug. 13, 1888,

(25 Stat. at L. 433, Chap. 866) Sec. 1, unless there is apparent some ground of equitable jurisdiction recognized by the federal courts."

Indiana Mfg. Co. v. Koehne, 188 U. S. 681; 23 Sup. Ct. 452.

There must be more than that the tax is illegal and unconstitutional. It is not enough that what is being done and threatened, constitutes a common trespass. — *Dows v. Chicago,* 11 Wall. 180. It is said in *Boise v. Boise,* 213 U. S. 276, 29 Sup. Ct. 429, that the books do not disclose a case in which chancery interferred merely because the enforcement of an illegal or unconstitutional tax was threatened.

The Circuit Court of Appeals recognizes its holding can be supported only by finding that in addition to illegal taxation some of the recognized heads of the chancery jurisdiction were also involved. (R. 259). So all that needs argument now is whether or not finding the existence of these chancery ingredients is warranted by the record.

AS TO FRAUD.

It is more than doubtful whether any fraud is charged. The only claim that there is such charge must rest on allegations (and to say the least, it is doubtful if there are any), that the board only pretended to be establishing a new and independent drainage system and was in fact using that pretense for obtaining money wherewith to repair existing ditches. We say elsewhere that the charge is unfounded in fact; that objections on that score could and should have been made to the assessing board or before the board of qualization — and we show in another place that this very question was raised in the Supreme Court of South Dakota as to the project at bar and it found affirmatively upon construction of the statutes of the state that this was a new and independent project. Three of the appellees concede this to be so. In *Union Pacific v. Commissioners,* (C. C. A.) 217 Fed. 544, it was charged that the taxing officers

were guilty of fraud in the assessment of plaintiff's property and claimed that such fraud gave equity jurisdiction. The court said it was by no means true that for all alleged fraud equity may be resorted to for redress; — that that was not the case when a legal remedy has been given by the statute which is a substitute for remedy in equity; — that it is immaterial what the cause of invalidity is and that even if it consists of unconstitutionality or fraud it still effects no more than to make the tax invalid, which alone is not a ground of equitable jurisdiction. It is only where correction has been sought from the board of review and there has been a failure to secure redress that an overvaluation that is fraudulently discriminatory will open the doors of the court of equity. — *Keokuk v. Salm,* 258 U. S. 122, 42 Sup. Ct. 207. This was held, too, where a corporation was assessed on the basis of 75% of actual values while taxable property in general was assessed systematically and intentionally at not more than 52%. — *Greene v. Railway,* 244 U. S. 522, 37 Sup. Ct. 675.

In *Boyce v. Grundy,* 3 Peters, 213, there *was* a sufficient charge of fraud:

> "The bill was filed to obtain the rescission of an agreement entered into on the 3d of July, 1918, between James Boyce, the appellant's testator and devisor, and the complainants, for the sale of a tract of land lying on the Homocito river, in the state of Mississippi. The grounds set forth in the bill are fraudulent misrepresentations: 1. As to the testator's title to the land. 2. As to the locality of the land. 3. As to the liability of the lands to inundation. 4. As to the general description of the character and quality of part of the land, not examined by complainant."

6.

AS TO MULTIPLICITY OF SUITS THREATENED.

It does not appear any are threatened. One set of

suits is brought and is pending. These will settle the rights of the parties and there is therefore no need for any further suits. *Boise v. Boise,* 213 U. S. 276; 29 Sup. Ct. Rep. at 430.

Where the multiplicity to be feared consists of repetitions by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a Court of Equity ought not to interefere on that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. — *Idem.*

It is ruled in the *Boise* case, 213 U. S. 276, and in *Indiana Company v. Koehne,* 188 U. S. 681, that the doctrine of jurisdiction to prevent a multiplicity of suits has no reference to suits which might be begun by him who asserts multiplicity. Whatever else may threaten, surely there is no possibility of suits against appellees.

Multiplicity cannot successfully be invoked where the statutes give access to the Board of Review, and appeal from the decision of such Boards to the Courts. — *Indiana Company v. Koehne,* 188 U. S. 681; 23 Sup. Ct. Rep. 452.

To the same effect is *Keokuk v. Salm,* 258 U. S. 122, 42 Sup. Ct. Rep. at 208.

In *Union Pacific v. Ryan,* 113 U. S. 516, 5 Sup. Ct. Rep. 606, it was found that in fact a multiplicity of suits was threatened concerning the title of lots, and that there was a cloud which prevented sale.

AS TO IRREPARABLE INJURY.

As seen, there is nothing but naked conclusion in asserting any of the recognized heads of the chancery jurisdiction. It is ruled in *Shelton v. Platte,* 139 U. S. 591; 11 Sup. Ct. Rep. 646, that a bill to restrain the levy of a distress warrant which seeks to collect an alleged illegal tax which bill merely alleges that the property of plaintiff — an express company — is employed in Interstate Commerce, and that the seizure will

greatly embarrass the Company and will result in heavy loss to it and the public it serves — states no ground for equitable intereference. A vague allegation will not suffice. — *Boise v. Boise,* 213 U. S. 276; 29 Sup. Ct. Rep. at 429.

AS TO IRREPARABLE INJURY.

We agree with the Circuit Court of Appeals to collect an illegal tax will open the doors of the chancery court if there be involved in addition a threat of irremediable mischief. (R. 259). But here there was no such mischief nor the threat of any which the law recognizes. For a valid law gave opportunity to have it dteermined whether these appellees shall ever pay any tax. Surely it is not an irremediable mischief such as gives chancery jurisdiction that one might be defeated on resort to lawful tribunals including the right to go to appellate tribunals. Where such remedy exists no case of irreparable injury is made out. — *Keokuk v. Salm,* 258 U. S. 122; 42 Sup St. Rep. at 208.

All that needs to be said as to *Watson v. Sutherland,* 5 Wall. 74, is that it exhibits an undoubted case of irreparable injury. Injunction was allowed to restrain a creditor who had levied on a miscellaneous stock in retail trade suitable for the then current season and intended to be paid for out of sale. The stock was in possession of a young man recently established in trade, and doing a profitable business. There was allegation that he had conveyed to defeat his creditors. The Court finding there had been no such conveyance held injunction was authorized because the measure of damages at law could not extend beyond the actual injury done, and would not cover loss of trade, destruction of credit and failure of business prospects — commercial ruin, in short.

7.

NO CLOUD ON TITLE OF RAILROAD OR CITY PROPERTY.

The Circuit Court of Appeals rules there was such cloud on title by threatened sale as to constitute a grievance entitling plaintiffs to enter a Court of Equity. (R.

259,. We submit that with the exception of the Northern States Power Company there is no possibility of a cloud on title to real estate. As we understand the pleadings, there is not even a claim that as to the appellees a lien against its property might be effected. All we can find on that head are assumptions in each of the lower Courts that such lien would follow assessment. (M. 79, 80, 92).

In *Boise v. Boise,* 213 U. S. 276; 29 Sup. Ct. Rep. 430, it is said that a certain ordinance did not cast a cloud upon the title of the Company or its franchise; that it is not a lien on any of its property; that the only remedy for collection is one at law for the collection of the assessment.

Averment that an assessment of capital stock on franchise constitutes a cloud on title is insufficient to sustain a bill which seeks to enjoin the collection of such tax as illegal, where it contains no allegation that the corporation owns any real property. *Indiana Company v. Koehne,* 188 U. S. 681; 23 Sup. Ct. Rep. 452. It will presently be shown that in no proper sense do either of the appellees other than the Power Company own any real property.

A railroad can not be regarded as mere land, like farm land or building lots; its value depends upon the whole line as a unit to be used as a thoroughfare and means of transportation. One mile or two of its length is almost valueless by itself. — *Union Pacific Ry. v. Ryan,* 113 U. S. 516; 5 Sup. Ct. Rep. at 603.

> "Payment of taxes on final assessment against real estate is enforced (as against railroads) in the first instance not by distraint or levy, but by legal proceedings, to-wit, application by the collector to the county court for judgment against the property." — *Keokuk v. Salm,* 258 U. S. 122, 42 Sup. Ct. Rep. 208.

Section 8463 of the Revised Code of South Dakota provides merely that "the proportion of benefits which

any Railroad Company may obtain for its property by such construction shall be fixed and equalized together with the proportion of benefits to tracts of land." This, of course, makes no provision for placing any lien upon any property of railroad corporations.

Section 8464, provides for a notice after equalization and requires the notice to state, among other things, the amount of each assessment, "together with the amount assessed against * * * * the Railroad Company." The notice shall further give the date when the assessment will become deliquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run — still no provision for any lien. But the Section provides further that "the provisions of Chapters 7, 8, 9, Part 9 of this Title shall apply to the enforcement of the lien or drainage assessments so far as such provisions are applicable."

Section 6606, dealing with the subject of how collections are made and enforced is as follows:

> "All laws relating to the enforcement of the payment of delinquent taxes shall be applicable to all taxes levied under the provisions of this article, and whenever any taxes levied under the provisions of this article shall become delinquent, the treasurer may proceed to collect the same in the same manner and with the same right and power as a sheriff under execution, except that no process shall be necessary to authorize him to sell engines, cars or any rolling stock for collection of such taxes."

Under this, the tax is assessed against the Railroad Company, as a personal tax, to be enforced by execution against the personal property of the railroad.

It is obvious this deals with nothing but the seizure of personal property. And as before indicated, the statute could not validly go beyond that. The State could not seize upon a few miles of railroad in South Dakota which is a part of a large interstate carrier system and sell those miles. Beyond doubt, such action wuold be

restrained as an interference with the carrying on of Interstate Commerce.

Section 8463 has, as to cities also a provision for equalizing benefits by the construction of drainage, to highways or otherwise.

Section 8464 provides that "whenever any assessment for drainage * * * has been made against any * * * city * * * as provided in this Chapter, the officers of such * * * city * * * whose duty it is under the law to make the levy of taxes shall at the time of the next annual tax levy after the making of this assessment, make a levy for drainage purposes for such amount as shall be necessary to pay such assessment, which tax shall be collected the same as other taxes." Of course the proposed assessment at bar would not result in any lien upon the property of a city.

In a word, all claim that equity has jurisdiction because of the casting of a cloud or because of a lien either threatened or effected, falls to the ground because the premise is unsound.

Ohio Railway v. Ditty, 232 U. S. 576; 34 Sup. Ct. Rep. 374, is merely a case wherein it was clear that lien was provided to make the tax effective.

So of *Wallace* case, 253 U. S. 66; 40 Sup. Ct. at 436. And *Union Pacific v. Board,* 247 U. S. 282; 38 Sup. Ct. 510.

XI.

THE CONSTITUTION EMPOWERS THE LEGISLATURE TO AUTHORIZE BOARDS LIKE APPELLANT TO ESTABLISH SUCH DRAINAGE PROJECT AS THE ONE AT BAR, AND THE LEGISLATURE HAS AVAILED ITSELF OF THIS POWER AND HAS AUTHORIZED SUCH ESTABLISHMENT.

It was the opinion of each of the lower Courts that appellant Board had no power to establish any drainage project unless it was one for the purpose of draining agricultural lands. (M. 79; R. 257).

It does not seem to be contended, and it cannot well be, that the Constitution of South Dakota does not authorize such a project as the one at bar. What is asserted is that while there is authority for the Legislature to authorize the establishment of such a one, that constitutional provision is not self-executing — in the language of the brief of the appellee Omaha in the Circuit Court of Appeals (30) that the Legislature has never passed an act putting into effect the authority vested in the Legislature to create drainage districts except such as are to drain agricultural lands. According to the trial Judge, while the Constitution has provided for the drainage of agricultural lands and also for the drainage of lands "for any public use", there is no statutory enactment under which drainage districts may be formed for the drainage of lands "for any public use". (M. 93, 94).

As to what the Legislature is authorized to do by the Constitution, there has been construction by the highest Court of the State and it is its holding that the Legislature is empowered to provide for either of two methods in authorizing drainage work. It may give authority to incorporate a drainage district and vest its corporate authorities with power to establish — or it may dispense with this and vest the necessary powers in such bodies as the Board of Commissioners. — *Davidson v. Watertown Tile Company,* (S. D.) 196 N. W. 96.

To like effect is *Tuthill v. McMackin,* 31 S. D. 507.

The Circuit Court of Appeals is of opinion there was no intention to establish a drainage for the purpose of draining agricultural lands. (R. 257). The sole purpose was in fact to drain these lands, and it may be conceded that the method adopted to accomplish this end, was to hasten the flow of the flood water tereby preventing it from ponding back on the lands. The property of the appellees was such as could be used as farm land, if so desired, though it may be conceded that it was not being used for such purpose at the time of the construction of this project. While there is testimony that appellees property has never been and cannot be used for agricultural purposes, one witness for the plaintiff testified in effect that the project did not deal with agricultural lands, excepts to a very limited extent, if at all. (R. 208). And there is testimony that there was no natural reasons why the lands of the plaintiffs might not in whole, or in part at least be used for agricultural purposes. (R. 183, 185, 197). All this, however, is not very important, because we rest this branch of the case on the proposition that the drainage project was for a public use and was authorized even if it was not intended for the drainage of agricultural lands which the constitution had made merely one public use.

The controlling question is whether the legislature has used the power given it by authorizing Boards such as this to establish drainage systems such as this.

It admits of no doubt that the Legislature has so availed itelf. All claims to the contrary are based on patent misconception of Section 8462 Revised Statutes. It certainly availed itself of the power which the Constitution has given the Legislature, for said statute authorizes establishment, not only of drainage for draining agricultural lands, but of any drainage system which the board finds conducive to the public health, convnience, or welfare. Indeed, so far from this statute limiting authority to the drainage of agricultural lands, it makes the establishment of systems for that purpose

merely alternative. It provides first, that if the Board finds the drainage proposed conducive to the public health, convenience, or welfare, then it may establish and then continue, *or* if it finds it necessary or practicable for drainage agricultural lands it may establish a drainage system to accomplish draining such lands.

2.

We are of opinion the Board was authorized to construct such drainage project without any reference to the particular Constitutional provision which has before been referred to.

Tuthill v. McMacken, 31 S. D. 507, so far from holding that the right to drain is limited to the drainage of agricultural lands construes the constitution to provide that one effect of the amendment of it was to make the drainage of agricultural land a public work. The amendment seems to be purely declaratory — to be an attempt to say in terms that the draining of agricultural land is a taking for and engaging in a drainage project for a public use. It needed no exercise of a power given by this particular constitutional provision to authorize the establishment of a drainage project other than one designed to drain farm lands. Authority to engage in such a project exists under the general provision of the South Dakota constitution and the general statutes availing of those provisions. Without reference to this particular amendment those who engaged in drainage projects generally were engaged in a public work for the public use. *Tuthill v. McMacken,* 30 S. D. 507. Without reference to this specific amendment there was authority to engage in works that were for the public use. The matter comes fairly within the rule laid down in *Fallbrook v. Bradley,* 164 U. S. 112; 17 Sup. Ct. Rep. 65, which rules that statutes authorizing drainage of swamp land have frequently been upheld independently of any effect upon the public health, as being reasonable regulation for the general advantage of those who are threatened as owners of a common property.

XII.

THERE IS NEITHER PLEA NOR PROOF OF ANY FRAUD, TO SAY NOTHING OF SUCH FRAUD AS GIVES EQUITY JURISDICTION, AND THE HIGHEST COURT OF THE STATE IN CONSTRUING THE STATUTES OF THE STATE HAS RULED THAT THERE WAS NO FRAUD.

We find ourselves unable to find any allegation of fraud. It seems to have gotten into the cases by declarations of each of the two lower courts, that the project at bar was a mere subterfuge; that a larger sum could be raised for a new drainage project than repairing an existing one, and that the board attempted to obtain the larger sum by pretending it was creating a new system and did this for the purpose of using what was raised in maintaining and repairing an already existing drainage system.

The trial court asserts at considerable length that what was really done was providing money to cure in the existing system defects of construction which were the fault of the appellant board; and that all that was in truth required to be done was to cure these defects in construction. (M. 85, 86, 87, 88, 93). Though this is said, the trial Judge points out forcibly how much more than mere repairing was needed by stating in detail how great was the danger at the time when this project at bar was established and how radical the steps needed to be to avoid this danger. (M. 86, 87, 88). The Circuit Court of Appeals admits the great danger that existed at the time of the establishment. (R. 254).

The Supreme Court of South Dakota ruled as follows:

> "It is contended by the appellant that the project contemplated by the petition was not the creation of a new drainage district or a new drainage ditch, but merely to repair a project already in operation, and that, therefore, the board was without authority to proceed."

"But this contention is not tenable. The constitution (Section 6, Article 21) and the statute (Section 8458) gives the board the same authority to reapir an old ditch that it does to construct a new one."

"But the two projects were by no means identical. The drainage district involved in this case contains a materially larger area than the combined area of the two old ditches."

Gilseth v. Risty, 46 S. D. 374, 193 N. W. 134.

"No fraud or bad faith on the part of the board has been shown." (135).

In addition, two of the appellees conceded that to be true which the Supreme Court affirms as above set forth. (Brief in Circuit Court of Appeals of Appellee Omaha, 24, 25, 28).

The trial Judge in effct sums his view with the statement that everything that was done merely came to giving the old ditches a new name. (M. 89). In this holding he disregarded that the project was initiated on a petition on which the City of Sioux Falls was one signer and which petition prayed the establishment of a new and enlarged drainage district, and which suggested also the enlargement and improvement of the old ditches, the canalizing of the course of the river and the enlargement of the assessment area by adding some ten sections (R. 42); overlooked, that it cost One Hundred Twenty-seven Thousand and some dollars to construct the old system and over Three Hundred Nine Thousand Dollars to construct the new. (R. 185), (R. 224 to 229), (M. 18). He overlooks his own statement that so great a danger existed as that no mere attempt to repair could meet it. (M. 86, 87, 88). And so does the Circuit Court of Appeals. (R. 254). He overlooked that the old ditch was but forty feet wide at the bottom with a side slope of one and one-half to one (M. 119; R. 159); while the new, is from eighty to one hundred feet wide, for miles (M. 256; R. 165);

overlooks the increased discharge capacity of the new ditch (P. 294; R. 180, 181); the nature and amount of work that was done. One item was that three miles of the original ditch was enlarged to a width of eighty to one hundred feet and that a dike five or six feet high was thrown up along the new ditch (R. 164, 204); overlooks, the size of the new drainage area (R. 179), and that it was increased so as to cover all the land described in the notice of equalization. (R. 19). Overlooks testimony that the effect was to establish a more perfect drainage system with more substantial controlling works and equipment and ditches of more than double the capacity of the old ones. (R. 19). Overlooks testimony that the effect of the canalizing and enlarging and installing wiers, dams, and controlling works and a substantial spillway, made a double and more perfect system of drainage (R. 41); testimony, that the real purpose of the ditch was to take the water from the river in flood time and conduct it to the spillway to prevent overflow from spreading over farm lands (R. 209); that the ditch serves the purpose of a drainage ditch as well as to care for overflow and was put in for the purpose of serving in both respects (R. 237); that through the diking when flood waters backed up on the farm lands to the west these lands were protected (R. 165); that the ditch was so effective as to lower water in wells to a very considerable extent (R. 208, 209); there was overlooked the detailed testimony by the engineer of the board as to how effective the new project was. (R. 236, 237).

The conclusion that merely repairing was the sole purpose is reached by ignoring all which showed that much more than repairing must have been in contemplation. The trial court seem to have been quite impressed by the fact that the board did not follow statutes that dealt with the abandonment of ditch projects or with projects to maintain and repair existing ditches. In other word, it seems to be found it was planned to do nothing but repair because repair statutes were not

acted upon. (M. 88). The Circuit Court of Appeals indulges in the same line of reasoning. (R. 255, 256).

We submit in all confidence there is no warrant for basing the decree below upon anything having so much as even a fraudulent aspect.

XIII.

AS TO DISREGARD OF STATUTORY DIRECTIONS.

The type of complaint on this head is fully exhibited in the statement of matters for consideration. From these we select, that as to action required to be had by resolution no resolution was passed; that the statute direction that the petition be filed was disregarded (ante 32); that the statute requiring petition to be sent to th state engineer was not followed. (Ante 33).

As to complaint that the construction was not on competitive bide (ante 34), the statute authorized what was done. Section 8465 provides that the work shall be let on competitive bids, the board being given the right to reject all bide, — and

> "If in the judgment of the board the entire drainage or any part thereof could be constructed for less money than the amount of any bid submitted therefor the board may cause such drainage to be constructed, hire the necessary labor and purchase all necessary materials for such construction, without letting contracts therefor."

The Board took that view of the situation.

The record shows without dispute that all complaints charging failure to comply with statute are unfounded.

All alleged failure to comply with the statute are foreclosed by the Gilseth case.

> "Numerous irregularities on the part of the board were alleged and it may be assumed that the board did in certain instances proceed in an ir-

regular manner, but it is not shown that the board did in any instance exceed the jurisdiction conferred upon it by law."

Gilseth v. Risty, 46 S. D. 374.

"All the irregularities complained of occurred after the board had acquired jurisdiction of the subject-matter". (135).

XIV.

AS TO THE CONTENTION THAT THE STATUTE LAW WAS ADMINISTERED IN AN ARBITRARY AND DISCRIMINATORY MANNER AND THAT THE ASSESSMENT OF BENEFITS WAS WITHOUT A BASIS IN REASON.

We have at the outset the question whether this complaint of arbitrary and discriminatory action includes as well a claim that by such action there was a violation of the Constitution of the United States — a violation of the guaranty of the equal protection of the laws. As to this it is our position that the bills do not assert there was any arbitrary conduct or discrimination in violation of that Constitution. All that is said is that there was arbitrary and discriminatory conduct so that if the apportionment of benefits be made as threatened and as stated in the notice given this "will deny and deprive plaintiff of the equal protection of the laws". (P. 14; O. 15; M. 15; M. 13, 14; R. 15; S. 13). A protest against such conduct must be made upon the ground that it violates the federal constitution. — *Hinds v. Township,* (Mich.) 65 N. W. 545. It is not enough to say that it will deprive of the equal protection of the laws, because the constitution of South Dakota (Art. 6, Sec. 18), has the same guaranty — wherefore, it cannot be told by this plea whether complaint is made of violation of the state constitution or the constitution of the United States. Neither is it clear that either of the lower courts put decision or any part of it on the ground that there had been a denial of the equal protection of the laws

in violation of the federal constitution. In the opinion of the trial Judge it is said there was a higher rate as to appellees, that it was ascertained on a different basis from that employed as to lands, that no direct benefits resulted, that the method was arbitrary and the benefits fanciful. (M. 81, 90). The opinion then enters upon what the appellees claim on this head, to-wit, that the assessment of benefits is arbitrary, unjust, illegal and void; that thereupon they claim that the assessment is such as to result in the property of the plaintiffs bearing more than its share of the burden, though not benefited; that the alleged benefits from this improvement have not been estimated on these properties in accordance with the basis used as to farm lands nor by any standard which will produce approximately general results; that the taxes upon the property of the plaintiffs are based upon some fanciful view of benefits, while farm property is assessed wholly according to its area and position, and that said property is sought to be burdened on a basis so wholly different from that used for ascertaining the contribution demanded from owners of agricultural lands as necessarily to produce manifest inequality. (M. 84).

The Court "suggests in conclusion" that the taxation that is imposed upon each of the plaintiffs:

> "Is at much higher rate and upon a different basis than the tax upon land lying within the district. * * * * It is further shown that the benefits estimated on the plaintiffs property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. Taking for instance, the tax upon the City of Sioux Falls, for its miles of streets, with no pretense that there is any method of taxation or measuring a benefit or a gain that would produce even approximately correct general results when considered with benefits to the lands in the district. Simply a vague, indefinite generality indulged in by the engineer and adopted by the board.

benefits purely fanciful with no substantial basis. Take the railroads, there is no pretense that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protction of the law that must be extended to all". (M. 90, 91).

It will be noted it is not said that the Constitution of the United States had been violated.

The Circuit Court of Appeals contents itself with saying the plaintiffs claim that the attempted assessment is arbitrary, unjust and illegal, and constitutes a discrimination so palpably arbitrary as to amount to a denial of the equal protection of the laws. R. 252, 253).

And it declines to pass upon any constitutional questions. We, therefore, repeat there is no complaint or decision that any alleged arbitrary or discriminatory conduct violated the Constitution of the United States.

Be that as it may, if it were asserted the Constitution of the United States had been disreyarded that will not avail in this collateral suit because the plaintiffs had full opportunity to object to the method of the proposd taxation and declined to avail themselves of that right.

2.

This brings up the question whether if it be assumed that the federal court had jurisdiction to decide this question it decided rightly. Before entering into this more in detail, we submit the main complaint on this head is that by reason of discrimination the appellees were threatened with an excessive tax, with having to bear more than their just share of the cost of

the drainage project. — And that, too, is a matter they were bound to present to the board of equalization before they could enter either a state court or a federal court. We submit also that the *Gilseth* case settles for this court that nothing arbitrary or discriminatory was done.

Entering now upon the question whether the evidence shows there was arbitrary and discriminatory action, it is a fair statement in the rough that the testimony was in conflict and that it should have been left to the board of equalization to resolve this conflict instead of turning the federal court into a reviewing tribunal.

The District Court ruled that no direct benefits to the property of the appellees within the City are shown. (M. 90, 92).

It cannot be stressed too much that the major prim-ise for all this is utterly lacking. It is difficult to see how it may be found there was discriminatory assessment as between agricultural lands and the property of the appellees when there is neither plea nor proof what these respective properties were worth; or what the assessment would be after equalization. (M. 5).

There is a statement that the project "was designed for the purpose of draining upwards of 20,000 acres of agricultural land", and there is a detailed description of where this land is located. There is no allegation that the drainage district in fact had that many acres; there is not even a suggestion as to the quality of this land or its value. Nor is there allegation as to how much the property of the appellees was worth. What basis is there for holding that there was discrimination between these two classes of property. If the property in lands that was subject to the assessment and the property of the appellees subject to assessment are of the same value, it would not be unreasonable to say it would not be arbitrary to tentatively fix benefits at the same rate, and for that matter, in the same sum.

Passing that, we have affirmative testimony that

all that was done was on careful and honest consideration and all substantially on the same basis. (R. 161, 162, 163, 166, 232, 233, 238, 239). While the trial court said (M. 91) there is no evidence that the Railroad Companies were treated like owners of agricultural lands and that the discrimination is palpable — there was testimony in detail which tended to show that there was no such discrimination and that the method used was not arbitrary. (R. 160, 256).

While the trial Court found there was a method of assessment that would necessarily produce manifest inequality in that farm property was assessed wholly according to its area and position, which was not done as to other properties (M. 84) — there is much testimony there was no discrimination and there is very much there was none against the City, and some that there was. (R. 160, 162, 170, 178, 178, 182, 232, 233, 234, 234, 241, 242, 253, 254, 255, 256, 257, 258, 260, 262, 263, 266).

The Court found the method for assessment was arbitrary and took a farciful veiw as to benefits which was not calculated to produce even approximately correct general results. (M. 84).

As to the methods not being arbitrary, much is found. (R. 162, 232, 233, 238, 239, 251). There is testimony that the method used involved great care and consideration, and therefore was not arbitrary. (R. 162, 163, 233, 234). In that connection, it was suggested in evidence that probably the tentative assessment might differ from the actual benefits received but that this could have been in a measure helped if the appellees had not seen fit to make no appearance and to give help by presenting their views. (R. 155, 156, 158).

There is testimony that the property of the appellees was in such position with reference to the river and otherwise as at least to be exposed to danger from flood. (O. 163, 182, 183, 184, 245; R. 169, 170, 171, 191, 192, 239, 240). Testimony, that past floods had

done no substantial damage to the property of any of the appellees. (M. 224, 246, 247; R. 179, 180, 181, 183, 193, 198, 200); that no Power Company property had been flooded since 1900 (N. 244); that the Rock Island has not suffered from even a threat of water damage from January 1, 1913, to June 1, 1920, (R. 181, 182); nor the Milwaukee since 1897. (R. 193). And there is testimony that this is so of practically all the appellees. (R. 177, 179, 189, 183, 189, 191, 194, 200, 103). On the other hand it is testified there was past flood injury. (R. 172, 183, 193, 200). (M. 247).

There is testimony that the project has accomplished nothing that could not have been accomplished at trifling expense by simply abandoning the old ditches and preventing the flow of the water through the bluff and into the river. There is variety of testimony as to why the project is needless. (R. 172, 180, 191, 204, 207). And testimony to the effect that it had done more harm than good. (R. 189, 193, 201, 204). And that no protection against floods was needed. (N. 244, 245; R. 193, 196, 197, 198, 202, 205, 206, 207, 297, 198; O. 196; M. 246, 247) — and that the elevations were too high to need protection against floods. (R. 177, 183, 188, 189, 191, 196, 199).

There was conflict of whether or not the operating expense of railroads was lessened. (R. 163, 168, 171, 172; N. 246).

There was much testimony without any substantial dispute that the Board acted honestly and according to honest judgment so that the most that can be claimed is that there was an honest mistake of judgment. (R. 232, 233, 234, 251, 255, 256, 258, 262). As said in *Embree v. K. C. Dist.*, 240 U. S. 242, 36 Sup. Ct. at 320, it presents a question which is one of opinion and degree. There is testimony that benefits accrued. One illustration is that in the past tracks had been washed out so that trains could not be run for eight or ten days. (M. 33; R. 192). Other instances are given. (R. 190, 200, 202, 241, 242, 243). Another instance is that, be-

fore, well water in the city was often unfit for drinking which was remedied after the project was constructed. (R. 279, 281). There are still other instances. R. 155, 156, 518, 234).

The Schodjt's dam was put in to prevent the water that had broken from the river into the ditch from being diverted; this was done at the request of the appellee Power Company, which had objected to the ditch taking its power; and the diversion was further promoted by the controlling gates at Thompson's. (R. 233).

It was testified that there was no benefit to the Power Company. (P. 197, 198, 295, 296, 297; R. 195, 196, 241, 259, 264). As to this there is conflict. (N. 243, 246; R. 241, 259, 264).

One witness gives it as his opinion that no benefit has resulted to railroad property. (R. 189). Link speaks to the same effect as to benefits to the Power Company plant. (R. 206).

When it is all said and done, there is nothing in all this that excused the appellees from presenting their claims to the Board of Equalization.

As to arbitrary method of assessment see page (5 ante); as to arbitrariness with reference to unit method (ante 45); as to arbitrariness concerning benefits (ante pp. 39 to 44, both inclusive, 46, 47, 48); as to benefits (ante 5), (And 55, 56, 57, 58); as to arbitrariness by discrimination (ante 34); as to discrimination (ante 5, 35 to 39, both inclusive, 44).

A brief on this subject will be presented in the summary that follows.

Each of the defendants made an affirmative plea of stoppel. These were never met by any denial in pleading. — (See O. 39; M. 34; S. 39; N. 38; P. 38; R. 39). Indeed, we are unable to find that the plea was met at all. It sets out specific conduct. A rought and fairly accurate summary is that the City is estopped because it was a signer on the petition that initiated the project, (M. 30, 31, 32, 33; N. 39; O. 35) — and that its representatives attended some of the proceedings and its commission witnessed some of the work while in progress — and that there is an estoppel by the acts of the railroads in co-operating as to the construction by carrying freight and men for it, and being paid for it. (N. 275, 276, 266; R. 237, 231, 279, 280, 183, 191, 211; S. 245).

The Circuit Court of Appeals says:

> "Appellants plead estoppel against all of the appellees, and claim that appellees are not in position to maintain their actions, for the reason that as to some of the railroad companies, the engineering departments have been in close touch with the drainage ditch proceedings; that some of them were assessed for benefits received upon the construction of the original ditches in the same territory, received benefit thereby, and have not protested before the bringing of this action. As to some of the appellees it is claimed that their officers showed interest in the construction work and encouraged the board of commissioners to do the work; that some of the appellees, for instance, the Chicago, Milwaukee & St. Paul Railway Company, hauled men and materials used in the construction work, and stopped trains between stations to unload men and materials."

> "As to the City of Sioux Falls, it is claimed by way of estoppel that under due authority the

mayor and city auditor signed the petition for the project". (R. 264).

It will be seen that the Circuit Court of Appeals points out what, the City did, and then stops; that it recognizes the acts pleaded (and which the undisputed testimony shows were done) and then holds that these acts do not constitute an estoppel because the city and the railroads did not have notice that they were to be affected by the drainage construction or by assessment for its costs. (R. 264).

This holding is undoubtedly in response to an argument made by appellees that under the South Dakota statute no notice was required to be given until the assessment of benefits had been made; that, therefore, up to that time appellees have no knowledge that their property situated outside of the original assessment area of the old ditches is affected by the drainage construction or would be assessed for its costs — and that all the acts upon which an estoppel is claimed were done during the time construction work was going on and long before the making of an assessment of benefits and the publishing of the equalization notice.

All this is a misconception of the record and of the statute law. The pleadings by the appellees demonstrate it is not claimed that no notice was required until the assessment of benefits had been made. The attack was, first, that a notice required by Section 8461 of the Revised Statute to be given earlier than that is not such notice as the persons affected are entitled to have under the Constitution of the United States. The exact complaint is it is too general, for in that, while it requires that notice be given as to the hearing on the petition asking establishment and though it is to describe the route of the proposed drainage and the tract of country likely to be affected thereby, it may do this in general terms, and that this is not helped by the requirement that it describe the separate tracts through which the proposed drainage will pass and to give the names

of the owners thereof as they appear from the records of the office of the Register of Deeds on the date of the filing of the petition, the complaint is that the statute makes no requirement as to who shall be summoned to the hearing except that it shall be "all persons affected by the proposed drainage" and "all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage". It was said in the printed brief presented to the Circuit Court of Appeals that while the board thus had before it the names of the property owners through wose land the drainage ditch passes neither it nor anyone has the slightest idea of what land will be assessed for the cost of construction because the only notice that is given is this general notice "to all persons affected"; that there cannot be found a case in which a mere general notice directed to "all persons affected" has been held to be sufficient notice to a property owner that his property is to be included within the assessment area; that under the statutes the first time the description of the land "affected" is published is when the notice of equalization is given. In fewer words, in framing their pleadings appellees did not present that they were not estopped because what they saw was done before any notice was required to be or was given. They say nothing as to the estoppel pleaded against them and urge nothing on any head except that while there is to be and was given a notice before they saw what it is claimed estops them, that such notice is violative of the federal constitution.

That this was the issue on this point is made clear by the opinion of the trial Judge:

> "Plaintiffs note that this statute except as to property owners through whose property the proposed drainage will pass provides only this general notice, and especially complain that it gives no property owner any notice that his particular tract of land is included in the lands affected by the proposed drainage, and insisted the notice is broad

enough to take in each and every tract of land included in the boundaries of the county in which the drainage project is instituted. It is true that other than this general notice there is no notice whatever given to the property owner that his particular land is affected by the drainage proposition or that he has any interest in it or will be mulched in assessment for benefits by reason thereof. He receives no summons or other notice, either by personal service or by mail. He has, however, the general notice given in the published summons by the commissioners to "all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed". (M. 77).

He then holds that this general notice is constitutional:

> "I repeat that under the South Dakota statute there is ample provision for notice to every land owner and an opportunity given to be present at the hearing at which time and place he may assert all objections against the validity and justice of the proposed charge upon his property before the tax is levied and carried by the county auditor as such on the books of his office and made a lien upon the property". (M. 82, 83).

In still other words, there was no issue here on whether certain acts constituted or did not constitute an estoppel; if it be assumed there was such issue, none that there was estoppel because when the acts upon which an estoppel is ureged were done no notice had been given which would cause the one sought to be estopped to know that what he saw was something that might affect him — and that the only issue was whether or not a notice which in fact was given and which advised the one sought to be estopped with notice that what he saw affected him, was unconstitutional. — And it is settled by the highest court of the State and binding on

this court that the general notice was sufficient under the statutes of South Dakota. — *State v. Pound,* 34 S. D. 628, 150 N. W. at 287, 288.

There was also a claim by the appellees that if the general notice be assumed to be valid and sufficient yet the statute is fatally defective because while it provides notice the provision does not include any notice to railroad corporations; that as to them no notice at any stage of the proceedings is provided. (See Omaha brief, in the Circuit Court of Appeals, pp. 30, 31, 32).

Finally the Circuit Court of Appeals dismisses the subject of estoppel with the following statement:

> "There can certainly be no just claim of estoppel as to those appellees whose property was not within the area of the original drainage ditch No. 1 and No. 2". (R. 264).

We are unable to understand how the fact that one does not have property within the area of the old ditches prevents his being estopped from objecting to the new ditches unless he had no property within the area of the new ditches. We concede for the sake of argument that one who has no property within the new area might not realize that what he saw in the way of ditch construction affected him, and on that premise could not be estopped by what he saw and apparently acquiesced in. But if he had property within the new area and remained silent when he should have spoken the fact that he owned no property within the area of the old ditches certainly does not destroy the estopel. On this point it cannot be the test whether one did or did not own property in the old drainage ditch territory. Whoever owned property in the new area would or would not be estopped without any reference to where else he did or did not own property.

We submit it was error not to hold that appellees are estopped.

SUMMARY OF ARGUMENT, AND BRIEF.

1.

AMOUNT IN CONTROVERSY.

Ruling on (R. 262, 26).

The amount in dispute must exceed Three Thousand Dollars even if a federal question is presented.

Sec. 991 (Judicial Code, § 24, as amended, Act, Dec. 21, 1911; c. 5) 1, U. S. Compiled Stat., 1916, annotated, bottom page 553.

The suits at bar are within none of the exceptions.

Idem, bottom pages, 758, 764, 784, 786, 798, 800, 802, 803, 805, 913, 814, 817, 830.

Such amount must be shown, affirmatively.

Johnson v. Wilkins, 116 U. S. 392; 6 Sup. Ct. Rep. 600.

Washington Ry. v. District, 146 U. S. 227; 13 Sup. Ct. 64.

Green v. Fisk, 154 U. S. 668; 14 Sup. Ct. at 1193.

Citizens Bank v. Cannon, 164 U. S. 319; 17 Sup. Ct. at 90.

Though there is an allegation that the drainage project was intended to drain 20,000 acres of agricultural land and though it appears that the board in assessing benefits considered the value of the property in the district belonging to appellees, there is neither plea nor proof as to what either said lands or said properties were worth; and even if there had been such plea and proof it would avail nothing because the values of the said lands and properties are not the amount in controversy.

At the least, proving the values of these was an essential step toward arriving at an amount in controversy.

Washington Ry. v. District, 146 U. S. 227; 13 Sup. Ct. 66.

Johnson v. Wilkins, 116 U. S. 392; 6 Sup. Ct. 600.

These suits were brought at a time when nothing had been done beyond making a tentative assessment of benefits and giving notice of time and place at which this tentative apportionment would be equalized.

It is said in *Green v. Fisk,* 154 U. S. 668; 14 Sup. Ct. 1193:

> "There has been no order even for an accounting, and as yet we are not advised there ever will be one; much less that, if it should be made, a balance would be found due from the appellant sufficient to make the value of the matter in dispute, on an appeal by him, such as our jurisdiction requires. As the appellant, to sustain his appeal, must show affirmatively that more in pecuniary value than our jurisdictional requirement has been adjudged against him, he has failed to make a case for us to ronsider."

In *Washington Ry. v. District,* 146 U. S. 227, 13 Sup. Ct. at 66, an appeal was dismissed where the bill alleged that complainant had refused to pay a certain tax and if same were held to be a lawful tax, "the amount which would probably be computed and charged against the complainant by the said municipal authorities would reach nearly if not quite the sum of $5,200.00 besides interest, fines, and penalties".

It is said in *Milheim v. Moffat,* 262 U. S. 710, 43 Sup. Ct. at 699:

> "It is contended that the commission arbitrari-

ly adopted an ad valorem basis of appraisal for the apportionment of benefits to the several parcels of land within the district, without reference to the actual benefits in each. This argument erroneously assumes that the commission had finally adopted such a basis for its appraisal. This is not the case. It had merely adopted a tentative ad valorem basis, subject to modifications and corrections, before final confirmation, after the hearing of objections filed by land owners, of which public notice was given. These land owners did not seek to have the commission modify or correct this tentative basis of apportionment or file any objections to the appraisal of benefits to their properties. Presumably if the tentative appraisal was made on an erroneous basis it would have been modified upon a proper showing. Having failed to object to the tentative ad valorem basis adopted by the commission or to appear before it for the purpose of obtaining modifications or corrections as to their lands before the final adoption of such basis, they have here no sufficient ground of complaint.

"Where a city charter gives property owners an opportunity to be heard before a board respecting the justice and validity of local assessments for proposed public improvements and empowers the board to determine such complaints before the assessments are made, parties who do not avail themselves of such opportunity cannot be heard to complain of such assessment as unconstitutional".

The amount cannot be based upon any contingent loss, including what may result from the probative effect of an adverse judgment, however certain it may be that such loss may occur.

Ross v. Prentiss, 3 How. 771.

New England Co. v. Gay, 145 U. S. 123; 12 Sup. Ct. 816.

As to the prematurity of attack upon proposed tax-

ation it is held in *Western Union v. Howe,* (C C. A.) 180 Fed. at 53, 54, that there may not be relief, "against anticipated injury consequent upon anticipated assessment before the assessment was completed".

The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of its Constitution. If, however, it should turn out that we are mistaken in this respect, the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States.

> "The doctrine here is that the aggrieved party must first invoke the aid of the state courts, since it is for the state courts to remedy the acts of state officers done without authority of, or contrary to, state law. In such a case the complaining party must exhaust his remedy in the state courts by prosecuting his case to the state court of last resort for cases of that character; and, until he has done this, it cannot be said that he has been denied due process or deprived of his property by state action. If the decision of the highest state court to which he can resort is adverse to him, he can then take his case on writ of error to the United States Supreme Court upon the ground, not that the proceeding or action complained of was contrary to or unauthorized by state law, but upon the ground that what was complained of as a deprivation of life, liberty, or property without due process of law in violation of the fourteenth amendment has at last received the sanction of the state and, in effect, become the act of the state itself". 5 Ency. U. S. Sup. Ct. Rep. p. 545.
>
> *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.,* 185 Fed. at 372.

2.

NO SUBSTANTIAL FEDERAL QUESTION WAS PRESENTED.

Each of the appellees other than the City of Sioux Falls has diversity, had there been an affirmative showing of sufficient amount in controversy these five had the right to enter the federal court, even though no substantial federal question was presented. But the City of Sioux Falls needs both the amount in controversy and the substantial federal question.

It is our position that no substantial federal question was presented because at the time these bills were prepared it was as well settled as any law proposition has ever been that in a collateral action such as this the federal courts could grant no relief as to anything complained of in the bills.

Appellees sum up that the due process of law clause requires that "at some stage of the proceedings the tax payer must have an opportunity to appear and be heard both as to the validity of the tax and as to the amount (Omaha brief, in C. C. A. 17); that in a special assessment proceeding the tax payer must have the right at some time or other in some manner or other, to be heard both as to the validity and as to the amount of assessment. — (Idem 20).

Exactly this is held in:

Londoner v. Denver, 210 U. S. 379, 28 Sup. Ct. 714.

Voight v. Detroit, (Mich.) 82 N. W. 253; being 184 U. S. 115 on appeal.

Embree v. K. C. Dist., 240 U. S. 242; 36 Sup. Ct. 320.

McGregor v. Hogan, 263 U. S. 234; 44 Sup. Ct. 51.

Paulson v. Portland, 149 U. S. 30.

Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 926.

The trial court held that the general notice given

as to the hearing on the petition for establishment saved the case from the Fourteenth Amendment. (M. 77).

This notice gave time and place for hearing. (R. 55; O. 55; M. 62; N. 54; S. 53; P. 56); it concluded with a statement "all persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause if any they have why the said drainage should not be established and constructed" and that "reference is hereby made to the files in said proceedings for further particulars". (M. 71; R. 62; O. 65; P. 65; S. 63; N. 63).

This was sufficient to give the board jurisdiction.

Lamb v. Connolly, (N. Y.) 25 N. E. 1043, 1044.

Hennessey v. Douglas, (Wis.) 74 N. W. 987.

Pittsburg v. Backus, 154 U. S. 421, 14 Sup. Ct. 1116.

There was sufficient notice of time and place at which the tentative apportionment of benefits would be equalized. (S. 17; R. 19; N. 19; O. 19; M. 19; P. 19).

On the equalization hearing review could be had on every matter set forth in the petition asking establishment.

Fallbrook v. District, 164 U. S. 112, 17 Sup Ct. 62.

People v. Hagar, 52 Calif. at 183.

There could be review on whether the lands would be charged with benefits including all that in the judgment of the board would be benefited. (Opinion of trial Judge, M. 78).

There was the right to make objection to the organization of the district and whether lands were included that should not be and on whether lands included would be benefited.

Embree v. K. C. Dist., 240 U. S. 242, 36 Sup. Ct. 320.

To raise question as to benefits to the owner's lands including all questions of fact which embraces the question of benefit to the lands.

Fallbrook v. District, 164 U. S. 112, 17 Sup. Ct. 62.

On whether the benefits tentatively assessed were out of proportion. (Idem). And as to the apportionment among the land owners.

Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 926.

They could there raise all pertinent and available questions and dispute their liability or its amount or extent. (Idem). And question the constitutionality and validity of the act; also the amount and mode of the apportionment itself. (Idem).

Could present any legal ground of objection including fraudulent discrimination.

Keokuk v. Salm, 258 U. S. 122, 42 Sup. Ct. 208.

Had the right to present whether the project would be a public benefit, as well as whether it would benefit their lands.

Soliah v. Heskin, 222 U. S. 522.

They were bound before attempting to enter any court to exhaust the adiministrative tribunals which the state had provided for raising all of the above questions.

Fallbrook v. District, 164 U. S. 112 17 Sup. Ct. 62.

And it is only where the matters that may be presnted at the hearing are unduly limited that the due process of law clause can be invoked.

Georgia Railway v. Wright, 207 U. S. 127.

If the legislature had itself established this district this would settle the propriety of establishing, or in-

clusion, or what is benefited and even how much. The only difference between legislative establishment and establishment on authority delegated by the legislature is that there must be such notice and opportunity to be heard as is above set forth.

Embree v. K. C. Dist., 240 U. S. 242.

Londoner v. Denver, 210 U. S. 373, and cases cited.

3.

These suits were prematurely brought.

The amount cannot be based upon any contingent loss, including what may result from the probative effect of an adverse judgment, however certain it may be that such loss may occur.

Ross v. Prentiss, 3 How. 771.

New England Co. v. Gay, 145 U. S. 123, 12 Sup. Ct. 816.

As to the prematurity of attack upon proposed taxation it is held in *Western Union v. Howe,* (C. C. A.) 180 Fed. at 53, 54, that there may not be relief, "against anticipated injury consequent upon anticipated assessment before the assessment was completed".

4.

It does not violate the equal rights clause that there was gross overvaluation.

Baker v. Druesedow, 263 U. S. 137, 44 Sup. Ct. 41.

It does not matter how unconstitutional, arbitrary, or discriminatory the method was there may not be this collateral suit where the administrative tribunals provided by the laws of a state have not been exhausted.

Martin v. Dist., 205 U. S. 135, 27 Sup. Ct. 442.

In *Dodge v. Brady,* 240 U. S. 122, being 36 Sup. Ct. 277, it was said, on motion to dismiss complaint for want of jurisdiction because complainant had an adequate remedy at law:

> "And this doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it." — Citing cases.

Where there is permitted to make payment of tax under protest and then to bring an action at law to contest the validity of the tax, the rule applies that:

> "The collection of taxes under state authority will not be enjoined by a court of the United States on the sole ground that the tax is illegal, but it must appear that the party taxed has no adequate remedy by ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of the equity jurisdiction".

Long v. Norman, (C. C. A.) 289 Fed. 67, with many citations of Supreme Court decisions.

Stonebraker v. Hunter, (C. C. A.) 215 Fed. 67, was an action to enjoin taxes alleged to be illegal:

> "It is and must be conceded that independently of statute an action in equity will not lie to enjoin illegal taxes in the absence of some specific grounds for equitable relief. Ordinarily there is a plain, speedy and adequate remedy at law, and, to maintain an action in equity to enjoin such taxes there must be some distinct ground of equitable jurisdiction, such as to avoid a multiplicity of suits or the like."

Citing the *Singer* case, 229 U. S. 481; *Pittsburg Railway v. Board,* 172 U. S. 32; *Shelton v. Platt,* 139 U. S. 591; *Stanley v. Supervisors,* 121 U. S. 535.

The rule that the state may not directly or indirectly keep one having diversity out of the federal courts is in the last analysis a prohibition of discrimination. In other words, a state that permits a suit in its own courts by its own citizens is bound to know of course that a

citizen of another state has an election to enter either the state or the federal court with such suit. All that is prohibited is interference by the state with this additional right of the non-resident. That is to say, as to a suit that both the resident and the non-resident can maintain in state court the state must leave the non-resident free to sue in federal court.

To put it another way — if no one may sue in the court of the state without first exhausting the state administrative tribunals, no one may sue in federal court without exhausting those tribunals.

Nothing less can explain the repeated holding of the federal courts, that exhausting the state administrative machinery is a condition precedent to suing for injunction, at all.

> "A suit to enjoin the enforcement of a municipal ordinance on the ground that it will deprive complainant of property without due process of law is not within the jurisdiction of the federal court as involving a constitutional question where the state constitution contains a similar provision and the ordinance, if invalid under one is equally so under the other, the rule being that in such cases the remedy must be first sought in the state courts." — *Seattle Electric Company v. Seattle Railway,* (C. C. A) 185 Fed. 365.

The assertion that there was disregard of statutory directions is unfounded in fact and the highest Court of the State has ruled as to this very project that there was no irregularity which prevented the acquisition of full jurisdiction by both the assessing Board and the same body as a Board of Equalization. *Gilseth v. Risty,* 46 S. D. 374. (140).

The contention that the statute law was administered in an arbitrary and discriminatory manner and that the assessment of benefits was without a basis in rea-

son, is unfounded in fact. The highest Court in sustaining the project held to the contrary, and no constitutional objection on that ground was ever presented.

Hinds v. Township, (Mich.) 65 N. W. 545. (141).

At any rate, there was conflict on all this and there is no reason why the objection that there was such arbitrary action should not have been submitted to the Board of Equalization, assuming for the sake of the argument that appellees were not bound so to submit even if there had been no such conflict. (144 to 147).

It is difficult to see how there may be claim of arbitrary or discriminatory assessment where there is no showing what the properties of the respective parties were worth, and where as yet it cannot be known, because no equalization has been had, what the assessment will finally be.

5.

No substantial Federal question was presented. (92, 93, 94).

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> "And this doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it." — Citing Cases.

Where there is permitted to make payment of tax under protest and then to bring an action at law to contest the validity of the tax, the rule applies that:

> "The collection of taxes under state authority will not be enjoined by a court of the United States on the sole ground that the tax is illegal, but it

must appear that the party taxed has no adequate remedy by ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of the equity jurisdiction".

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To put it another way — if no one may sue in the court of the state without first exhausting the state administrative tribunals, no one may sue in federal court without exhausting those tribunals.

Nothing less can explain the repeated holding of

the federal courts, that exhausting the state administrative machinery is a condition precedent to suing for injunction, at all.

The administrative state tribunals must be exhausted first because it is not to be assumed that these tribunals will not modify and correct as justice demands.

Milheim v. Moffat, 262 U. S. 710; 43 Sup. Ct. 699.

To like effect is *Seattle v. Seattle Railway,* (C. C. A.) 185 Fed. at 372.

Oklahoma permits injunction to restrain the illegal levy of any tax.

> "If this section would authorize a suit in the state court then the plaintiff being a citizen of Missouri could maintain the action in the United States court."—Citing *Cummings v. Merchant Bank,* 101 U. S. 153.

The question, therefore, is whether this action could be maintained in any of the courts of Oklahoma.

> "We find that the Supreme Court of Oklahoma has uniformly held, where the question was considered by it, that such suit would not lie, and there being no allegation in the bill of any distinct grounds of equitable jurisdiction" — dismissal of the bill is affirmed.
>
> *Stonebraker v. Hunter,* (C. C. A.) 215 Fed. 69, 70.

Each of the lower courts laid much stress on the fact that the board had not observed relevant statutes. But all relevant statutes were observed and thus was obviated all the objections under the Fourteenth Amendment. (M. 84, 85).

The statute gave ample opportunity to be heard both by the administrative tribunals and afterwards on appeal from the final decision to the regularly constituted courts of the state. (M. 90). — Wherefore, no objections

on the score of unconstitutionality lies in collateral suits such as the one at bar.

Soliah v. Heskin, 222 U. S. 522.

Whatever discrimination there may be is not available where the parties fail to avail themselves of what the Board of Equalization might do.

First National Bank v. Board, 264 U. S. 450; 44 Sup. Ct. at 386.

Plaintiffs have failed, likewise, in showing systematic refusal on the part of the state board to allow a proper reduction in the valuation of any railroad.

Southern Railway Co., 260 U. S. 519; 43 Sup. Ct. 195.

Union Pacific v. Commissioners, (C. C. A.) 217 Fed. 541, is a suit by the railroad against the commissioners and its tax collecting officers to restrain the collection of certain taxes levied for the year 1912, and the complaint charges that the property of the company was assessed at one-third of its actual value while all other property was assessed at not to exceed one-fifth of its value. It is further charged that some classes of property which should properly have been assessed for the purpose of taxation were wholly omitted by the assessors. These discriminations are alleged to have been systematic and deliberate. Temporary injunction was denied.

> The question whether an assessment is excessive is not for the courts to try and the board of review is the only tribunal to try and determine that question.
>
> The board of review is a tribunal provided by law in which the taxpayer may appear to contest an unequal or excessive assessment. Failing to appear there, he is estopped to assail the assessment afterwards. Citing cases.
>
> *Township v. Rose,* (Mich.) 53 N. W. at 928.

Even if a substantial Federal question were presented, appellees had no right to enter the District Court because the amount in controversy was insufficient. (83, 84).

6.

While the appellees did not have a sufficient amount in controversy, appellants do have a sufficient amount to maintain appeal from the Circuit Court of Appeals to this Court.

The entry into the Federal Court is governed by one statute, the entry into the Supreme Court on appeal by an independent one.

On the right to appeal, the test is how much has been adjudged to the appellees. — *Green v. Fish,* 154 U. S. 668, 14 Sup. Ct. 1193.

Appellees will, if there be an affirmance, be denied the right to raise a $250,000.00 assessment and therewith to pay the drainage warrants outstanding. (80).

The appellees having entered the Federal Court on the plea that more than $3,000.00 was in controversy, will not now be heard to say that their opponents' may not maintain appeal because there is less than $1,000.00 involved.

Butte v. Clark, 249 U. S. 12; 39 Sup. Ct. 233. (81).

7.

There was no denial of the equal protection of the laws in violation of the Constitution of the United States. (86, 87).

There was no plea asserting such violations. (P. 87, 89).

There was nothing in the administration of the statutes that violated the Federal Constitution. (M. 88). It is doubtful to say the least whether the decision of either of the lower Courts is addressed to any viola-

tion of the Constitution of the United States; and the trial Court expressly ruled that the due process clause had not been violated. While it is true it discusses denial of the equal protection of the laws, we submit it did not place the decision in whole or in part on that violation — and the Circuit Court of Appeals declined to determine any constitutional question; so that at no time was it the fact or was it held that the charge of unconstitutionality had been sustained.

8.

No fraud was charged, but each of the lower Courts largely based decision on the existence of a fraud said to consist of the pretense that an independent drainage project had been established, when in truth this was a scheme to raise the larger amount that could be raised for the new project in order to repair old ditches which the appellant Board had inefficiently constructed. (95, 96).

No such subterfuge was established by the evidence, and the highest court passing upon this very project, held there was no fraud of any kind, and that the project was in truth a new and independent drainage system.

At all events, opportunity was given to present objection on the ground that there was such subterfuge, to the Board of Equalization. (96, 97, 98, 99).

There was at any rate no fraud that will avail because nothing was done to prevent full presentation of all objections to the administrative tribunals. (101).

Where the administrative tribunals and the appeal provided by state laws are not exhausted, chancery has no jurisdiction where nothing is involved but the unconstitutionality of the tax. — *Shelton v. Platt,* 139 U. S. 591, 11 Sup. Ct. 648, 649. — *Boise v. Boise,* 213 U. S. 276, 29 Sup. Ct. 428.

A non-constitutional tax or one tainted with fraud

still presents nothing but the case of an invalid tax and where the administrative relief is not exhausted, invalidity of a tax may not be urged. — *Union Pacific v. Commissioners,* (C. C. A.) 217 Fed. 544; *Shelton v. Platt,* 139 U. S 591, 11 Sup. Ct. 647, 648.

9.

Section 267, Judicial Code, reads as follows:

> "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain adequate and complete remedy may be had at law."

And it was said in *New York Guaranty Company v. Memphis,* 107 U. S. 205:

> 'This enactment certainly means something".

Smith v. Douglas County, (C. C. A.) 242 Fed. 856.

There was no right to entertain these suits in chancery because nothing was involved but the claim that a tax was invalid, and there was no recognized ingredient of the chancery jurisdiction in the case; and with the exception of the appellee, Power Company, the real property of appellees could not be affected by either a cloud or a lien. — *Wallace v. Hines,* 253 U. S. 66, 40 Sup. Ct. 436; *Union Pacific v. Board,* 247 U. S. 282, 38 Sup. Ct. 510.

Assuming with each of the lower courts that the board acted wholly without jurisdiction and was, therefore, committing a naked trespass, there was adequate remedy on the law side of either the state or federal courts by a suit for damages. Wherefore there was no chancery jurisdiction. — *Shelton v. Platt,* 139 U. S. 591, 11 Sup. Ct. 648.

10.

It was error to overrule the defendant's plea of estoppel.

The acts upon which the plea is founded are not in dispute. The Circuit Court of Appeals recognizes their existence, but denied the plea on the unfounded ground, among others, that at the time when these acts were done, those who did them had not yet been notified that their property would be affected. (148 to 152).

11.

It would be mere pedantry to cite cases for the proposition that this court is bound by the construction of state laws and state constitution on part of the highest court of the state.

12.

Where the legislature establishes, it settles against all court review, proper inclusion, and that property included will be especially benefited. — *Milheim v. Moffat*, 262 U. S. 710, 43 Sup. Ct. 698.

Whether the estimate of the value of land for the purposes of taxation as fixed by the legislature exceeds its true value, the Supreme Court cannot consider upon writ of error to a state court. — *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 926.

As said elsewhere, when the legislative function is delegated the action of the one to whom the power is delegated is conclusive. The only difference is that the board acting under delegation must give notice and opportunity to be heard.

13.

It does not work an inequality which is protected by the constitution of the United States that the administrative boards have not arrived at an assessment of benefits which is exactly equal to the benefit received. — *Southern Railway v. Watts*, 260, U. S. 519, 43 Sup. Ct. 195, 197; *Stanley v. County*, 121 U. S. 535, 7 Sup. Ct. 1238, 1239.

There should not be extracted from the very general language of the Fourteenth Amendment a system of delusive exactness. — *Martin v. Dist.*, 205 U. S. 135, 27 Sup. Ct. 441.

The Fourteenth Amendment "was not intended to compel the states to adopt an iron rule of equal taxation". — *Branson v. Bush*, 251 U. S. 182, 40 Sup. Ct. 115.

Railroads differ in so many respects from other properties that they as a class must be taxed differently or additionally so long as that is not inconsistent with the constitution of the state. — *Southern Railway v. Watts*, 260 U. S. 519, 43 Sup. Ct. 197.

"The equal protection clause is not violated by prescribing different rules of taxation for railroad companies than for concerns engaged in other lines of business". — *Baker v. Druesedow*, 263 U. S. 137, 44 Sup. Ct. at 41.

There must be added the obvious fact that anything that develops the territory which a railroad serves must necessarily be a benefit to it, and that no agency for such development equals that of good roads — and the holding of the Circuit Court of Appeals that the railroad would not be benefited by the improvement cannot be sustained.

Branson v. Bush, 251 U. S. 182, 40 Sup. Ct. 116.

Traffic benefits resulting from the haul of increased croppage on lands within a drainage district, because of overflow protection, are sufficient to authorize assessment of railroad property for improvements within such district, though there were no direct benefits, by way of protecting the company's right-of-way from overflow.

Thomas v. Kansas City Southern Ry. Co., 277 Fed. 708.

Wherever there have been holdings such as in *Kansas City Railway v. Road Improvement District*, 256

U. S. 658, 41 Sup. Ct. 604, or *Gast v. Schnider,* 240 U. S. 155, 36 Sup. Ct. 255, there was direct attack upon the assessment. In other words, the administrative tribunal had been exhausted before the federal court was entered.

14.

BENFITS.

Section 6 of Article 21 of the constitution of South Dakota, makes the drainage of agricultural lands a "public purpose" and gave to the legislature the authority to provide therefor and that the same should be paid for "by special assessments upon the property benefited according to benefits received." Here is no constitutional limitation upon "property benefited". Whatever that "property" might be, it may constitutionally be assessed if benefited. Section 8463, Code 1919, provides, "The proportion of benefits which any county, city * * * * may obtain by the construction of such drainage to *highways or otherwise* and the benefits which any railroad company may obtain for its *property* * * * shall be fixed and equalized together with a proportion of benefits to *tracts of land.*" It will be seen, that the drainage may be constructed for a "public purpose" included in which is the drainage of farm lands, but that under both the constitution and law the only limit in respect to benefits is that the drainage shall be constructed and paid for by special assessments upon "property benefited" without regard to the nature or kind of *property,* the only requirement being that it be *benefited*

Com'rs of Highways v. Com'rs of Drainage, (Ill.) 21 N. E. 207.

The power to treat a drainage improvement as giving relief to agricultural lands is not limited to lands that are absolutely worthless and incapable of growing anything valuable without irrigation. — *Fallbrook v. District,* 164 U. S. 112, 17 Sup. Ct. 66.

Though the land sought to be assessed for benefits in the construction of a drainage ditch were covered by

native timber and underbrush, grass and weeds, though they were never used for for agricultural purposes and were of little or no value, they were nevertheless subject to assessment as agricultural lands.

"Certainly a tract of land need not be in use and cultivated for agricultural purposes in order for it to be agricultural land * * * * (unimproved lands) are agricultural lands before they are prepared as well as afterwards." — *Milne v. McKinnon,* 32 S. D. 627.

15.

To avail of a fraud in any event, even if resort had first been had to the administrative tribunals provided, it must appear there was an undervaluation which was intentional and systematic, and unless that is shown an equal assessment will not be held to violate the equality clause.

Southern Railway Co. v. Watts, 260 U. S. 519, 43 Sup. Ct. 195.

16.

The Courts cannot relieve against honest mistakes of judgment in the administrative Boards.

Maish v. Territory, 164 U. S. 599, 17 Sup. Ct. 198.

Baker v. Druesedow, 263 U. S. 137, 44 Sup. Ct. 41.

Pittsburg Railroad v. Backus, 154 U. S. 421, 14 Sup. Ct. 1120.

And in the Pittsburg rase it was stressed there was no evidence the Board had before it or considered any matter in reaching its determination which it was not proper to receive and consider.

At the most there have been errors of judgment;

and mere errors of judgment are not subject to review in these proceedings.

Southern Railway Co., 260 U. S. 519; 13 Sup. Ct. 195, 196.

All of which is respectfully submitted,

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Appendix A

PROVISIONS OF SOUTH DAKOTA CONSTITUTION

SECTION 2 OF ARTICLE VI.

§ 2. No person shall be deprived of life, liberty or property without due process of law.

SECTION 6 OF ARTICLE XXI.

§ 6. The drainage of agricultural lands is hereby declared to be a public purpose and the legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest the corporate authorities thereof, and the corporate authorities of counties, townships and municipalities, with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby, according to benefits received.

Appendix B

SOUTH DAKOTA DRAINAGE STATUTES

(Note: The section numbers at the beginning of each paragraph are those of the South Dakota Revised Code of 1919. The references at the end of each paragraph are to the Session Laws of the various years. The paragraphs as printed constitute the law as it stood at the time of the transactions involved in this suit.)

§ 8458. POWER OF COUNTY COMMISSIONERS. The Board of County Commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural land. (§ 1, ch. 98, 1905; § 1, ch. 134, 1907.)

§ 8459. PETITION. Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in whole or in part, and a general statement of the territory likely to be affected thereby. The petition shall be accompanied by a bond with sufficient sureties to be approved by the county auditor, conditioned to pay all expenses incurred in case the board does not grant the petition or the same is denied on appeal. Such petition may be presented at any regular or special meeting of the board and, if sufficient in form, shall be ordered filed with

the county auditor. (§ 2, ch. 98, 1905; § 2, ch. 134, 1907.)

§ 8460. INSPECTION OF PROPOSED ROUTE. It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together with the board of county commissioners shall as soon as practicable, inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such survey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage, but may be a complete survey such as will be required for the construction of the proposed drainage and assessment of its cost, or as much less as the board may require. Such survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. For the purpose of inspection, the county commissioners, surveyors or their employees may enter upon any lands traversed by the proposed drainage or in their judgment likely to be affected thereby. The county auditor shall promptly furnish the state engineer with a copy of the surveyor's report mentioned in the succeeding section and of all maps and plans filed by such surveyor and also with a copy of such further files as the state engineer may ask for. In case the drainage is established the preparation of plans and specifications upon which the contract of construction is to be awarded and also the work of construction, shall be under the supervision of the state engineer. It shall be the duty of the state engineer to render such assistance and advice to the board of county commissioners in regard to such drainage as the duties of his office will permit and he shall be reimbursed by such board for his expenses incident thereto;

provided that in case of minor ditches the state engineer shall not be required to attend with the board of county commissioners at the first inspection, nor to perform subsequent services if in his judgment it shall not be necessary for him to do so. (§ 3, ch. 98, 1905; § 3, ch. 134, 1907; § 1, ch. 102, 1909.)

§ 8461. SURVEYOR'S REPORT—NOTICE OF HEARING. The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall determine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceedings for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing. (§ 4, ch. 98, 1905; § 4, ch. 134, 1907; § 2, ch. 102, 1909.)

§ 8462. HEARING ON PETITION. At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the

surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. After full hearing the drainage may be established along the line set forth in the petition or in the finding of the board prior to the hearing, or the board may vary the route thereof, or its width, as deemed practicable or necessary. If the board deems it best to vary the route, or to materially change the initial or terminal points of such proposed drainage so that it will pass through other lands than those described in the notice of hearing, or to increase the width of lands to be taken for the proposed drainage, the board shall adjourn the hearing and give the owners of such lands notice as in case of the original hearing. No open ditch shall be constructed within the limits of any public highway except where the topography of the country makes such construction advisable and in such case the ditch shall be located at a sufficient distance from the center of such highway to permit a roadway of standard width being constructed. If the proposed drainage does not give sufficient fall to drain the lands sought to be drained or will not properly take care of the waters collected by such drainage, the same shall be extended so as to secure the drainage or properly dispose of the water. The hearing in any such case shall be adjourned and notice given to all parties newly affected as in case of the original hearing. When the board of county commissioners shall have fully heard and considered such petition, and all matters in opposition to or in support of the same, it shall, if it finds the proposed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition, the petitioners to be jointly and severally liable for the costs of the proceeding, the same to be recovered in a civil action. If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property

through which the same shall pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimants right to have the same assessed by the jury. Such drain shall be given a name and the proceeding thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office. (§ 5, ch. 98, 1905; § 5, ch. 134, 1907; § 3, ch. 102, 1908; § 1, ch. 205, 1917.)

§ 8463. EQUALIZATION OF BENEFITS. After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds at the date of the filing of the petition and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of

such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed. (§ 6, ch. 98, 1905; § 6, ch. 134, 1907; § 4, ch. 102, 1909.)

§ 8464. ASSESSMENTS. After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. The cost of establishment shall include the costs of the service of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all other expenses incurred or to be incurred that in any way contributed or will contribute to the establishment or construction of the drainage. At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same will be so filed, by publication at least once each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assess-

ment in the treasurer's office, the same shall be due and payable and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the State and the United States and, if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest from the date of the order of the assessment at a rate not to exceed eight per cent per annum payable annually. Such assessment shall be paid to and received by the county treasurer and paid over to the holders of the assessment certificates or upon the order of the board of county commissioners. The board of county commissioners may issue separate assessment certificates against each tract assessed for the amonut of the assessment thereon, and may sell the same at not less than par value with all accrued interest, or may contract to pay for the construction of such drainage with such assessment certificates or with warrants. Such assessment certificates shall refer to the record in the office of the county auditor of the order of assessment and of the filing of a copy thereof in the county treasurer's office, shall transfer to the holder all interest, claim, or right in or to such assessment, bear the same rate of interest, carry the lien of such assessment and be enforcible as provided by law. Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale, provided that no such assessment or installment thereof shall be included in the sale of any given year unless the same shall have been delinquent on or before August first of each year. The provisions of Chapters 7, 8, 9, Part 9 of this title shall apply to the enforcement of the lien or drainage assessments so far as such provisions are applicable, except that a treasurer's deed issued upon a delinquent drainage assessment shall recite the fact that the title conveyed is subject to all the claims which the state or any political subdivision thereof may have thereon for annual taxes.

Whenever an assessment for drainage or an installment thereof has been made against any county, city, town or township, as provided in this chapter, the officers

of such county, city, town or township, whose duty it is under the law to make the levy of taxes, shall at the time of the next annual tax levy after the making of such assessment make a levy for drainage purposes of such an amount as shall be necessary to pay such assessment, and return the same to the proper officers as provided by for the other taxes, and such levy and tax shall be enforced and collected in all respects as provided by law for other taxes; provided, that any surplus remaining in any fund at the close of any year may be used by any township to pay and apply on any drainage assessment, as provided herein; provided, further, that in unorganized townships the county commissioners shall be authorized to pay for drainage as provided herein out of any money belonging to such unorganized township, and each succeeding year a like levy shall be made by such authorities until the whole of such assessment for drainage is paid. Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at a rate not to exceed eight per cent per annum payable annually, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any damages allowed and cost of establishment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage. (§ 7, ch. 98, 1905; § 7, ch. 134, 1907; § 5, ch. 102, 1909; ch. 130, 1911, and as amended by § 1, ch. 46, Laws of Second Special Session of the Sixteenth Session of the Legislature of South Dakota 1920.)

§ 8465. BIDS—SPECIFICATIONS—CONTRACTS. Whenever sufficient money shall have been collected the damages occasioned by the construction of such drainage and fixed as herein provided shall be paid and thereupon the board of county commissioners shall proceed to construct such drainage and shall let contracts for the construction of the same. Such contracts may require the

contractors to take their pay in assessment certificates or in warrants to be thereafter issued. The contract may be for the construction of the entire drainage or for any portion thereof, and shall be let upon competitive bids, the board reserving the right to reject any and all bids. The lowest responsible and capable bidder shall be accepted but if any landowner affected be an equally low, capable and responsible bidder with a non-owner of the lands affected the former shall be preferred. When any contract shall be let the contractor shall give a bond in such sum as shall be approved by the board of county commissioners, conditioned for the faithful performance of his work and full completion of his contract to the satisfaction of such board. For the information of the contractors in bidding upon the proposed drainage, full plans and specifications shall be filed in the office of the county auditor. If in the judgment of the board of county commissioners the entire drainage or any part thereof can be constructed for less money than the amount of any bid submitted therefor, the board may cause such drainage to be constructed, hire the necessary labor and purchase all necessary material for such construction, without letting contracts therefor. Contracts for building bridges or culverts rendered necessary by the construction of such drainage may be let separately and after the drainage is completed. The cost of constructing such bridges or culverts shall be charged in the first instance as part of the cost of drainage and thereafter such bridges and culverts shall be maintained as part of the highway; provided, that the cost of removing, repairing, enlarging or replacing bridges and culverts already existing across the line of a proposed drainage ditch shall not be charged as a part of the drainage. (§ 8, ch. 98, 1905; § 8, ch. 134, 1907; § 6, ch. 102, 1909; ch. 206, 1917.)

§ 8467. ASSESSMENTS FOR FURTHER COSTS. At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If

the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction, including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessments and certificates. The board of county commissioners may sell such assessment certificates at not less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants only one assessment need be made. In any case, in the discretion of the board, several assessments may be made as the work progresses. Assessments shall be paid to the county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners for the purpose of the particular drainage. (§ 10, ch. 98, 1905; § 10, ch. 134, 1907; § 7, ch. 102, 1909.)

§ 8469. APPEALS. An appeal shall lie for any final order or determination of the board of county commissioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage to the circuit court of the county in which such drainage is located by any one deeming himself aggrieved by any such order or determination. Written notice of such appeal shall be served upon the board of county

commissioners and a bond conditioned to pay all the costs of such appeal, in case the contention of appellant be not sustained in some respect, shall be filed in the office of the clerk of courts, to be approved by him in such amount and with such sureties as he deems necessary. Upon the service of such notice and the filing of such bond, the county auditor shall transmit to the clerk of courts the petition and all other papers and records in the matter or certified copies thereof, when the convenience of the auditor's office would be seriously impaired by the transmission of the original records, and such matter shall be heard as an original action in the circuit court. No appeal shall operate as a stay of proceedings by the board of county commissioners, but the court may upon the taking of an appeal, for good cause shown issue an order staying the further proceedings by the board of county commissioners until the hearing and determination of such appeal. Before granting such stay, the court shall require an undertaking in sufficient amount and with sufficient surety to the effect that if the order appealed from be sustained the person upon whose motion the stay is granted shall pay all damages caused by the issuance of such order of stay. Any number of persons interested may join in the same appeal. Appeals shall be in all cases taken within thirty days from the making of the order or determination appealed from. If, on the trial of such action, it be determined that the drainage as petitioned for and established by order of the board is not conducive to the public health, convenience or welfare or is not necessary or practicable for the purpose of draining agricultural lands, the petitioners shall be jointly and severally liable for all the costs thus far incurred. If the contention of the appellant as to the amount of damages or proportion of benefits, the acceptance of the drainage, of the practicability of the drainage when the route thereof is varied by the county commissioners over the protest and objection of the petitioners, be sustained in whole or in part, the costs of such trial shall be part of the cost of the drainage. Upon an appeal from an assessment of benefits, the court

or jury shall consider not only the relative benefits, to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not; if benefited, to what extent. (§ 12, ch. 98, 1905; § 12, ch. 134, 1907; § 9, ch. 102, 1909.)

§ 8474. FURTHER POWERS OF BOARD. Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as in all lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly. (§ 17, ch. 98, 1905; § 17, ch. 134, 1907.)

§ 8476. POWERS DEFINED. The powers conferred by this article for establishing and constructing drains shall also extend to and include the deepening and widening of any drains which have heretofore been or may hereafter be constructed, also to straightening, cleaning out and deepening the channels of creeks and streams and constructing, maintaining, remodeling and repairing levees, dykes and barriers for the purpose of drainage; and the board of county commissioners may relocate or extend the line of any drain if the same is necessary to provide a suitable outlet, and shall cause a survey thereof to be made, but no proceedings affecting the rights of persons or property shall be had under this section except upon notice and the other procedure pre-

scribed herein for the construction of drains. (§ 19, ch. 98, 1905; § 19, ch. 134, 1907.)

§ 8482. DRAINS FOR TOWNS AND CITIES. The board of county commissioners shall have authority to establish drainage for or including the whole or any part of any city or incorporated town, including cities acting under special charter, as provided in this article, and it shall have the same authority with respect to the assessment of damages and benefits within such city or town or in other cases provided for in this article, and like notices to such city or town with respect to the establishment of such drainage and the apportionment and assessment of damages and benefits shall be given as is required by this article to be given to the owner of property damaged or benefited by the establishment or construction of such improvement. (§ 24, ch. 98, 1905; § 24, ch. 134, 1907.)

§ 8486. NOTICES, HOW SERVED. Notice by personal service, as of a summons in a civil action, may be given instead of by publication and posting in all cases where notice is provided for in this article. In any case where notice is required under the provisions of this article and any person affected by the drainage has not been notified, either by publication or personally, and a hearing has been had or determination made, such person may be notified personally or by publication and posting, to show cause at a time and place to be fixed by the board of county commissioners, and to make return or claim damages as in case of the original hearing. Any such omitted person may be brought in on such due notice at any stage of the proceeding, or after it has been otherwise concluded. The enforcement of any assessment shall not be enjoined for want of the notice provided for in this article, except pending an application to the board of county commissioners for the determination of such matters as to which any person deems himself not bound because of want of notice. (§ 28, ch. 134, 1907.)

§ 8488. DEFECTS IN PROCEEDINGS DISREGARDED. Any defect or irregularity not affecting the substantial rights of parties interested, occurring in any drainage proceeding, shall be disregarded in any action seeking to avoid an assessment or cancel, annul or declare void any such proceeding. And in case the defect is substantial the court shall of its own motion determine the rights of the parties, validate the proceedings and assess the costs as justice may require, if the court shall find cause for such valuation or such action should have been taken in the first instance and all parties interested are before the court. (§ 29, ch. 98, 1905; § 30, ch. 134, 1907.)

§ 8489. INVALID OR ABANDONED PROCEEDINGS. If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned, or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate therefrom, but the board shall in any case notify all persons interested to show cause why

the determination of the board thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by the board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons. (§ 33, ch. 134, 1907.)

§ 8491. REFUNDING SURPLUS ASSESSMENTS. The board of county commissioners shall have authority and it shall be its duty to refund, upon request, any excess assessment or funds not necessarily used in the contruction of any drainage, made or levied against any person, private corporation, city, town or township within any drainage district, in proportion to the amount paid by him or it. (Ch. 219, 1913.)

EXHIBIT "C".

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§ 6606. COLLECTION, HOW MADE AND ENFORCED. All laws relating to the enforcement of the payment of delinquent taxes shall be applicable to all taxes levied under the provisions of this article, and whenever any taxes levied under the provisions of this article shall become delinquent, the county treasurer having control of such delinquent taxes may proceed to collect the same in the same manner and with the same right and power as a sheriff under execution, except that no process shall be necessary to authorize him to sell engines, cars or any rolling stock for collection of such taxes. (§ 11, ch. 100, 1915.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 95

A. G. RISTY, et al, as County Commissioners, etc., et al,

Appellants,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Appellee,

And the Five Other Cases set forth on the cover page hereof numbered 95 to 100 inclusive.

REPLY BRIEF AND ARGUMENT FOR APPELLANTS.

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And the Five Other Cases set forth on the cover page hereof numbered 95 to 100 inclusive.

REPLY BRIEF AND ARGUMENT FOR APPELLANTS.

As a reply to the appellees' contentions advanced in their several briefs the appellants submit the following:

I.

AS TO THE CONTENTION THAT THE REQUIRED AMOUNT IS AFFIRMATIVELY MADE TO APPEAR OR EXISTS.

See *Citizens' Bank v. Cannon,* 164 U. S. 319, 17 Sup. Ct. 90.

There is the required affirmative showing, if what

is in effect a concession that no one can tell what the amount will be, constitutes such showing, but not otherwise.

The statute (Sec. 8464), prevents any assessment until there has been the equalization which appellees stopped by injunction. That is the settled law of the State, and the trial Court so ruled. (M. 79, 80).

> "Because no one can say what injury will result before an anticipated assessment is completed, there can be no relief before the completion of the assessment."
>
> *Western Union v. Howe,* (C. C. A.) 180 Fed. 53-54.

The trial Judge made it the settled law of the case that the Board had power to determine what the assessable benefits should be after equalization. (M. 78).

> "No one can say what amount is in dispute when no accounting has yet been ordered, much less, that if one should be had that appellant would have a balance large enough. — That is not an affirmative showing of a jurisdictional."
>
> *Greene's case,* 154 U. S. 668, 14 Sup. Ct. 1193.
>
> "An unaccrued tax cannot be conjectured in order to make up the requisite amount."
>
> *Washington Railway,* 146 U. S. 227, 13 Sup. Ct. 66.
>
> "The amount may not be based on any contingent loss including what might result from the probative effect of an adverse judgment however certain it may be that such loss may occur."
>
> *Ross,* 3 How. 771; *New England Company,* 145 U. S. 123, 12 Sup. Ct. 816.
>
> "And it will not avail that decision on the validity of the tax at bar will have effect on future

taxation."

Holt v. Indiana, 176 U. S. 68, 20 Sup. Ct. 273.

And one appellant (R. brief 24) after contending, as they all do, that the tentative apportionment supplies the amount, naively inquires, "but after equalization how much of an assessment".

Nor will it avail that there is a total of more than $3,000.00 to be collected. Rights against third persons, singly or collectively, add nothing to what each appellee may have in dispute.

I-(a).

WRONG PRESUMPTION.

One of the two main arguments of appellee is a disregard of the fact that they enjoined when nothing more than a tentative apportionment had been made — that this no more fixed a tax than an unaccepted proposal fixes a liability. (N. 42; P. 39).

For illustration:

> The apportionment as to railroads has already been determined in advance and it is conceded is to be made of the railroad companies. (M. brief 55, 56).

For another illustration:

Argument that because we say we have $250,000.00 to collect and therefore have a sufficient amount in controversy to entitle us to appeal, no matter what becomes of the total of the tentative apportionment against appellees, we concede that such apportionment gave appellees enough to enter the District Court.

As said, it amounts to a claim (a) that what is purely tentative is fixed, and (b) that it must be presumed the tentative will become the final apportionment

— neither of which positions is sound.

> "While some step is still to be taken, the tax cannot be treated as something finally adopted."
>
> *Milheim,* 262 U. S. 710.

By enjoining, there was stopped that action which by statute (Sec. 8463) is termed final equalization. It is this equalization which for the first time *fixes* assessment in accord with benefits, and the notice of proposed equalization gives opportunity to be heard on whether the tentative apportionment shall become fixed.

> "The apportionment made when appellants were enjoined is only tentative and subject to correction and modification. — *Milheim,* 262 U. S. 710. And it is the equalization which was stopped that 'completes the assessment'." — *Western Union v. Howe,* (C. C. A.) 180 Fed. at 53-54.

And there is no right to urge that the tentative is equivalent to the final apportionment. That is presuming that the Board will not correct as justice requires (which the Circuit Court of Appeals did). The presumption runs the other way.

It is said in *First National Bank v. Board,* 264 U. S. 450, 44 Sup. Ct. 387:

> "We cannot assume that if application had been made to the commission proper relief would not have been accorded by that body, in view of the statutory authority to receive complaints and examine into all cases where it is alleged that property has been fraudulently, improperly or unfairly assessed".
>
> It is presumed such tribunal will modify and correct according to the demands of justice.
>
> *Milheim v. Moffat,* 262 U. S. 710.
>
> *Seattle v. Railway,* (C. C. A.) 185 Fed. 372.

ACTION TENTATIVE.

Throughout, appellees *assume* the Board was a naked trespasser. Were that so, it is immaterial as to amount in controversy. If tentative apportionment by a trespasser is effective, so is a reduction of the apportionment by the same trespasser.

And even as to an alleged trespasser there is no right to say, before he is asked to change, that a change of mind on his part is impossible.

I-(b).

UNSOUND ARGUMENT.

The remaining argument is (a) that matter anticipated may supply, and thus there has been supplied, the requisite amount, (b) pure guessing and speculation, and (c) mere words. — Also another naive admission that there is no way to tell how much the anticipated injury will reach in money.

First comes a statement which abounds in generality, and in blithe *assumption* that the Board had no power or jurisdiction:

> The amount in controversy cannot be questioned. Appellee is threatened with an assessment amounting to (amounts stated) and its property will be so assessed upon its failure to show cause, before a tribunal having no power or jurisdiction, why a levy of that amount should not be spread. (N. 43; P. 40).

Next comes generality plus speculation:

> In addition, there is the great and irreparable damage that appellee is threatened with by having its property included within the drainage area. (N. 43; P. 40).

It was not only threatened with the levying of

such a tax but with a further and possibly more dangerous situation — that of having its property included within a drainage district, resulting in the extreme probability of its becoming involved in a project threatening to cause great and irreparable damage to property interests.

If the property is brought within the territory it will be there forever. Future repairs will be assessed. Evidence shows spillway is already being endangered and that time is soon coming when more money will have to be expended for its maintenance.

There is great danger that the new spillway will go out and that there is danger the ditch will have to be closed and the water turned into the original channel. And if it should wash out there is no way in which it can be determined what amount will in future be assessed against the appellees.

In the case of *Washington Railway,* 146 U. S. 227, 13 Sup. Ct. 66, the following allegation was held not to exhibit the requisite amount:

The taxes alleged to be wrongful would be in an amount "which would probably be computed and charged against the complainant and would reach nearly if not quite the sum of $5,200.00 besides interest and costs."

Finally, "argument" which we are unable to see the meaning or relevancy of:

"The testimony shows the dissimilarity of the property and the theory of the arbitrary assessment so that it clearly appears from the pleadings and the proof that * * * * more than $3,000.00 is involved". (M. 56).

I-(c).

CONSISTANCY.

We are told that *Butte v. Clark,* 249 U. S. 12, is inapplicable because it but holds that litigants must be consistent. It does so hold. We have been consistent, have always urged there was no showing of amount that entitled appellees to enter the District Court. The violation of consistency asserted is, however, that we urge appellees have not shown what amount is in controversy and also that we have the right to appeal because more than $1,000.00 is in dispute.

I-(d).

CASES DISTINGUISHED.

Butte v. Clark, 249 U. S. 12, and *Western Railway v. Commissioners,* 261 U. S. 264, are cited.

As to the first, it is obvious that it merely holds that a sufficient amount was involved because of facts stated in the opinion which conclusively demonstrate that there was such amount.

And so of the last. It was an injunction halting an order that the railroad construct and maintain a spur track for a shipper. It holds that the sum involved may not be limited to the original cost of construction; that there is involved also the cost of maintenance, and the annual burden of interest on the cost of construction, maintenance and operation — and that all this capitalized at a reasonable rate comes to more than $3,000.00.

II.

AS TO THE QUESTION WHETHER WE HAVE THE RIGHT TO APPEAL TO THIS COURT FROM THE DECISION OF THE CIRCUIT COURT OF APPEALS.

We have attempted to show that when the bills were filed it did not appear that more than $3,000.00 was in dispute. It is obvious this may be true and also true that when the decision of the Circuit Court of Appeals came that we would lose more than $1,000.00 if that decision was not appealed or was affirmed. So much for amount in controversy.

II-(a).

The appellee, Power Company, moved here to dismiss this appeal, and the motion was denied. At least one other of the appellees now moves to dismiss. In support, it presents, in effect, just the decisions that were relied on by the Power Company — and our brief on the Power Company motion fully met those decisions.

That brief is on file in the record of the instant Power Company case, and we beg to refer the court to that brief.

II-(b).

STATEMENT OF SUING PARTY FURNISHES GROUND OF JURISDICTION.

The motions to dismiss urge as ground that since the trial Court made a decision, which was not appealed from, that the objection of unconstitutionality could not be sustained, no federal question *now* exists. In addition to calling attention to it that the Power Company motion was denied, we submit:

Defendants were forced into federal court and five

of the plaintiffs asserted a federal question when they could have entered on diversity alone.

They induced both the lower courts to hold that a substantial federal question had been presented by them and it does not lie in their mouths now to say that it was not substantial.

Appellees thus kept the door open for themselves to go higher and would have claimed that right had they been defeated on the merits. This right must be reciprocal. But they say that defeat on the merits takes away from appellants a right of appeal that appellees made by their bills.

Appellees desire to take away the right to go to this court by one who has lost everything of substance because appellees were defeated and told that their federal question objection, though substantial, was untenable. The argument is that because plaintiffs were mistaken about their federal question, the moral victory of defendants of having this held compels the defendants, who were dragged in, to refrain from a right that appellees always had, and which appellants now need as badly as ever, in spite of their academic victory.

A premium is to be paid the appellees because their assertion of violating the federal constitution was not sustained.

> "It is sufficient to render the judgment appealable that the injury may become irreparable by the final judgment or action of the Supreme Court on the judgment."
>
> 3 *C. J.* § 276, page 460.
>
> " 'The principle of decision' is that the ground of jurisdiction in the District Court and ultimately in this court on appeal from the Circuit Court of Appeals is the statement of the suing party of his cause of suit."
>
> *Butte v. Clark*, 249 U. S. 12, 39 Sup. Ct. 233.

It may be said in passing, that while appellees contend the federal questions have died, they argue them at great length, seemingly, in the hope of inducing this court to decide them differently than the trial court did.

It is indisputable that some federal questions are still left for decision. These are (a) the dispute over the amount in controversy, and (b) the holding of the lower courts that the federal question presented was a substantial one.

We are at a loss to understand the presenting of *United States v. Jahn,* 155 U. S. 109 (R. 17). It is cited for the proposition that appellants might have gone directly to this court from the District Court, on the jurisdictional question. That may be done only where nothing but the jurisdictional question is to be presented. The *Jahn* case itself is authority for the rule that there should be no direct going to this court where in addition to a jurisdictional question the merits also are decided against a party.

III.

AS TO THE CONTENTION THAT THESE SUITS WERE NOT PREMATURELY BROUGHT.

Little further argument on this head is needed, because of what has been said as to the bearing that inability to say at the time appellants were enjoined how much in money was involved, has on amount in controversy. This inability resulted because nothing tangible had yet been done. That fact demonstrates there was nothing to enjoin.

Additionally —

The appellee, Rock Island, asserts that only a suit in equity can remove a cloud (it is elsewhere shown

there could be no cloud); with this assertion it couples the concession that chancery may function only "once the assessment attaches". (R. 21).

> "There may not be relief 'against anticipated injury consequent upon an anticipated assessment before assessment is completed'."
>
> *Western Union v. Howe,* (C. C. A.) 180 Fed. 53, 54.

The trial Judge ruled and it is universally held that there is sufficient notice if opportunity be given before the assessment of benefits becomes final. — *Erickson v. County,* (N. D.) 92 N. W. 841. — Sufficient if notice is given at any time before the assessment becomes a lien. (As to the City and the Railroads there never could be a lien). *Soliah's* case, 222 U. S. 522. — Which means, by the clearest analogy, no suit in equity should be begun until the assessment has become final. Nothing is certified or filed until thirty days have elapsed from the completion of the assessment. (Sec. 8464).

The suits were prematurely brought because brought before the administrative hearings provided by state law had been gone into, to say nothing of having been exhausted. An appeal after assessment, which the statute provides, could not be foregone and a court of equity entered. — *Milne v. McKinnon,* 32 S. D. 627. There was no right to enter the courts until equalization was exhausted. — *Bagley v. Butler,* 24 S. D. 429.

The view of appellees is that the suits were not premature because there was the right to proceed at once because the board was acting beyond jurisdiction — as to which we say, the record shows and that the highest court of South Dakota settled in the Risty case that the board *had* acquired jurisdiction. Further argument is that appellees had the right to sue when they did, to ascertain whether the board was acting beyond jurisdiction and also attempting to deny due process of law (N. 43; P. 40); that they were under no obligation to wait because the

statutes of the state were unconstitutional — which assumes, that this is so though the trial Judge made a final decision that it was not so, and which disregards the oft repeated decisions that one who does not exhaust administrative relief afforded by state statutes may not urge unconstitutionality or other invalidity. Still further argument is that they had the right to sue when they did because there was improper discrimination — another objection that is waived if the administrative relief is not exhausted. Finally, that there was no obligation to wait because there was no probability that the board would change from the tentative apportionment that had been made. (R. 23, 24). — Which disregards, first, that if this be sound, statute provisions for equalization are idle, and, second, disregards the presumption that the board would change its mind if justice demanded a change in the tentative apportionment.

Another position is an assertion that we have admitted, at least inferentially, that the board intends to make levy and have nowhere said that that was not the intention. (R. 23, 24). It is elementary that no mere threat of assessment will base the chancery jurisdiction. And our alleged intentions are quite immaterial since we were stopped from doing even as much as attempting an equalization.

III-(a).

AS TO THE CITATIONS FOR APPELLEES.

Gast v. Schneider, 240 U. S. 55, reached this court on writ of error and therefore could not involve the question of exhausting the administrative tribunals; and it was a suit to collect a tax already levied. — In *Thomas v. Kansas Railway,* 277 Fed. 708, 261 U. S. 481, the tax had already been levied and the case involved attempt to enjoin the collection of it. In *Kansas City v. Road District,* 256 U. S. 658, the assessment had been

made.

The case of *Milheim,* 260 U. S. 710, furnishes nothing whatever in support of a claim that these suits were not prematurely brought.

III-(b).

NEED FOR HASTE UNEXPLAINED.

Just what hardship appellees would have suffered had they waited with their suits, is not indicated. Nothing is said to show it would not have been just as effective to protect appellees against an alleged illegal tax and its collection had they waited until such time, if ever it came, as found them dissatisfied with the action of the board of equalization.

In a word — the matter is squarely within the holding of *Western Union v. Howe,* (C. C. A.) 180 Fed. 53, 54, that to permit these suits to be brought at the time they were would take away all right of the appellant board to exercise the discression and judgment in arriving at a fixed and proper valuation which the statutes have confided to it. And that, therefore, the courts may not be entered in anticipation of an assessment before such assessment is completed. We do not overlook the claim that this case is to be distinguished because in it no lack of jurisdiction is involved. As to this we repeat that the lack of jurisdiction in the cases at bar is pure assumption, made contrary to the record and the decision of the highest court of the state.

IV.

AS TO THE CONTENTIONS THAT THE BOARD ACTED WITHOUT OR BEYOND JURISDICTION.

It is important to deal with these contentions because, time and again, positions are taken which have as their premise, or as a material ingredient, an assumption that the Board was not clothed with jurisdiction.

As to the claim that while Constitution authorizes legislation dispensing with corporate entities and gives the power to establish drainage projects to the board (N. 12; P. 12) — the legislature has not availed itself of the grant.

Whether or not the legislature has availed itself of what permission there may be in the Constitution to establish drainage districts, other than those organized for the purpose of draining agricultural lands, is quite academic, for, drainage is an exercise of the police power — *Bemis v. Drainage District,* (Ind.) 105 N. E. 496. Under that power there is authority to establish drainage projects though they be not for the draining of agricultural lands, unless the Constitution forbids the establishment of such districts — and that is not claimed for the Constitution of South Dakota.

It is settled by the highest court of the state that no constitutional amendment was needed; that the constitutional provision merely made the drainage of agricultural lands something done for a public purpose or use, and that so far as establishing drainage conducive to the public health, convenience and welfare was concerned, there was power on part of someone to do this before said constitutional provision was adopted. — *Tuthill v. MacMackin,* 31 S. D. 507; and see *Fallbrook's* case, 164 U. S. 112.

The relevant constitutional provision is Section 6 of Article 21. It does permit the drainage of agricultural lands, by declaring that such drainage is for a public purpose. But to permit this is of course no exclusion of any drainage project that is, and before the adoption of this constitutional provision was, something for a public purpose. It will not be seriously contended that a drainage system which is conducive to the public health and welfare is not something provided for a public purpose and public use, even though it does not touch an acre of land being used or being useable for agricultural purposes.

After so dealing with the drainage of agricultural lands the Constitution next says that the legislature may provide for the organization of drainage districts for the drainage of lands "for any public use"; and that it may vest the corporate authorities of counties, etc., with power to construct levees, drains, and ditches, paying therefor by special assessments on property benefited thereby, according to benefits received.

The sole question then is (if it be material) whether the legislature has availed itself of this grant, which we concede is not self-executing. Section 8458 R. C. 1919, provides that the board "may establish and cause to be constructed *any* ditch or drain * * * * whenever such ditch, drain, or water course shall be conducive to the public health, convenience and welfare".

The highest court of the state has settled that the legislature *has* availed itself of the power granted by the Constitution; that the grant authorized the legislature to select who should have authority to construct drainage projects, and that it had selected the boards of county commissioners. — *Davidson v. Tile Company,* (S. D.) 196 N. W. 96; *Tuthill v. MacMackin,* 31 S. D. 507; and *Gilseth v. Risty,* 46 S. D. 374.

IV-(a).

ULTRA VIRES.

As to the claim the board acted *ultra vires* because the appellees owned no agricultural lands, and that the power of the board was limited to draining such lands.

First — it is not essential the benefits shall be *for* agricultural purposes. It suffices that a district is *organized* for that purpose. — *Commissioners v. Commissioners,* (Ill.) 21 N. E. 207.

But it is obvious the board is not limited to the drainage of agricultural lands, (1) because the Con-

stitution does not attempt so to limit it, and (2) because Section 8458 availing iself of the grant of power in the Constitution gives the board power to establish and cause to be constructed "any" ditch or drain, etc. (a) whenever it finds the same to be conducive to the public health, convenience or welfare, and having thus provided adds in the alternative — (b) "or" whenever the same shall be for the purpose of draining agricultural lands. Nothing can be dealt with as being exclusive when it is obviously but an alternative to something else.

It has been settled by the highest court of the state that the power of the board is not limited to the drainage of agricultural lands but extends to any drainage project so long as same is conducive to the public health, etc. — *Tuthill v. McMackin,* 31 S. D. 507; *Davidson Co. v. Tile Co.,* 47 S. D. 101; *Drainage Ditch No. 12,* 44 S. D. 157.

> "Drainage for public purpose includes drainage for farm lands but under Constitution and law the only limit as to benefits is a drainage district constructed and paid for by special assessment on property benefited, without regard to the nature or kind of property."
>
> *Commissioners v. Commissioners,* (Ill.) 21 N. E. 207.

The state Constitution (Section 6, Article 21) permits assessment for benefits to the "property" benefited. Sec. 8463, to "the lands affected".

> "It is not essential that the land be in use for agriculture."
>
> *Milne v. McKinnon,* 32 S. D. 627.
>
> "It need not be absolutely worthless and incapable of growing anything."
>
> *Fallbrook v. District,* 164 U. S. 112.

IV-(b).

POWERS OF THE BOARD.

The assertion that jurisdiction was lacking has many details other than those that have been adverted to. We are told the board had no power to determine whether any benefit was being produced by the project, nor the extent of the benefit. The highest court has declared that it had jurisdiction to deal with both. — *Milne v. McKinnon,* 32 S. D. 361. Next, that there is no evidence that the Great Northern and the Power Company ever received any benefit. (Briefs N. 46; P. 42). Surely that is an evidentiary question that does not go to jurisdiction but is to be deteremined by resort to the administrative tribunals provided. Next, that the threatened assessment was excessive. But as said in *Curtiss v. Pound,* 34 S. D. 628, 630, that only results in making an assessment larger than it should be, does not go to jurisdiction and must be corrected by resort to said tribunals. Next, that there was no power to assess the appellee Power Company, for in that, the statute permitted dealing with "lands" affected and with tracts of land only, and that what the Power Company possessed was neither lands nor tracts of land. The railroad company appellees make a similar argument. All overlook that under Section 8463, benefits may be taxed against *any* property. So of Section 8464. So of Section 6 of Article 21 of the South Dakota Constitution. And that this is the range of assessment is held in *Milne v. McKinnon,* 32 S. D. 361. But the Power Company concedes (Brief 2) it owns "real property" consisting of a hydro-electric plant, dams, property rights and water rights. It is declared in Sections 256 and 257, South Dakota R. C., 1919, that real property is land or anything affixed to land or anything incumbent or appurtenant to land, anything that is in law immovable; any solid material of the earth whatsoever, as sand, soil, rock, or other substances.

It was said in *Kimberly v. Hewitt,* (Wis.) 44 N. W. 303:

> "It may be conceded that a water power used or unused is included within the meaning of the word 'land'."

In *Carey v. Daniels,* 8 Metchalf, 866:

> "Right to the use of the flow and fall of water on land of the proprietor is not an easement. It is inseparably connected with and inherent in the land; is a part of the inheritance and passes with it."

And see *Edwards,* 180 Ill. 99; *Philadelphia Trust Co.,* (N. J.) 69 Atl. 729; *Swain,* (N. H.) 85 Atl. 288.

The appellee Rock Island, concedes (Brief 35) that the board did have jurisdiction to determine what the amount of assessment should be. It is ruled in *Erickson v. County,* (N. D.) 92 N. W. 841, that such boards as this have jurisdiction to apportion benefits. And to assess them; and that the courts will not inquire into the correctness of their determination. (92 N. W. 848). It is ruled in the *Gilseth* case that the filing of the petition gives jurisdiction to inspect and survey and that the filing of the surveyor's report gives power to fix time and place as to the hearing of the establishment of the project.

It is also argued that power to do what was done was lacking because there having been no abandonment of the old ditches there was no right to add new territory or to make a new and larger ditch system on the lines of the old, even if the new project doubled the capacity of the old — meaning that if a plow ditch was made, it must remain all the drainage its territory can ever have.

There was power to determine what lands would be benefited. — *Erickson v. County,* (N. D.) 92 N. W. 841.

842, and to apportion the cost. — *Idem* — and in the absence of fraud there was jurisdiction to determine what lands should be included and assessed, and an honest mistake in this regard would not open the doors of the courts for redress. *Idem* 848.

This overlooks the authority given in Section 8458, under which the Board is given the same and equal authority to do *three* things, viz.: (1). "May establish and cause to be constructed any ditch"; (2). "May provide for the straightening or *enlargement* of any watercourse *or drain previously constructed*"; and (3) "May provide for the maintenance for such ditch, drain or watercourse"; all this "whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare", included in which is the drainage of agricultural land.

The Power of the Board, the method to be pursued, etc., when providing for *straightening or enlargement of any water course or drain* previously constructed, is governed by Section 8476, which says: -

> "But no proceedings affecting the right of persons or property shall be had under this section, *except upon notice* and the other procedure prescribed herein for the construction of drains."

This provision places the straightening or enlargement of any watercourse or drain previously constructed in the same class or category as an original drainage project, and the procedure is governed by Section 8459 to 8468, inclusive, as well as subsequent sections applicable to a new drainage project, and authorizes the inclusion and assessment of all property benefited, whether in the old drainage district or not.

Most of the important positions taken by the appellees on this head are squarely negatived by *Tuthill's* case, 31 S. D. 507, and emphatically so by *Gilseth v. Risty*, 46 S. D. 374. In the last named case the Court said:

"It is contended by the appellant that the project contemplated by the petition was not the creation of a new drainage district or a new drainage ditch, but merely to repair a project already in operation, and that, therefore, the board was without authority to proceed. But this contention is not tenable."

"The two projects were by no means identical. The drainage district involved in this case contains a materially larger area than the combined area of the two old ditches."

"No fraud or bad faith on the part of the Board has been shown."

The authority to build enlarged ditch over line of old ditch is supported by the following decisions:

In re Sorenson Drainage Ditch, 27 S. D. 342.

In re Judicial Ditch No. 8 v. Nelson, (Minn.) 163 N. W. 135.

Steensburg v. Kyle, (Ind.) 121 N. E. 537.

C. & N. W. Ry. Co. v. Board, (Ia.) 172 N. W. 443.

For that matter there is neither plea or proof of fraud or bad faith. As to this, one appellee concedes that though it charges bad faith that possibly the board had no bad intentions. (P. brief 23, 24). The claim that there is "ample proof" on this head (P. 29) seems to rest on the fact that those who became the petitioners first attempted other projects and went into this new one as a result of compromising. (P. 29). If compromise as an antecedent constituted fraud most things that have been accomplished after negotiation are fraudulent. At worst there is nothing pleaded or proven beyond honest mistake — which of course will not suffice. — *Southern Railway v. Watts,* 260 U. S. 519. And the fraud that would avail must be of a character to have kept the complainant from making full and fair presentation of its side — which

of course cannot be claimed here. — *Toledo Company v. Scale Company,* 261 U. S. 423.

IV.-(c).

NEW ENLARGED DRAINAGE.

The *Gilseth* decision is addressed to the project at bar. And it should be said, in passing, that some of the appellees have conceded that this was a new and independent project.

It is held in *People v. Mayor,* 4 N. Y. 419, and *Roberts v. Smith,* (Mich.) 72 N. W. 1092:

> "There never was any just foundation for saying that local taxation must necessarily be limited in or co-extensive with any previously established district."

And while *Thornton v. Road District,* 291 Fed. 520, has some language in line with the contention of appellees on this head, the exhausting of administrative tribunals is not mooted.

We are not overlooking the avoidances. We are told that the *Gilseth* case is inapplicable because Gilseth, unlike most of the appellees, was in the old drainage area, but the decision was in no manner based upon it. It is pointed out that Gilseth joined in the petition, was present at the hearing and took no appeal from establishment. (Briefs N. 46; P. 42). The City of Sioux Falls is also in the old drainage area, its representatives too were present at the hearing, and while the appellees other than the City, did not join in the petition nor appeared at hearing on it, we shall show in another connection that they too are as much estopped as though they had done what the City did. But like Gilseth, neither appellee appealed from the setablishment of the project, which appeal certainly would have enabled them to test whether or not their property should be included

and whether or not the establishment was a mere pretense and subterfuge. We concede that constitutionality was not challenged in the *Gilseth* case; but jurisdiction was. And there was a flat holding that the board had acquired jurisdiction.

Finally, it is argued (Brief N. 47; P. 43) that the real decision in the Gilseth case is first, that there was no protest when Gilseth saw the work performed. Assume for the sake of argument, that that is the holding. Neither appellee objected to the work — and their agents saw it going on and some of them furnished help to carry it on. It is strenuously insisted that the *Gilseth* decision turns wholly on the fact that Gilseth was held to be estopped. Any examination will make it clear this position is untenable. What is stressed is that there had been no appeal from the order of establishment and that, therefore, injunction would not lie to stop the carrying out the work contemplted by the petition. True, after the Court had declared that the board had jurisdiction and stressed the failure to take appeal it also found that Gilseth was estopped. That was purely a cumulative holding and the case makes plain the court had no thought of resting decision on this estoppel; that the main inquiry was whether or not the establishment and the proceedings of the board were valid and done within jurisdiction. Surely the estoppel cannot take first rank in the decision. At best for appellees it is only one ground of decision. And it is elementary that though more than one point is decided that does not make any particular point decided a *dictum*. (See our original brief, pp. 110, 111, 112). If that were not so, every decision having more than one point would be a *dictum, in toto*. Every litigant could pick out one of the points and say *it* was *dictum*, because other points were decided. His opponent might select other points decided as being alone of the essence of the decision — and as said, the effect would be that nothing would be a *decision* unless the court limited itself to passing upon some one single point.

IV-(d).

LACK OF JURISDICTION NOT SUSTAINED BY DECISIONS.

There is nothing in *Milheim's* case, 262 U. S. 710, which justifies a claim that this board lacked jurisdiction. It is not limited to a holding that where the jurisdiction of the assessing authorities is not challenged, there is no right to restrain in federal court where the only complaint is that an erroneous method of assessment or assessment on a wrong standard are involved — in other words, is not limited to cases where the taxing authorities have jurisdiction and the complaint is that an *ad valorem* basis was and should not have been used.

> "The Constitution violations were charged to be (a) that the purpose of the act is not public in the sense warranting the exercise of the power of taxation, but is essentially private; (b) it authorizes the imposition of the entire taxes upon the lands within the district, without regard to and relation to the tunnel or the benefit to be derived from it, and, there being no special benefits to such lands justifying such taxation is entirely arbitrary; and (c) that the commission has arbitrarily and unreasonably adopted an *ad valorem* basis for the appraisal and apportionment of benefits to the several parcels of lands within the district without reference to the actual benefits to each."

So of *Keokuk v. Salm*, 258 U. S. 122. It does not hold that such boards as this have power to act only in cases where nothing is involved but the amount of the tax. It does speak to such a situation, but only to say that *if* that be all that is involved there can be no relief in equity without tender of amount confessedly due or what may be found to be due in justice and equity.

In the guise of a concession it is said we might be right in asserting there should have been no enjoining if nothing were involved but irregularities in procedure

or dispute over amount. Thus is produced as assumption that the *Gilseth* case and others cited by us were decided as they were because nothing was involved beyond mere irregularities in procedure or dispute in amount. That is not a proper limitation upon these decisions.

V.

THE SUBSTANCE OF ATTACK AS PRESENTED IN THE ARGUMENTS FOR THE APPELLEES, IS ASSERTION THAT BOTH STATUTE LAW AND CONDUCT OF THE BOARD WERE VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES.

Assuming for the sake of argument that there is the requisite amount in controversy, still, appellees are not entitled to relief on the ground of unconstitutionality or other invalidity, because —

(a). Their bills do not raise the objections that their arguments do.

(b). The trial Judge ruled that there was no violation of the federal Constitution, or of any other. Appellees have not cross-appealed. And the Circuit Court of Appeals left the constitutionality question where the trial Court had put it. This means it is the settled law of the case that there is no unconstitutionality here presented — and though it be assumed appellees presented a federal question that might in reason be urged, the constitutional objection could not be sustained — that while the objection may have given the right to be heard by the District Court the hearing had is final on the point, and there is no constitutional question that can now be argued or ruled in favor of appellees.

(c). The failure to exhaust the administrative

tribunals provided by statute, estops appellees from urging unconstitutionality, fraud or other invalidity.

(d). They are estopped by conduct and silence to question constitutionality or other illegality or invalidity.

(e). If all else be passed, there was no unconstitutionality or other invalidity or illegality.

V-(a).

AS TO THE PLEADINGS.

First — is a blanket allegation that the *statute law* violates the federal Constitution. Then, that —

> If the apportionment of benefits be made, as threatened, it will constitute taking of property affected by the notice given, without due process of law.

So far — a blanket attack on *statute,* and another that threatened action will violate the due process clause.

There is further allegation for which it seems to be claimed it raises infringement of the equal protection clause of *the Constitution of the United States.* If it is to be held there is a reference to *that* Constitution, it must be because, in the beginning, it is said in terms that the statutes violate that Constitution, and because the allegations next to be set forth begin with, "it is further unconstitutional and void". Those allegations are:

> It is further void and unconstitutional because it provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within said drainage area, and especially that it does not fix

> one for the apportionment of benefits upon the property of railroad companies and other corporations and municipal corporations. (Par. 22, P. 15 — M).

It will be noted that the *Constitution of the United States* is not mentioned. This does not meet the strictness with which federal questions must be pleaded. True, the pleading *may* be a charge that the Federal Constitution has been violated. But as the Constitution of the state has the same guaranties, the pleading *may* be addressed to a violation of those. Indeed it is elsewhere urged by the other appellees that the state Constitution *has been* violated. The trial Court ruled that the statute law does lack fixed and determinable method or rule for apportionment of benefits, and especially so as to apportionment to railsoads and municipal corporations. But it did not so much as suggest that the Constitution of the United States had been disregarded. And the Circuit Court of Appeals declined to pass on constitutionality, at all.

Up to now, there is not a word about improper conduct — and no claim or ruling that any conduct violated *any* Constitution. Then comes an amendment to the bills (M. 74). The nearest it comes to intimating a constitutional question is by allegation that —

> Said equalization of benefits is so arbitrary and discriminatory against the property of plaintiff as to deprive it of its property without due process of law and of the equal protection of the laws.

Which, as said, may refer to the Constitution of the state. As for the rest — conduct is attacked, as follows:

> The equalization of benefits out of the total number is estimated at a sum greater than three thousand dollars.
>
> This equalization is wholly speculative, arbitrary, unjust, illegal, and discriminatory, and was made by the board without any reasonable and ra-

tional basis therefor.

It is not in proportion to any benefit which the property of plaintiff has received or ever can receive by what is proposed to be done

Its property has not been and never can be benefited by the work performed by the board to the extent of said estimated amount or to any extent.

The assessment sought to be collected from plaintiff is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the city of Sioux Falls and within the drainage area of the new ditch.

And, as said, neither of the lower courts ruled that as to the matter so pleaded there had been any violation of the Constitution of the United States.

We are not overlooking that the appellee City alone is concerned with the absence of Federal question; that the other appellees, having diversity, may have decision of non-federal questions. At this point we but assert that no plaintiff is entitled to more than he pleads; that on appeal by his opponent plaintiff can have nothing added to what the lower court gave him, and that anything that has become the settled law of the case binds him on appeal by his adversary.

VI.

WHAT HAS BECOME THE SETTLED LAW OF THE CASE BECAUSE OF DECISION BY THE TRIAL COURT, NOT APPEALED FROM, NOR TOUCHED BY THE CIRCUIT COURT OF APPEALS.

Starting with the premise that nothing has been declared unconstitutional, what the trial Court has settled negatives the allegation that the statute is further unconstitutional and void because it provides for an assessment against property without the right of the

owners to be heard thereon and without notice of any kind to him. It has been made the settled law of this case, binding on this appeal, as it should have been on the Circuit Court of Appeals:

1. It has so become settled that the "general" notice, saved from the Fourteenth Amendment — and that there was such provision for notice at some time before any assessment could become final, or a lien, as that there was no denial of due process. (M. 79, 80). — On which the trial Court is sustained by the statutes of the state and such decisions as that of Soliah, 222 U. S. 522; Gatch, (Iowa) 18 N. W. 314; and Ford, (Iowa) 45 N. W. 1034.

2. Settled it was an unjustified claim that no notice to railroads and municipal corporations was provided for. (P. 37). Or that there was no provision for notice to cities or railroad corporations of either apportionment or equalization.

3. That notice provided was proper though it did not name all those to be affected, and that though it was not required to name them, the notice of equalization was required to and did give a detailed description of the property, including that of the railroad appellees. (Section 8463). Curtis v. Pound, 34 S. D. 628.

4. It is so settled that no appellee was mislead because notice did not name it; nor because it did name some appellees. (R. 19, 21; P. 19). Nor mislead by the alleged fact that the notice spoke only of tract owners and tracts of land (P. 36; R. 32, 33) — the fact being that the notice of equalization gave name, owner and definite and specific tracts by specified section, township and range — and the appellee, Rock Island, was not mislead by a notice (and it is not the fact that there was such a notice) which gave no information beyond describing the land through which the ditch would pass, though it is true same did not de-

scribe property of the Rock Island, nor advise it that its bridges would be assessed. (R. 28).

5. No one was mislead into believing that nothing would be assessed except agricultural land. (N. 21; P. 20). — Or into believing there was to be no enlargement of the area of the already constructed older ditches.

6. It was expressly settled that the notice provided complied with constitutional requirement (M. 77) — and with the South Dakota statutes.

7. Involved in this finding is a denial of the contention that the notice was bad even if it be assumed to be good in itself because no statute provided for such notice as was given (which however is not the fact) — and such alleged "fact" is not material — see *Paulson,* 149 S. U. 30; *Tripp v. Yankton,* 10 S. D. 516; *Page* and *Jones, Taxation,* Sec. 135 and cases cited.

And so of the claim that there is a fatal defect as to notice because it was given without preceding action by the board. (N. 20; P. 19).

8. There was opportunity by Sections 8463 and 8464 to present whether the cost was greater than the benefit. (N. 9; P. 9, 20). And the trial Court so ruled. (M. 76).

9. There was due opportunity to contest all that is to be set forth in the petition to establish. (Sec. 8459).

10. To contest establishment, but opportunity to contest is not limited to that.

11. To contest all that is required to be set forth in the report of the surveyor, required to be filed. (Sections 8459, 8461, 8462).

12. To contest the finding of the board on width and route. (Same statutes).

13. To contest whether the proposed system is conducive to the public health, convenience and welfare. (Same statutes). — Or is necessary and practicable for agricultural purposes. (Same statutes).

14. To contest as to what lands should be included. (M. 76; R. 35; N. 21; P. 20).

15. It is so settled there was due opportunity to be heard on whether there should be a tax at all (N. 9; P. 9) — on whether the proposed tax was valid and just. (M. 81, 82; N. 8; P. 7).

16. Opportunity to be heard was not limited to the amounts to be apportioned. (N. 21; P. 20). And there was due opportunity to be heard on the amount of tax (M. 81; N. 9; P. 9) — on whether same was after equalization, confiscatory. (M. 78; R. 30, 35).

17. Opportunity to show that owner was not being benefited (N. 21; P. 20); or not as much as assessed for — and see *Hennessey's* case, (Wis.) 74 N. W. 985; *Soliah,* 222 U. S. 522; *Milheim,* 262 U. S. 710; *Paulson,* 149 U. S. 30; *Spencer,* 125 U. S. 345.

The trial Court so ruled. (M. 82).

18. There was opportunity under Section 8463 to present the objection that action was taken before cost was known and that cost exceeding benefit resulted. (R. 29).

19. There was opportunity to have determined whether the proceedings had been illegal. (R. 29).

By way of avoidance it is said the decision of the trial Court is sound only where the legislature fixes the boundaries and what is the amount of benefit. The only difference between the doing of this by the legislature

and doing it on delegation is that in the first case notice is not required and in the last it is. And that is all that is held on this point by *Spencer v. Merchant,* 125 U S. 345, and *Road District v. Railway,* 275 Fed. 600. It is obvious, then, that the decision holding there was due notice is not irrelevent.

Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct., 1064, holds only that an ordinance which attempts to keep men from pursuing a lawful calling except on permission, is unconstitutional.

VI-(a).

RULING OF TRIAL COURT.

What was settled by the trial Court as to the objection of unconstitutionality (N. 47; P. 43; R. 25) is fairly well presented by the following extracts from its opinion:

> "Without repetition, and calling attention now to the reasons urged by plaintiffs sustaining the unconstitutionality of the statute enacted for the purpose of draining agricultural lands, and considering the objections urged in various forms by the different plaintiffs, we find that all of the objections center about the criticism that no notice is provided the owners of land affected by the drainage ditch except the general notice, and in fact, no personal notice until the date fixed by the board for the equalization of proportional assessments for the various tracts of land benefited by the drainage." (M. 79, 80).
>
> "In my judgment the South Dakota statutes enacted in the light of that provision of the Constitution of the State providing for the drainage of agricultural lands is constitutional." (M. 83).
>
> "The statutes of this state do not provide for the description of the lands alleged to be benefited

by the ditch, or the owners of the lands, or that notice shall be given to such owners, or that the owners shall appear and show cause if any they have why the ditch is not practicable or should not be established, or have the opportunity to show that the cost would be greater than the benefits, or would be confiscatory, and yet, I am satisfied that the courts of the various states and the Supreme Court of the United States have recognized the power of the legislature to provide the method of the levying of this tax against the lands benefited by a drainage ditch, and have held that a law that provides for notice and an appearance and the right to contest the amount of the tax, and to contest the right to tax at all, with the right of appeal therefrom, if given to the land owners prior to the time that a tax is levied, and becomes effective, is 'due process of law'." (M. 80).

He then holds that this general notice is constitutional:

"I repeat that under the South Dakota statute there is ample provision for notice to every land owner and an opportunity given to be present at the hearing at which time and place he may assert all objections against the validity and justice of the proposed charge upon his property before the tax is levied and carried by the county auditor as such on the books of his office and made a lien upon the property." (M. 82, 83).

VI-(b).

RULINGS NOT APPEALED FROM, FINAL.

Argument on errors against appellee will not be considered.

3 *C. J.*, pp. 1404-1405.

The review is limited to the assignments of the appellant.

U. S. v. Blackfeather, 155 U. S. 180.

The appellee cannot complain of any adverse ruling.

Bolles v. Outing, 175 U. S. 262, 268.
Guarantee Co. v. Ins. Co., 124 Fed. 172.
Canter v. Ins. Co., 3 Peters 307, 318.
Pauly v. Co., (C. C. A.) 62 Fed. 698, 703.

Can urge no issue founded on errors below.

Guarantee Company, supra.

It is the long settled rule that appellee will be heard only in support of the decree as it stands.

London v. Dist., 104 U. S. at 774.
The Stephan Morgan, 94 U. S. 599.
The Maria Martin, 12 Wall. 31, 40.
Guarantee Company, supra.
The William Bagaley, 5 Wall. 412.

Where a plaintiff also has grounds of complaint in respect to judgments in his favor he may cross-appeal if the defendant has appealed or independently if defendant has taken the case directly to the Supreme Court on the question of jurisdiction only.

United States v. Jahn, 155 U. S. 109.

Though an error might be held to be fatal were there cross appeal, without such appeal appellee can

not take advantage of such error, and the matter stands as if he had waived the error at the hearing.

Chittenden v. Brewster, 69 U. S. at 195.

VII.

THE APPELLEES ARE ESTOPPED FROM ASSERTING UNCONSTITUTIONALITY OR OTHER ILLEGALITY BECAUSE THEY HAVE NOT MADE USE OF THE ADMINISTRATIVE TRIBUNALS PROVIDED BY THE STATE STATUTES.

If it is the law that those who do not exhaust the avenues of summary and administrative relief provided by the state may not enter court to complain of *any* invalidity including unconstitutionality, it is idle to argue upon whether there is invalidity. And such *is* the law.

It is bottomed on the presumption that such tribunals will see that no wrong or injustice is done the ones sought to be taxed. — *Milheim*, 262 U. S. 710; *First National Bank v. Board*, 264 U. S. 450.

In the case of *Milheim*, it is stressed that the apportionment of taxes was "subject to correction and confirmation after hearing the property owners affected".

> "The utimate test is that there be some tribunal especially fixed by statute with the power of equalization, which power it may assert at the instance of anyone aggrieved".
>
> *First National Bank v. Board*, 264 U. S. 454; 44 Sup. Ct. Rep. 387.

Must exhaust administrative tribunals before

raising any question in court.

Fallbrook v. District, 164 U. S. 112.

Making no complaint before the reviewing board is an admission that the action of the assessing board is correct.

Hinds v. Township, (Mich.) 65 N. W. 546.

In these administrative tribunals relief may be had as to the finding on any matter alledge in the petition.

People v. Hagar, 52 Calif. 183.

Bigelow Estoppel, page 142.

Freeman Judgment, Section 523.

Ward v. Alsup, (Tenn.) 46 S. W. 575, 576.

And this is so because of Section 8459 and others.

And see *Fallbrook v. District,* 164 U. S. 112.

The one deeming himself aggrieved must appeal.

Milne, 32 S. D. 627 — and it is only where no appeal is permitted that the courts may be entered.

Bemis v. Drainage, (Ind.) 105 N. E. 497.

The scope of the appeal permitted by the South Dakota statute permits review of all that appellees complain of, and the alleged grievances are dealt with as in original action. Section 8469 Code 1919; *In re Sorenson,* 27 S. D. 342.

The constitutional guaranties of due process of law in *Const. Bill of Rights,* § 21, requiring just compensation for private property taken for public use, are not absolute but are subject to the right of the state to modify or appropriate when public necessity or welfare requires, under the police power, the taxing power, or the

power of eminent domain.

Bemis v. Guirl Drainage Co., (Ind.) 105 N. E. 496.

The taxing power being reserved to the states, they may control method, manner and detail of fixing, apportioning, equalizing and collecting tax — method of determining same, and the agencies by which the proceedings are to be carried on.

And the exercise of these powers presents no federal question.

Davidson, 96 U. S. 97.
Spencer, 125 U. S. 345.
Walston, 128 U. S. 578.
Hagar, 111 U. S. 701.
Lent, 140 U. S. 318.
Fallbrook, 164 U. S. 113.
French, 181 U. S. 324.
Mt. Cemetery, 248 U. S. 502.

They have power to prescribe as to kind of notice to be given to avoid due process clause — courts may not question either method, manner or kind of notice provided — and notices containing less than the one at bar and not naming the parties affected have been repeatedly held to satisfy the Fourteenth Amendment.

The failure to appeal gives jurisdiction to proceed — and as to anything done with jurisdiction there may not be collateral attack.

Erickson, (N. D.) 92 N. W. 848.

VII-(a).

To speak more in detail.

For illustration, the following objections may not be raised by one who has not exhausted the administrative

tribunals created by state statute.

That the land of the complainant should not have been included.

Embree v. District, 240 U. S. 242.

For, if it was not intended to afford a hearing on inclusion there was no purpose in the provision of Section 8462 for contesting the statements of the petition with reference to the "territory affected"; or in requiring notice to describe the tract of land likely to be affected.

Unconstitutionality only works invalidity and may not be raised by those who have not entered the administrative tribunals.

Union Pacific v. Commissioners, (C. C. A.) 217 Fed. 544.

Milheim v. Moffat, 262 U. S. 723.

Martin v. District, 205 U. S. 135.

Farncomb's case, 252 U. S. 7, 11.

So of fraud.

Union Pacific v. Commissioners, (C. C. A.) 217 Fed. 544; — and whether the property has been fraudulently assessed.

First National Bank v. Board, 264 U. S. 455. This on the reasoning that being tainted with fraud only works that the tax is invalid. — *Shelton v. Platt,* 139 U. S. 591; *Union Pacific v. Commissioners, supra.*

That the assessment was illegal.

Ward v. Alsup, (Tenn.) 46 S. W. 575.

That it was improper.

First National Bank v. Board, 264 U. S. 450.

Ward v. Alsup, (Tenn.) 46 S. W. 575.

That the assessment is unjust and unwarranted.

Curtiss v. Pound, 34 S. D. 633.
Petoskey, (Mich.) 127 N. W. 345.
Michigan Bank v. City, 107 Mich. 246.

That the assessment was unfair.

First National Bank v. Board. 264 U. S. 450.

That the assessment was disproportionate and unequal, as between those sought to be taxed.

Bagley v. Butler, 24 S. D. 429.
Spencer v. Merchant, 125 U. S. 345.
Township v. Rose, (Mich.) 53 N. W. 928.

That the assessment is excessive.

Curtiss v. Pound, 34 S. D. 628, 633.
Hinds v. Township, (Mich.) 65 N. W. 546.
Township v. Rose, (Mich.) 53 N. W. 928.
Ward v. Alsuf, (Tenn.) 46 S. W. 575.
Southern Ry. v. Watts, 260 U. S. 501.

Whether it was illegally excessive or irregular and excessive.

Stanley v. County, 121 U. S. 535.
Ward v. Alsup, (Tenn.) 46 S. W. 575.

Or excessive through over-valuation.

Stanley v. County, 121 U. S. 535 — a question not for the courts.

Spencer v. Merchant, 125 U. S. 345.

Whether there is any benefit or to what extent it is benefited.

Milne v. McKinnon, 32 S. D. 361.
Fallbrook v. Dist., 164 U. S. 112.
Soliah v. Heskin, 222 U. S. 522

Resolving a conflict on whether lands included would be benefited.

Pittsburgh Ry. v. Backus, 154 U. S. 421.

The courts may not be entered in the first instance to determine whether either statute or administration of it is arbitrary or the method is so arbitrary as that a wrong must result.

Milne v. McKinnon, 32 S. D. 627.

Martin v. District, 205 U. S. 135.

Keokuk v. Salm, 258 U. S. 122.

Even if it be fraudulent discrimination caused by over-valuation.

Milheim v. Moffat, 262 U. S. 710.

At this point the attention of the court should be called to the fact that all complaint of arbitrariness in assessment falls flat where the one complaining prevented equalization. One may not presume that the assessment would have remained unequal, disproportionate or arbitrary after equalization had been had. One unconscious piece of humor in which appellees indulge is urging that the equalization was arbitrary, unfair, etc., when through their own act there was no equalization. It should further be noted the burden was on the plaintiffs to show unconstitutionality, and neither of the lower courts found any unconstitutionality. Further, the evidence does not sustain the complaint.

And the courts may not be appealed to in the first instance on a complaint that the appellees should not be taxed because they were not the owners of agricultural lands.

VII-(b).

CASES DISTINGUISHED.

As to the citations by appellees and their attempt at distinguishing of citations on our part —

The case of *Abernathy,* 274 Fed. 801, is not authority on non-existent taxes because it involves a controversy where in the *tax bills had already issued.* In *Board v. Pipe Line Company,* 292 Fed. at 474, there was involved resistance to a proceeding "to collect unpaid levy taxes", and the matter of exhausting administrative tribunals is not mooted. Nor was this mooted in *Norwood v. Baker,* 172 U. S. 269, 19 Sup. Ct. 187; nor in the *Milheim* case, 262 U. S. 710. The matter of exhausting the administrative tribunals could not arise in *Myles v. Board,* 239 U. S. 474, nor in *Gast v. Schneider,* 240 U. S. 55, nor in *Kansas City Railway v. Road Improvement District,* 256 U. S. 658 — because each of these cases went through the state courts and were considered in the Supreme Court only on writ of error to the respective highest court of the states.

The case of *Milheim v. Moffat,* 262 U. S. 710, is not distinguishable on the ground that in it no lack of jurisdiction was asserted, because the case at bar is just in that situation. For a conclusive showing that jurisdiction has attached is at least equivalent to a failure to assert lack of jurisdiction. (N. 45; P. 41).

Keokuk v. Salm, 258 U. S. 122, is not well distinguished. At any rate the construction that appellees give it differs from the analysis given the case in the matter of *Bohler,* numbers 170, 171, October Term, 1924. The Supreme Court says the *Keokuk* Decision declining to enjoin should be sustained because the assessment was subject to revision by a board of review which was required to give a hearing and to correct the assessment as should appear just; that the payment of taxes was not to be enforced (as here, except as to the Power com-

pany) by distraint or levy but by legal proceedings in a civil suit for the collection of a debt wherein any defense including discrimination could be made; that complainant brought his bill without taking any of the steps offered by the statute as an administrative body — and the *Bohler* case sustains itself on the ground that the state statutes provided no remedy against excessive assessment other than by petition in equity and that, therefore, those who had the right to enter the federal court at all might do so with a petition in equity.

The *Soliah* case deals with a statute which for one thing had provision for a suit to recover back. From that fact appellees deduce that the *Soliah* decision rests on that fact. What it holds is that where ample provision for administrative review is made the courts may not be entered in the first instance. It nowhere holds that equity has not jurisdiction because of this provision for a suit to recover back but merely that such provision is one reason why there was an adequate remedy at law. It does not hold that such provision is the only adequate remedy at law which will deter the court of equity from acting. It stresses this one provision no more than the fact that general review in administrative tribunals is provided. And *Ward v. Alsup,* (Tenn.) 46 S. W. 575, holds that though there be provision for suit to recover back the courts may not be entered in the first instance without exhausting the administrative tribunals.

VII-(c).

NON-RESIDENT MAY ENTER FEDERAL COURT ONLY WHEN CITIZEN MAY ENTER STATE COURT.

It was ruled in *Reagan v. County,* 154 U. S. 362, and followed in *Smyth,* 169 U. S. 466, 517 and *Sheffield,* 149 U. S. 574:

> " 'Whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state

may invoke the jurisdiction of the federal courts to maintain a like defense'. *A state cannot tie up a citizen of another state having property rights within its territory invaded by unauthorized acts of its officers to suits for refress in its own court."*

The italics are those of appellees, and indicate they deem the matter within the rule that the state may not, directly or indirectly, keep one out of federal court who by federal law has the right to enter it — a sound piece of law, but utterly irrelevant. What they should have italized is, "whenever a citizen of a state can go into the courts of a state". In other words, diversity will not open the federal courts to a suit which the resident may not bring in the courts of his state. Where the resident can sue he must sue in state court. The non-resident has an election. He may sue either in state or federal court. On this head the following are significant:

"If this section would authorize a suit in the state court then the plaintiff being a citizen of Missouri could maintain the action in the United States court".

Stonebraker v. Hunter, (C. C. A.) 215 Fed. 69, 70, citing *Cumings v. Bank,* 101 U. S. 153.

"We find that the Supreme Court of Oklahoma has uniformly held that such suit would not lie, and there being no allegation in the bill of any distinct ground of equitable jurisdiction, dismissal of the bill is affirmed".

Stonebraker v. Hunter, (C. C. A.) 215 Fed. 69, 70.

To put it another way — if no one may sue in the court of the state without first exhausting the state administrative tribunals, no one may sue in federal court without exhausting those tribunals.

It is ruled in *Bagley v. Butler,* 24 S. D. 429, one may not enter the courts until he has at least exhausted equalization. It would seem this applies to both resident

and non-resident. If it does not, there is no explaining the countless *federal* decisions that one must first exhaust the state administrative tribunals. If appellees are right the federal court should have entertained the suits on the ground that the provisions for administrative relief were void because an attempt by indirection to shut one who had the right to sue in federal court, out of that court.

VIII.

APPELLEES ARE ESTOPPED BY ACTION AND NON-ACTION TO ASSERT ANY INVALIDITY.

As to the Appellee City —

It signed the petition, was present at hearings; its commission visited the work; it furnished water for the job, put in a meter for it and was paid by the Board on bills presented — and it seems to be admitted that the project saved or at least helped save the water supply of the City. Gilseth was held estopped on less than this. Beyond question it estops the City to assert any invalidity. — *De Noma,* 28 S. D. 372.

Shepard v. Barron, 194 U. S. 583.
Wright v. Davidson, 181 U. S. 371.
Conde v. City, (N. Y.) 58 N. E. 130.
Vose, 44 N. Y. 415.

City v. Hill, (Wash.), 62 Pac. 446, and long line of cases cited; *Erickson,* (N. D.) 92 N. W. 850; *Vickey,* (Ind. Supp.) 32 N. E. 881 and cases cited.

The Circuit Court of Appeals disposed of the estoppel by statement that when the acts relied on for estoppel were done those who did them did not know the project was likely to affect them. How can that possibly be so as to the City?

Counsel for the City presents another avoidance, to-wit, that there is no estoppel because despite all done

by the City it is not estopped because the project work departed from the petition, violated the federal Constitution and was otherwise tainted with illegality.

This disregards (a) that the allegation of fact is unproved, and (b) since what the City did estops it to object on account of illegality it is not relieved from the estoppel by asserting illegality.

VIII-(a).

ESTOPPEL AS TO OTHER APPELLEES.

It is true no other of the appellees did so much to base estoppel as did the City. But it does not follow these others are not estopped. They are estopped because all done was open, notorious and long continued, and they stood by silently and made no objection and took no action until the work was finished.

> *McCoy v. Able,* 131 Ind. 417; *Kellog,* 15 Ohio State 64; *Wiggin,* 9 Page 24; *Erickson,* (N. D.) 92 N. W. 849 — citing a long line.

In *Erickson v. County,* (N. D), 92 N. W. 850, it is said on citation of *Smith v. Carlow,* (Mich.) 72 N. W. 22:

> "The entire proceedings were open and notorious and evidenly were known to most, if not all, who were affected. The courts were open to them to contest validity before the work was performed. Whatever advantage the system is to the public has been reaped. This brings the case within the well settled doctrine that when parties stand by and see the improvement made and take no steps to impeach invalidity, they are estopped to raise validity when called upon to pay."

To like effect is *Patterson v. Baumler,* 43 Iowa, 477, citing numerous cases. One thing said in the Patterson case is that the work of construction was adjacent to the property of those sought to be taxed, that they cannot

be presumed to be ignorant of any irregularity and must be presumed to have had notice of the action on the work and the causing of it to be prosecuted. A consent by implication is said to be established in such circumstances. See *Motz v. City*, 18 Mich. 495 (Cooley).

IX.

PASSING ALL ESTOPPELS, THE CITY MAY NOT BE HEARD AT ALL BECAUSE IT HAS NO DIVERSITY, AND WE CONTEND HAS NO SUBSTANTIAL FEDERAL QUESTION.

At this point we claim nothing for the fact that it was held below there had been no unconstitutionality; and concede that whether it was reasonable to assert unconstitutionality is raised by our assignments.

In the main, the basis of attack was unconstitutionality, and excessive taxation. We have seen that here neither raises a federal question.

It is our position that no substantial federal question was presented because at the time these bills were prepared it was as well settled as any law proposition has ever been that in a collateral action such as this the federal courts could grant no relief as to anything complained of in the bills.

X.

PASSING ALL ESTOPPELS, NO COURT WAS WARRANTED TO ENTERTAIN THESE SUITS ON THE CHANCERY SIDE. NO EQUITY SHOWN.

At the outset, it is to be noted that unless state law permits it, the federal courts are extremely reluctant to interefere with the collection of state taxes by injunction. And Congress has recognized that the process of injunction has been used too freely, by several statutes making injunction more difficult to obtain or forbidding

its use altogether. See *Boise v. Boise,* 213 U. S. 276.

It is settled that illegality of a tax, alone, will not base chancery jurisdiction. — There must, in addition, be present something that rightfully invokes that jurisdiction. — *Shelton v. Platt,* 139 U. S. 591. All this is conceded, and the sole question is whether appellees present more than illegality of tax.

(a). *They invoke multiplicity of suits.*

Multiplicity cannot successfully be invoked where the statutes give access to the Board of Review, and appeal from the decision of such Boards to the courts.

Indiana Company v. Keohne, 188 U. S. 681.

To the same effect is *Keokuk v. Salm,* 258 U. S. 122.

We add, in the words of *Boise v .Boise,* 213 U. S. 276, it does not appear any other suits are threatened, the ones brought so involve the whole controversy that no new suits are necessary, and that the doctrine is not invoked by suits that are threatened by these appellees who have already sued.

(b). *No immediate or irreparable injury is made to appear.*

A vague allegation of irreparable injury will not suffice.

Boise v. Boise, 213 U. S. 276, 29 Sup. Ct. 429.

Surely it is not an irremediable mischief such as gives chancery jurisdiction that one might be defeated on resort to lawful tribunals, including the right to go to appellate tribunals. Where such remedy exists no case of irreparable injury is made out. *Keokuk v. Salm,* 258 U. S. 122; 42 Sup. Ct. Rep. 208.

(c). *No cloud on title is possible,* unless, perhaps, on the property of appellee Power Company.

The appellees present that Section 8464 of the Code makes the assessment a valid and perfect lien and that this apparent valid lien (said to be in reality invalid) would cast a cloud. (R. Brief 21). To begin with, all cloud was the purest speculation and merest anticipation when the bills were filed, and, for that matter, when the injunction issued. At these times no tax of any sort was in existence. Wherefore no enforcement of tax could at that time cast any cloud. Section 8464 in plain language declares that no assessment may be made, to say nothing of being made effective, until after the ascertainment of benefits are equalized which the injunction stopped.

Again — the doctrine of casting clouds cannot be invoked against one whose real property may not be seized to enforce the collection of a tax. Sections 6606 and 6663 makes fairly clear that as to railroads taxes can be collected only out of sale of personal property. It directs collection to be made by selling engines, cars, rolling stock "and any personal property".

Sections 6662, 6663 and 6664 permit railroad companies to defend any suits brought against them to collect such tax, in which they may set up any defense which they have, even to attacking the validity thereof.

Moreover, if any statute had attempted to permit collection of taxes by selling some part of a railroad lying within South Dakota it would undoubtedly have been held to be an interference with Interstate Commerce. As said in *Union Pacific v. Ryan,* 113 U. S. 516, a railroad cannot be regarded as mere land as farms or building lots, that its value depends on its whole line as a unit, and any segregated section would be almost valueless, by itself.

As to the City — Section 8463 provides that enforcement of anything due from the City must be made by the assessing officers — and of course these may be commanded by *mandamus* to act.

Taxes against such parties are not enforced by distraint or levy but by suit to collect.

Keokuk v. Salm, 258 U. S. 112.

Averment that an assessment of capital stock on franchise constitutes a cloud on title will not sustain bill to restrain collection without allegation that corporation owns real property.

Indiana Co. v. Kochne, 188 U. S. 681.

Payne, (Calif.) 138 Pac. 967.

Union Pacific's case, 113 U. S. 516.

Greene's case, 244 U. S. 499.

(d). What has been said as to casting a cloud applies quite largely to the claim of lien attaching. See *Boise,* 213 U. S. 276. As said, at the time the injunctions issued, there was no lien possible.

Section 8467 says that the tax shall be a perpetual lien but says that this is so as to "tracts". We have appellees committed to the assertion that using the word "tract" found in another statute or found in a notice, does not give notice to either a railroad or a municipal corporation. If that be so, fixing a lien on "tracts" is not fixing a lien on any property of either a railroad or a municipal corporation.

But as said, liens at all event attach only to real property owned by someone whose real property may be sold for taxes — and neither railroads nor municipal corporations are in that class. There can be neither cloud or lien cast upon property of Railroads or City described.

X-(a).

ADEQUATE REMEDY AT LAW.

It is strenously urged there was chancery jurisdiction because there exists no adequate remedy. The provisions for administrative tribunals alone constitute an

adequate remedy.

The *Ward* case, (Tenn.) 46 S. W. 575, approves the statement of Cooley on taxation, that "the statutory remedy of equalization is supposed to be adequate to all the requirements of justice, and it is the party's folly if he does not avail himself of it".

Administrative provisions give adequate remedy.

Milheim v. Moffat, 262 U. S. 710.

Indiana Co. v. Koehne, 188 U. S. 681.

Union Pacific v. Commissioners, (C. C. A.) 217 Fed. 456.

Wherefore there is not ground for equitable jurisdiction.

Boise v. Boise, 213 U. S. 276.

Dows v. Chicago, 11 Wall. 180.

Walla Walla v. Walla Walla, 172 U. S. 1, 19 Sup. Ct. 77.

Shelton v. Platt, 139 U. S. 591.

Having failed to object to a tentative *ad valorem* assessment, failure to ask modification of cost before the board of equalization, and before the tentative basis has been finally adopted, leaves the party with no sufficient ground of complaint.

Milheim v. Moffat, 262 U. S. 723.

Relief in equity depends on having sought correction from the Board of review and failure to secure redress.

Keokuk v. Salm, 258 U. S. 112, 42 Sup. Ct. 207, 208.

A subordinate but involved argument is that there was chancery jurisdiction because whatever remedy existed was not one that can be presented on the law side

of the federal court. It is held in *Shelton v. Platt,* 139 U. S. 591, and the *Walla Walla* case, 172 U. S. 1, 19 Sup. Ct. 77, that as to an illegal tax a damage suit may be enteretained on the law side of the federal court. Again, over and again is it asserted (and the Circuit Court of Appeals sustains the assertion) that the Board acted without color of right or authority, that it was a naked trespasser from the very commencement of the assessment proceedings. (P. 23, 34, 35, and also in the briefs of M., S. and O.). Surely, there is a remedy against a trespasser on the law side of the federal court, say, by a damage suit. There is no suggestion that the appellants are insolvent, and it is presumed they are solvent — moreover it seems to be settled that the existence of a threatened common trespass will not give equity jurisdiction.

No relief in equity as to tax which because of invalidity amounts to a common trespass.

Dows v. Chicago, 11 Wall. 80.

Some peculiar reasons are given why the chancery jurisdiction should be sustained. Largely, these reasons assert matters which we have attempted heretofore to show are immaterial and untenable under the law, and not sustained by the evidence.

For illustration — equity had jurisdiction because the project was "confessedly" a mere subterfuge — which was never confessed and is negatived by the express holding of the highest court of South Dakota.

Another "reason" is that there was the right to have equity investigate whether the board was acting without power and whether appellees were being deprived of due process of law. This is remarkable. It seems to be thoroughly settled that the chancery court has no jurisdiction *even if the* proposal of a tax has no authority back of it, or violated the Constitution. But

the court does have jurisdiction to find out whether what it could not act on, if established, existed.

Finally, that there was jurisdiction because the state statutes did not provide the right to bring suit for the recovery back of illegal taxes paid under protest. That such provision would have constituted an adequate remedy at law we concede. But there are a number of things that might be such remedies that the state statute did not provide for. How is it material if there are other sufficient provisions to constitute adequate remedy at law? And what of it, that no statutory right is given to recover back? If, as appellees urge, the members of the Board were mere trespassers there was always the common law right to bring suit to recover back anything that these trespassers had obtained by their trespass.

It might be added that the very fact that there is no remedy in equity proves there is one on the law side, for it cannot be assumed the law has left a wrong without a remedy.

XI.

PASSING ALL ESTOPPELS, THERE WAS IN FACT NO VIOLATION OF THE FEDERAL CONSTITUTION.

The Board was acting under the taxing power. — *People v. Mayor,* 4 N. Y. 419; *Roberts v. Smith,* (Mich.) 72 N. W. 1092. As to what should be included in the District, its action was a political matter. — *Bemis,* (Ind.) 105 N. E. 497. — And it would not deny due process if notice as to boundaries were not required. *Ross v. Board,* (Iowa) 104 N. W. 506.

Being an exercise of the taxing power, one reserved to the states, the courts may not interfere because of the method, manner or details of apportionment, equalization and collection adopted and fixed by the proper state

authority; nor with their method of determination or the agencies chosen to carry on; nor because of the method and manner of notice, or the kind of notice adopted — and many times all such action has been held to satisfy the Constitution — even where what was done was much more open to such objections than those urged by appellees, or anything done or omitted here.

NOTICE GIVEN, SUFFICIENT.

No notice showing intended classifying as to assessment is necessary.

Ross v. Board, (Iowa) 104 N. W. 506.

In *Curtiss v. Pound*, 34 S. D. 628, the notice to City and Railroads is held sufficient. In it —

> A township unsuccessfully contended it had no notice because it could not infer from the notice whether the township was to be affected, that it was not named and had no reason to believe it would be benefited or damaged by the proposed drainage. It was further held the owner need not be named, and that all that was necessary was a general description of the lands to be affected.

It suffices that appeal is provided. — *Bemis*, (Ind.) 105 N. E. 497.

It suffices that notice is given at some time before the assessment becomes final. — *Idem.* This is true as to the question of what may rightly be included in the District; — *Voight*, 184 U. S. 115; 22 Sup. Ct. 337, — this, even where no notice was given before establishment, as to establishing. *Goodrich v. Detroit*, 184 U. S. 432, 22 Sup. Ct. 397.

Sections 8459, 8461 and 8462 provide for due notice on whether there is necessity for establishing. Section 8463, for due notice as to assessment. — Section 8476 is a complete harmonizer as to notice requirements. It provides:

> "All proceedings affecting right of persons in the establishment must be had on such notice as the statute requires to be given as to construction of drains."

Thus, it puts straightening or enlargement of old drains previously constructed, in the same class as an original drainage project; and provides for due notice as to inclusion, whether in the old drainage district or not. This applies particularly to the enlargement proceeding in the cases at bar.

> It is settled by the highest court of the State that the notice which the trial Judge found sufficient was sufficient under the statutes of the State.
>
> *State v. Pound,* 34 S. D. 628, 150 N. W. 287, 288.
>
> *Gilseth v. Risty,* 46 S. D. 372.

And such is the holding of

> *Lamb v. Connolly,* (N. Y.) 25 N. E., 1043, 1044.
>
> *Hennessey v. Douglas,* (Wis.) 74 N. W. 987.
>
> *Pittsburgh v. Backus,* 154 U. S. 421.

Under Sections 6663 and 6664, the railroad appellees had opportunity to present all they complain of, by way of defense to a suit to collect.

The opportunity to be heard as to the petition is penary. (Sections 8461, 8462). For one thinb, the notice as to this hearing, "shall refer to the files in the proceedings for further particulars. Such notice shall summon *all persons affected* by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed."

And Section 8461 provides for a notice that shall contain:

> A description of the exact line and width of the ditch as determined by the board, describing

"the tract of country likely to be affected thereby, in general terms."

So the property sought "to be affected" is required to be described even though its owners are not named, and the notice given describes said land by sections, townships, ranges, and city sub-divisions.

It would not deny due process if no notice of hearing on sufficiency of the petition had been provided. — *Bemis,* (Ind.) 105 N. E. 497.

There was power to determine what lands were benefited. *Voight,* 184 U. S. 115, 22 Sup. Ct. 337 — and at least one appellee seems to concede this. (Brief R. 35).

All held in *Georgia v. Wright,* 207 U. S. 127, is that the opportunity to be heard is too much limited. The laws of Georgia seem to deny about all notice and hearing that the laws of South Dakota give.

XII.

THERE IS IN FACT NOTHING ARBITRARY EITHER IN STATUTE OR ADMINISTRATION OF STATUTE.

What is arbitrary in taxation is described in *Brushaber v. Union Pacific,* 240 U. S. 1, 36 Sup. Ct. 237, to be a tax that transends the conception of all taxation, is a mere arbitrary use of power, forces courts to the conclusion that it is not the exertion of taxation but an attempt to confiscate, and is so wanting in basis for classification as to produce such gross patent unequality as leads inevitably to the same conclusion. This is the standard then to measure by — in which connection it is not amiss to add that the *pleadings* do not seem to attack the *statute* for being arbitrary but are addressed to arbitrary conduct by those who proceeded under statute. In argument, however, this is enlarged and we

are told the statute is so arbitrary as to be unconstitutional because it fixes no definite standard for benefits. (N. 8; P. 8). And *Martin v. District,* 205 U. S. 135, is cited and appears to be a case on a statute that *was* so lacking in definite standard. Passing the question of pleading, the statute itself (Section 8463) follows Section 6, Article 21 of the Constitution in providing that the special assessments shall be raised according to benefits "among the lands affected".

There is no limitation that it shall be *upon* or among lands *used for agricultural purposes.* There is no suggestion that railroads or cities shall not be assessed for benefits resulting to their property. The board then fixes a time and place for equalizing the same. Notice of such equalization shall be given by publication and posting. Said notice shall state (1) the width and route of the drainage; (2) a description of each tract of land affected by the proposed drainage; (3) and the names of the owners of the several tracts of land as appears from the records in the office of the Register of Deeds; and (4) the proportion of benefit fixed against *"each tract of* (or) *property* *", and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated.

Under clause 4 above, the statute now reads "each tract *of* property", and is evidently a typographical error on the revision, as the original statute of 1907 read "each tract *or* property". Since the statute specifically directs that "all such owners" be notified to show cause, (Sec. 8463) it cannot be said that owners of one class of property are required to be notified, and that no provision is made for notifying owners of property used for a different purpose, (City or Railroad Companies).

It is of course also argued that the board did not follow this statute. (R. 33; P. 29). All that need be said as to this is that the evidence does not sustain the assertion. The main support of the assertion that the board acted arbitrarily is (1), that it listened and

was largely influenced by the advice of its engineer and that this engineer was too ignorant to be a competent advisor; and (2) that an opportionment of benefits made in 1919 as to a proposed system which was abandoned made the apportionment much lower, and that the 1919 action in this regard is sacrosanct, and any great departure from it proves arbitrariness.

The evidence is set forth fairly well in the briefs of the appellees (N. 27, 28, 29; P. 28, 29) and we may fairly claim for *Pittsburg Railway v. Backus*, 154 U. S. 420, that the evidence does not sustain the contention. In that case it was said:

> "Is testimony that the value placed by the board was excessive together with testimony that portions of the road outside of the state were of largely greater value than any similar length of road within the state, unaccompanied with evidence that the board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the state, sufficient to impeach its determination? This question must be answered in the negative. No determination of a special board, charged under the law with the duty of placing a value upon property, can be successfully impeached by such meager testimony".

We have the rather remarkable argument that there was arbitrariness and undue discrimination worked by equalization — remarkable, because the injunction prevented there being any equalization. Then there is "argument" that here was arbitrariness because the benefits were not derived directly or indirectly from the drainage of agricultural lands. As to this we have said already all that seems to be necessary.

The cases of *Thomas v. Railway*, 277 Fed. 608, and *Kansas City v. Road District*, 256 U. S. 658; and that of *Gast*, 240 U. S. 55, involve an attack upon the statute

for being arbitrary which is not made in the pleadings in the case at bar, and each of the three exhibits a situation that comes fairly within the description of *Brushaber's* case.

Let it again be noted it is impossible to hold that the apportionment was arbitrary for being either unequal or excessive, because the act of the appellees left the apportionment purely tentative and no one can say whether it would be either unequal or arbitrary if appellees had permitted equalization to be proceeded with.

XII-(a).

METHOD OF DETERMINING BENEFITS.

If there is a possibility of direct or indirect present benefit or a potential present benefit, based on reasonable facts, which benefits are determined by a method which can be reasonably presumed will produce substantial equality between lands and properties, and if all property of the same class is operated on alike, the tax and the method pursued is not arbitrary.

> "Traffic benefits resulting from the haul of increased croppage of lands within a drainage district, because of over-flow protection, are sufficient to authorize assessment of railroad property for improvements within such district, though there were no direct benefits, by way of protecting the company's right-of-way from overflow".
>
> *Thomas v. Kansas City Southern Ry. Co.*, 272 Fed. 708.
>
> "There must be added the obvious fact that anything that develops the territory which a railroad serves must necessarily be a benefit to it, and that no agency for such development equals that of good roads — and the holding of the Circuit Court

of Appeals that the railroad would not be benefited by the improvement cannot be sustained".

Branson v. Bush, 251 U. S. 182, 40 Sup. Ct. 116.

The drainage act provides that in apportioning benefits among the several tracts and property benefited by the system the board shall select one tract, "the benefit" received *"by which"* shall be taken as the unit from which to measure the benefits received by the other tracts and property. This does not make it arbitrary to use "the benefit" in dollars received by any tract of any class as the unit from which to estimate the proportionate benefit received by any other tract or property of either class — the sole thing aimed at being the ascertainment of what proportion of the total amount to be assessed should be borne by each tract, or property. *Milne v. McKinnon*, 32 S. D. 627.

The capitalization method of determining the amount of actual benefit in cases like this, has been approved in *Western Railway v. Commissioners*, 261 U. S. 264. And the method of assessment in

Railway v. Supervisors, (Iowa) 153 N. W. 110.

Marion v. Simons, (Ind.), 102 N. E. 132.

Drainage District v. Railway, (Nebr.) 146 N. W. 1055.

Chicago, Rock Island v. County, (Iowa) 154 N. W. 888.

Northern Pacific v. Board, (Wash.) 181 Pac. 868.

Northern Pacific v. County, (N. D.) 148 N. W. 545.

Spring Creek v. Railway, (Ill.) 94 N. E. 529.

Illinois Central v. Commissioners, (Ill.) 21 N. E. 926.

XIII.

THERE WAS IN FACT NO PROHIBITED DISCRIMINATION, IF ANY, AND NOT MORE THAN PERMITTED CLASSIFICATION.

It is held in at least ten decisions in this court that classification for tax purposes is permissible and is not in contravention of the equal protection clause of the Fourteenth Amendment, so long as all persons similarly situated are treated alike.

> It is not necessary that the benefits assessed and those in fact received should be exactly equal.
>
> *Southern Ry. v. Watts*, 260 U. S. 519.
>
> *Stanley v. County*, 121 U. S. 535.
>
> There should not be extracted from the very general language of the Fourteenth Amendment a system of delusive exactness. — *Martin v. Dist.*, 205 U. S. 135, 27 Sup. Ct. 441.
>
> The Fourteenth Amendment "was not intended to compel the states to adopt an iron rule of equal taxation". — *Branson v. Bush*, 251 U. S. 182, 40 Sup. Ct. 115.

What is condemned is wilful disregard of law requiring uniformity in valuation and taxation — *Western Union v. Missouri*, 190 U. S. 412; *Stanley v. County*, 121 U. S. 535. Here, there was no disregard, wilful or other, because Section 2, Article 11, South Dakota Constitution, empowers the legislature to divide all property into classes for the purpose of taxation and only requires that all property of the same class should be taxed uniformly.

For illustration — the following have been held to be not improperly discriminatory:

> Allowing deduction for interest in income tax

return to one class of corporations and not to a different class or to individuals.

Brushaber, 240 U. S. 1, 36 Sup. Ct. 237.

Allowing individuals to deduct from gross income dividends paid them by corporations whose incomes are taxed and not allowing the same deduction to such corporation. — *Idem.*

Though family expenses are not as a rule deductible, allowing farmers to omit from their return certain products which are susceptible to use by the family. — *Idem.*

Excusing owners of the house they live in from giving an estimate of rental value, and not allowing renters to deduct rent paid. — *Idem.*

And as to discrimination by valuation it has been held that a disproportionate assessment is but an excessive one — from which relief will not be granted to those who have not invoked the aid of the equalization board — *Bagley v. Butler,* 24 S. D. 429. — So, where a corporation was assessed on basis of 75 per cent of actual value — property generally not more than 52 per cent — *Greene v. Railway,* 244 U. S. 522.

And so where one class was assessed at one-third actual value, and others at less than one-fifth. — *Union Pacific v. Commiss.,* (C. C. A.) 217 Fed. 541.

XIII-(a).

ELEMENTS OF BENEFIT.

That different elements of benefits enter into different classes of property, is immaterial. The law does not require that a farm as such shall be compared with a railroad track or a high-way or with the grade of the bridges of a City or of a railroad company.

Though benefits to a railroad company as such are composed of different and larger number of elements than real estate consisting, say, of land, which latter can be determined by estimating value before and after — it is still allowable to tax benefits to a railroad company, say, to right-of-way, bridges, culverts, embankments, tracks, and uniterrupted traffic and saving in annual maintenance.

Railroad v. Supervisors, (Iowa) 153 N. W. 110.

Marion, (Ind.) 102 N. E. 132.

Drainage No. 1 v. Railway, (Nebr.) 146 N. W. 1055.

Chicago and R. I. Ry. v. Wright, (Iowa) 154 N. W. 888.

Northern Pacific Railway v. Board, (Wash.) 181 Pac. 868.

Northern Pacific v. County, (N. D.) 148 N. W. 545.

Spring Creek District, (Ill.) 94 N. E. 529.

Illinois Central v. Commissioners, (Ill.) 21 N. E. 926.

Railroads differ in so many respects from other properties that they as a class must be taxed differently or additionally so long as that is not inconsistent with the Constitution of the state.

Southern Railway v. Watts, 260 U. S. 519.

43 Sup. Ct. 197.

"The equal protection clause is not violated by prescribing different rules of taxation for railroad companies than for concerns engaged in other lines of business". — *Baker v. Druesedowe*, 263 U. S. 137, 44 Sup. Ct. at 41.

Proper method so long as railroads are not dealt with differently than those in its class. —

Kent Railway case, 115 U. S. 321; *Durham,* 261 U. S. 149; *Valley Company,* 261 U. S. 155.

And we have this sample of hyper criticism:

> The statute itself is discriminatory because as to lands affected it fixes the apportionment of benefits and as to the property of railroads it is "the benefits". In the one case it requires relative benefit and in the other of an actual benefit. And if the benefits should materially exceed the cost, the result of the discrimination would be most obvious. (N. brief 25.)

XIV.

THE CONTENTION THAT THE EVIDENCE SHOWS NO BENEFIT WAS RECEIVED.

As to this we have the opinion of a witness that the project did the interests of the Power Company harm rather than good because diversion of water of any kind would diminish its power. We think the testimony on this head is clearly over-borne by the testimony as a whole. Next comes the opinion of employees of the appellees that there was no benefit whatever to either right-of-way, tracks, bridges, embankment grounds, or station grounds. Next, an opinion that the system does not take enough water out of the river to make any material difference although it had just been said for the same side that it took so much that it injured the Power Company. Then we have the opinion of one of the employees that if he were planning to shorten bridges he would act as though this ditch did not exist. Next, opinion that the new spillway is as liable to go out as the old one — a defect that does not seem to have been charged in pleading.

Then comes a line by the employees which involves past history. Bassett says that no property of the Great Northern has to his knowledge ever been flooded; and he and Link and Reed unite on the proposition that both

Power Company and railroad property are so constructed as to be flood proof. Bassett supports this by the fact that the Great Northern banks have high slope, that there is a growth of grass and weeds and rip rap, and that therefore the embankments of the Great Northern will withstand any possible flood conditions. Another basis for the claim that no benefits were received, (if not worse) is that the engineer of the Board was ignorant — something hardly borne out by the record and the statement of qualification and experience in the record as to this engineer which seems to be disputed in argument only.

We are content to stop with saying that if there is any reason to complain of benefits tentatively assessed, if there is any reason why the proposed assessment is too high, or to say that no benefits were being received, that was all a matter for the Board of Equalization and if necessary for appeal to the Circuit Court of the state — *Curtiss v. Pound*, 34 S. D. 633. We are content with the holding of *Pittsburg v. Backus,* 154 U. S. 421, on sufficiency of testimony herein earlier set out. And, finally, submit we have heretofore made clear, it may fairly be said, on this record that unquestionably the appellee City received a benefit, and the record is equally clear that, within rules we have heretofore called attention to, each of the other appellees was benefited in some degree at least. That the proposed assessment seemed greater to them than the benefit received was, as said, a matter to be first presented to the administrative tribunals.

XV.

In the case of the appellee Milwaukee and appellee Omaha the trial Court refrained from enjoining the making of *any* assessment leaving it open for later determination how much the assessment should be in view of the fact that these two appellees had previously been assessed for the construction of the old ditches. It seems

the City is in exactly the same situation. But as to it the injunction stops *all* assessment, without the reservation made as to the Milwaukee and Omaha — and the Circuit Court of Appeals left this matter uncorrected, also.

Respectfully submitted,

BENJ. I. SALINGER,
Solicitor for Appellants.

E. O. JONES and
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Of Counsel.

Appendix "A"

SOUTH DAKOTA REVISED CODE 1919.

NATURE OF PROPERTY.

Sec. 256. REAL PROPERTY DEFINED. Real or immovable property consists of:

1. Land.
2. That which is affixed to land.
3. That which is incidental or appurtenant to land.
4. That which is immovable by law.

Sec. 257. LAND DEFINED. Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance.

COLLECTION OF TAXES.

Sec. 6662. CIVIL ACTION TO COLLECT, PROCEDURE. In case any railroad company, telegraph company, telephone company, express company, sleeping car company, private car line company, or other company or corporation coming within the provisions of this chapter, shall refuse or neglect, for a period of thirty days after the same shall have become delinquent, to pay any tax levied against it the state or county treasurer to whom such tax is payable shall have the power, in addition to other remedies provided by law for the collection of personal property taxes, to institute and main-

tain an action in the circuit court, in his name as such treasurer, against such company to collect the tax, with penalties and interest as provided by law. In any such action it shall be sufficient for the treasurer to allege in his complaint that the taxes stand charged upon his books against such company and the same are due and unpaid, and that a debt is thereby created, and that such company is indebted in the amount appearing to be due on the treasurer's books. The treasurer's books shall be received as prima facie evidence, on the trial of the action, of the amount and validity of such tax appearing due and unpaid thereon, and of the non-payment of the same. If on the trial of the action it shall be found that such company is so indebted, judgment shall be rendered in favor of the treasurer prosecuting such action for the taxes, penalties and costs as in other actions. The defendant may set up by way of answer any defense which it may have to the collection of such taxes. If the defendant claims the tax to be void, the court must in the action ascertain the just amount of taxes due for the year it is claimed the taxes are delinquent, and if, in its opinion, the assessment or any subsequent proceeding has been rendered void or voidable by the omission or commission of any act required or prohibited, the court shall order it reassessed by the tax commission, and shall thereupon render judgment for the just amount of taxes due from the defendant for that year or years.

Sec. 6663. SPECIAL ASSESSMENTS, PROCEDURE. If any railway company shall neglect or refuse to pay any special assessment levied against such railway company, the county treasurer, city treasurer, or other officer charged with its collection, whenever such special assessment shall become delinquent, shall collect the same by seizure of engines, cars, rolling stock, and any personal property of such company, in an amount sufficient to pay such special assessment, with accrued penalty and interest, and all accrued costs, wherever the same may be found in the county or coun-

ties in which such special assessment may have been made and levied, and shall immediately proceed to advertise the same for sale in three public places in the county, or by advertisement in one of the newspapers published in the county where such property is taken, for a period of at least ten days before such sale, stating the time when and place where such property will be sold. And, if the special assessment or assessments for which such property is distrained, and the accrued costs thereon, are not paid before the day appointed for such sale, such treasurer shall proceed to sell such property at public auction, or so much thereof as shall be sufficient to pay such special assessment, penalty and cost of such seizure and sale. Any surplus remaining above the special assessment or assessments, charges for keeping, fees for sale, fees for levying on the property and mileage, as allowed by law, shall be returned to the owner; and the treasurer shall, on demand, render an account in writing of the sale and charges. If the property so distrained and seized cannot be sold for want of bidders, the treasurer shall return a statement of the fact, and return the property to the possession of the railway company from which the same was taken and such tax shall be returned as unpaid.

Sec. 6664. GENERAL TAX PROVISIONS APPLICABLE. The provisions of this code relating to general taxes shall apply to the enforcement and collection of any delinquent special assessment against a railway company, so far as such provisions are applicable, and wherever in this code reference is made to general taxes, the same shall be construed to include special assessments, as well as taxes for general purposes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 95

A. G. RISTY, ET AL, as County Commissioners, etc., et al,

Appellants,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Appellée,

And the Four other cases set forth on the Cover page hereof, numbered 96, 97, 98 and 100, inclusive.

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

PETITION FOR REHEARING.

All references to record pages hereinafter made will be made to the printed record in case No. 96, Chicago, Milwaukee & St. Paul Railway Company, Appellee. All the other cases have the identical records hereinafter referred to, but the pagings, of course, will be different. For that reason we limit ourselves to the record in case No. 96.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Having carefully examined the opinion of the Honorable Court herein, we think with propriety we may ask

the Court to consider whether the opinion does not err on certain vital points. We respectfully submit that there is such error, and therefore, appellants pray this Honorable Court to set aside the opinion and judgments rendered herein on March 1, 1926, and to reverse the decision of the District Court in these cases. Supporting this appellants respectfully say that the Court overlooked the following matters:

FIRST.

The pronouncement that "while *Gilseth v. Risty*, 46 S. D. 374, has expressions which, standing by themselves, might be regarded as supporting that the proceedings at bar were authorized by statute — the court clearly rested its decision upon other grounds, and the said decision does not so clearly or decisively pass on the question involved herein as to control the decision here," clearly overlooks the true holding in that case.

SECOND.

The basic "fact" found by the trial and appellate Court, and which this Court assumes to be true in its decision, is the finding that "Drainage Ditch No. 1 and 2 was not a new project (and) that no new or additional drainage was established". It is our contention that this "Finding of Fact" is not only unsupported by any evidence in the record, but the undisputed evidence is against such finding, and the same is conceded by appellees Milwaukee, No. 96, and Omaha, No. 97.

THIRD.

The meaning and interpretation of Sections 8458 and 8476 of the Revised Code of South Dakota, 1919, as construed by this Court, is not in accord with the repeated construction placed thereon by the Highest Court in the State of South Dakota.

ARGUMENT.

I.

THE GILSETH DECISION SHOULD CONTROL AS TO EVERY PRONOUNCEMENT THAT WE HEREIN CHALLENGE.

This Court speaking with reference to amount in controversy says that "the substantial basis of the suit was want of jurisdiction in the Board". Surely the Gilseth decision speaks clearly and decisively as to that vital matter. This will be obvious from the following statement of just what that decision is. The very last thing in it is the finding that Gilseth was estopped. What is said on this head is purely an independent ground for affirmance stated after several other such independent grounds had been put forth. It does the utmost violence to that decision to hold that it "rests" on that last stated ground. If there be any stressing it is as to the grounds that come first. If there be any difference in emphasis the last ground is the more incidental. Indeed the very fact that there was an affirmance in the Gilseth case makes it error to hold that the estoppel is the essence, because the affirmance of necessity declares that the Board had jurisdiction to do just what it did do.

The Gilseth decision:

It deals with reference to the very project at bar; and says the record shows that in 1908, a petition was filed with the County Commissioners asking that the said drainage district be extended several miles farther up the river, and that the following further action was had upon this pettiion, to-wit:

> "Said petition was allowed, and a resolution adopted by the Board of County Commissioners, establishing said drainage and designating it as 'Drain Ditch No. 2', extending said original drain No. 1 from the upper end of said original drainage ditch No. 1 about 12 miles".

This would seem to be a clear cut holding that the project asked for and ordered was *not* a repair project, and that, instead, there was an extension about 12 miles long "extending said original drain Ditch No. 1 from the upper end of said original Drainage Ditch No. 1".

(If we accept this Court's pronouncements the establishment of Drainage Ditch No. 2 was only repair and maintenance of the original Ditch No. 1, and could only be paid for by assessment upon Ditch No. 1 district).

Surely, in cases of mere maintenance of an existing ditch there could be no such thing as "an original drainage ditch", as distinguished from an extension of an original drain. In maintaining an established project there is but one ditch; there is neither original nor extension of original.

> "Sometime in April, 1916, Gilseth and others affected by the condition of the water and of the existing drainage ditches, filed a petition with the Board "asking that said spillway be abandoned and that the water flowing through said ditches be turned through a certain sleugh or lake in the northern part of te city of Sioux Falls and thence into the channel of the river and flow around said city. A survey of said proposed plan was made, and, after notice to the interested parties a hearing was had upon said petition and report of said survey. On the 8th of July following, an order was made granting said petition. Thereafter, many conferences were had between plaintiff and the said petitioners and other interested parties, with the result that the said petition and the said plan of drainage were abandoned. Thereupon, a second petition was filed, asking for the re-establishment of drainage ditch No. 1 and 2, for the re-construction of said spillway and for the enlargement of the drainage area so as to include all the land along the river to the outlet of said spillway. This petition was filed on the 3rd of August, 1916. The Board thereupon caused

a survey to be made of the entire area covered by the said last named petition. Upon the filing of the report of such survey the Board gave notice of hearing on the said petition and upon such hearing the Board, on the third day of October, 1916, made an order purporting to establish a new drainage district, designating it as 'drainage ditch No. 1 and 2', and this drainage district included the entire area of the two former districts together with drainage area along the river through the city of Sioux Falls."

Speaking to whether the project is a new enlarged district, the Supreme Court of South Dakota said:

"The Board then proceeded to do the work necesary to carry out the plan contemplated by the said order. The ditches in what had been drainage districts Nos. 1 and 2 were cleaned out, widened, deepened, and diked, *so as to greatly increase the carrying capacity thereof. Several cut-offs were made in the river so as to accelerate and increase the flow of water* through the channel of the river, a new and larger spillway was constructed".

The doing of all this work cost approximately $240,000.00.

"It is contended by the appellant that the project contemplated by the petition was not the creation *of a new drainage district or a new drainage ditch* but merely to repair a project already in operation, and that, therefore, the Board was without authority to proceed. *But this contention is not tenable."*

"But the two projects were by no means identical. The drainage district involved in this case contains a materially larger area than the combined areas of the two old ditches".

"The Constitution, Section 6, Article 21, and the Statute, Section 8458, gives the Board the same au-

thority to repair an old ditch that it does to construct a new one."

"The filing of the petition, asking for the establishment of a new drainage ditch on the third of August, 1916, gave the Board jurisdiction to proceed with the inspection and survey of the proposed drainage area as required by the provisions of Sections 8460 and 8461, Revised Code, 1919, citing *Laning v. Palmer,* 117 Mich. 529, 76 N. W. 2".

"Upon the filing of the surveyor's report the board was authorized to fix a time and place for the hearing on said petition. This was done and the notice provided for in Section 8461 given. The hearing was had as provided for in Section 8462".

"The board after a full hearing found the drainage, as petitioned for in said petition, to be conducive to the public health, convenience and welfare, and necessary and practicable for the drainage of agricultural lands".

"Numerous irregularities on the part of the Board are alleged and it may be assumed that the Board did in certain instances proceed in an irregular manner. But it is not shown that the Board did in any instance exceed the jurisdiction conferred upon it by law".

"All the irregularities complained of occurred after the Board had acquired jurisdiction of the subject-matter".

"No appeal was taken from the order establishing the new district. Therefore, *the order became final, and there cannot in our judgment be any* question of the board's jurisdiction to proceed to carry out the work contemplated by the petition".

"No fraud or bad faith on the part of the board has been shown.

It was after all this was said that the Court then

spoke of estoppel (upon which it is claimed the decision "rests") then:

> "While plaintiff did not sign this petition he was present at the hearing thereon and is presumed to have known that whatever was done in the way of constructing any drain, ditches or repairing the old ones would have to be paid by an assessment on the property that received the benefits. He saw the work in progress and was advised of all that was done".
>
> "Two years were allowed to elapse after the work was completed before this action was commenced".
>
> "Appellant having stood by and seen all the work performed without protest, and having received all the benefits that can result therefrom, should not now be permitted to escape payment for the same. The relief asked by appellant is equitable in its nature, but because of the circumstances above shown, all the equities of the case are against appellant and in favor of the Board".

It is said also in the Gilseth case:

> "At the hearing Gilseth and many others interested were present".
>
> "Appellant was present when the order granting the new district was made. If he believed that such order was prejudicial to his rights, or was dissatisfied for any reason with the course pursued by the Board, he should have appealed from the said order before the expense of executing the same had been incurred".

There is just one way to argue that nothing but the estoppel pronouncement is a binding decision — and that is to claim that if a decision is made on more than

one ground, then nothing is decided. That is not the law.

In *First National Bank v. Board,* 264 U. S., 455, it was contended that the decision turned upon the point that plaintiff had an adequate remedy at law, and not upon the question whether plaintiff had lost its rights by neglecting to seek administrative remedy. The Court said:

> "It is true the court, after the statement quoted above, proceeds to say that plaintiff cannot have relief in equity. But this seems to be put forth as an independent ground for affirming the judgment. It follows the unqualified statement that 'plaintiff having refrained from seeking the administrative relief open to it, may not now complain'."

It is next said that though adequacy of remedy was also dealt with, there is a holding that administrative remedies must be exhausted prior to judicial challenge, and that, indeed, such pre-requisite could not be dispensed with.

> "The case is of *equal* authority upon each of two distinct and sufficient grounds upon which an appellate court rests its affirmance of a judgment, although only one of those grounds was considered in the court below."
>
> *Union Pacific v. Ry.,* 199 U. S., 160.
>
> "Where a decision is based on two independent lines of reasoning, neither is a dictum".
>
> *Pugh v. Moxley,* 104 Cal., 374.
>
> "Where an appellate court bases its decision on two or more distinct grounds, each is as much an authoritative determination as the other, and neither can be disregarded as dictum."
>
> *King v. Pauly,* 159 Cal., 549.
>
> "Where a case presents two or more points any one of which is sufficient to determine the court

issues, but the court actually decides on such points, the case is an authoritative precedent as to every point decided, and none of such points can be regarded as having merely the status of dictum."

15 C. J., 953.

This is supported by citations from this court, Federal Courts, California, Iowa, New York, Oregon, Tennessee, Texas, Washington, and Wisconsin.

"An adjudication on any point within the issue presented by the case cannot be considered a dictum. Accordingly, a point expressly decided does not lose its value as precedent because the disposition of the case is based upon other grounds."

15 C. J., 952.

The text cites for support cases in this Court, the Federal Courts, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Tennessee, Washington, and from English Courts.

"This is so even though by reason of other points in the case, the result reached might have been the same if the court had held on the particular point otherwise than it did."

15 C. J., 952.

Where one specific objection urging invalidity of a statute is raised by the record, and argued by counsel, the denying the force of the objection is not dictum, even though the statute is held invalid on other grounds.

Carstairs v. Cochran, 95 Ind., 488, affirmed 193 U. S., 10.

"It cannot be said that a case is not authority on one point, because although that point was properly presented and decided in the regular course of consideration of the cause, something else was found in the end which disposed of the holding made."

Railway Co. vs. Schutte, 103 U. S., 119.

It is said in *Ontario vs. Wilfong,* 233 U. S., 543:

> "Though both were grounds of decision, to-wit: that the decision was not based alone on actual knowledge of what property was intended to be taxed, but upon the sufficiency of a description to identify the land in connection with the notice given to appellant — this does not constitute dictum."

If this were not true, every decision having more than one point would be dictum in toto. Every litigant could pick out one of the points and say it was dictum because other points were decided. His opponent might select other points that were decided as being alone the essence of the decision. In effect, it would lead to holding that nothing is a decision unless the court limits itself to passing upon some one single point.

II.

FACT ASSUMED NOT SUPPORTED BY ANY EVIDENCE.

When we say this Court overlooked a fact question, we are not unmindful of the rule that this Court is not a trier of facts, (Case *Mfg. Co. vs. Soxman,* 138 U. S., 431), nor of the well settled rule mentioned in the case of *U. S. vs. State Investment Co.,* 234 U. S., 206, 207, that the concurrent findings of the two lower courts will be accepted by this Court unless error is shown, and neither are we unmindful of the rule of the cases on the law side of the Court, that errors merely in the findings of fact by the Court are not subject to revision by this Court if there is any evidence upon which its findings could be made. *Alexander vs. Machan,* 147 U. S., 72, 77; *Dooley vs. Pease,* 180 U. S., 126, 131, 132. The rule of concurrence with the conclusions of the trial and appellate courts is given more weight when in the first instance the facts are found by a master or a jury. *Furrer vs. Ferris,* 145 U. S., 132, and cases cited in the opinion; *Beyer vs. Le Fevre,* 186 U. S., 114, 119. However, all of these rules are subject to the additional rule, that the

findings made by the two lower courts must be based upon *some* competent evidence in the record, or it will be disregarded. *Beyer vs. Le Fevre*, 186 U. S., 114, 119; *Darlington vs. Turner*, 202 U. S., 195, 220.

We respectfully assert that the finding of the two lower courts which is approved by this court and hereinafter mentioned, is without *any* support, and is not based upon *any* competent evidence in the record.

This Court in its opinion says:

> "The two Courts below agree as to all material facts. We accordingly consider them here only so far as is needful to pass on questions of law. * * * *
>
> "Both courts below found that the drainage ditch No. 1 and 2 was not a new project, but was in fact identical with the previously established ditches No. 1 and No. 2; that no new or additional drainage was established, and that the only purpose of the proceedings was to provide for the maintenance and repair of the previously established ditches by assessing the cost on tracts not included within the area originally assessed for their construction. For these reasons, among others, both courts held that the proceedings had by the Board of County Commissioners to apportion and assess benefits on land outside the original drainage districts were unauthorized and void under the statutes of South Dakota. In this we think they were right."

The foregoing statements are apparently based upon the theory that there was *some* evidence to support the findings of the lower courts, but in making these statements, we believe this Court inadvertently overlooked the fact that there is *no* evidence in the record to support such findings by either of the lower courts, and this point appellants attempted to stress in their argument.

The findings of the trial court appear on pages 84

to 87 of the record. Assuming for the moment that Section 8458 of the Revised Code authorizes the Board to do *three* things, viz: "(1) May establish and cause to be constructed any ditch or drain; (2) may provide for the straightening or enlargement of any watercourse or drain previously constructed, and (3) may provide for the maintenance of such ditch, drain or watercourse"; we find that whenever there is presented a question of deepening or widening a drain, or of straightening, cleaning out, or deepening creek channels and streams, or remodeling or repairing dikes or barriers, all proceedings therefor are to be considered upon like notice, hearing, etc., as though the project were a new project. (Sec. 8476), which means, of course, upon petition, notice, hearings, surveys, orders, apportionments, equalizations, assessments, etc., as provided by Sections 8458 to 8569, inclusive. The trial judge and the highest court of the State hold that the notice at bar was valid and sufficient. We also find that when it is desired to merely repair or maintain a ditch previously constructed, the work may be done only "upon the petition of any person setting forth the necessity thereof, and after due inspection by the Board of County Commissioners", but without notice or public hearing thereon. (Section 8470). Whether, therefore, the project be one for *enlargement,* or one for *maintenance,* the law requires that a proper petition must be first filed with the Board before the Board can consider the work. It is clear, from this law, that the determination of what should be done concerning a ditch previously constructed, does not lie in the first instance with the Board to determine, but such determination is made by those whose land is affected by such established drainage. They petition the Board, and say that they desire the constructed ditch to be *enlarged* so as to make a more complete drainage project, or that the ditch so previously constructed shall be *merely repaired* and kept in the same condition as originally constructed. A petition having been presented, the Board is then authorized to consider the same in connection with the physical condition of the drainage suggested, and the Board may

either reject or grant the petition, and that only. (Sorenson case, infra). In the case at bar, as we will later show, the petition called for an *enlargement* of a previously existing drainage ditch, (Record, p. 50), and the Board, therefore, was only authorized to consider that petition together with the facts as found generally by the trial court, as indicated supra, and the Board, acting thereon, after due hearing, granted the prayer of the petition and established the enlargement project. The determination of the Board thereon is quasi-judicial, and had it refused to grant the prayer of the petition in part or in toto, the petitioners would have had the right to appeal to the Circuit Court and the Supreme Court of the State of South Dakota for redress. Such is the ruling of the highest court of the State.

In the case of *In re Sorenson Drainage Ditch,* 27 S. D., 342, the ditch there considered was established in 1907 and was thereafter constructed and completed. Later, owners of lands affected petitioned the Board, and alleged that the ditch was "wholly insufficient and inadequate to drain a portion of the lands through which the same runs, and which were assessed", and was "wholly insufficient in size to carry off the water so collected", and that the same would "flood the lands and destroy the crops and vegetation", unless the same was "deepened, widened and enlarged", and prayed that it be "enlarged, deepened and widened", and that "bends in said ditch be straightened out, and that the same would be more efficient if straightened". On June 8, 1910, upon due notice, the Board made an order enlarging the ditch, but to a very much less extent than petitioned for. The petitioners appealed to the Circuit Court, and alleged that "the proposed enlargement granted by the Board was entirely inadequate and insufficient". The Board moved to dismiss the appeal, and the Circuit Court dismissed the appeal. The petitioners then appealed to the Supreme Court. The respondent Board contended that inasmuch as it had determined to enlarge the ditch to a certain extent, but not to the extent asked for, and as

the petition was one for enlargement of an already established ditch, the order of the Circuit Court was not, therefore, an appealable order, for the reason that it did not present a judicial question, and was not such a one as could be appealed under the drainage law, in that it was not an appeal from any final order or determination of the Board establishing or denying the proposed drainage. The Board urged that appellants' only remedy was to have appealed from the original establishment, and having failed so to do, they could not, by a petition to enlarge, indirectly accomplish an appeal, and could not attack the original decision fixing the size and route of the ditch. In other words, respondents contended that they alone had the authority to decide how much enlargement should be made, or whether it should be an enlargement or a maintenance project.

The Supreme Court, construing the drainage law, held that the action of the Board was quasi-judicial, and that the action of the Board upon the petition was a final and appealable order; thus conclusively determining that the Board must be governed by the petition presented, and that it did not lie within its power to determine in the first instance whether the constructed ditch, under the circumstances existing, should be enlarged, or should be repaired and maintained in its original condition, but that the authority to make such determination resided solely in the owners of property affected by the original ditch. The Court said: "The petition of the appellant and associates, while not demanding the construction of an entirely new ditch, does demand the enlargement of a ditch already constructed, to such an extent as, in effect, to constitute a drainage ditch, and a denial by the Board of the application, except to a very limited extent, was in effect a denial of the proposed drainage." * * * * * It seems quite clear that an order establishing or denying a proposed drainage by way of enlarging a ditch previously constructed, is equally as final and quasi-judicial in its character as an order establishing or denying the construction of the originally proposed drainage ditch."

In the case at bar, the petition (Record, p. 50), says that the petitioners are affected by the ditch, and that the old ditches have been established and constructed, and "that said drainage ditches Nos. 1 and 2, *were and are insufficient* to accomplish the purpose for which they were constructed, and were and are insufficient to properly drain the agricultural lands within the drainage districts or territory supposed to be drained thereby, and are insufficient for the drainage of *other agricultural lands* lying within the valley of the Big Sioux River above the mouth or outlet to said drainage ditches Nos. 1 and 2, and *between the mouth of said outlet and the lands heretofore included within the assessment districts upon which the cost of the construction of said ditches, Nos. 1 and2 was imposed*", and "that it is necessary for the drainage of agricultural lands within said drainage districts Nos. 1 and 2, *and also* agricultural lands lying above the mouth of the spillway or outlet to said ditches and *between the mouth thereof and the present boundaries of said drainage districts,* to reconstruct, deepen, widen and improve said drainage ditches", and "that in the reconstruction of said ditches, that it will be necessary that the same be *cleaned, deepened, widened* and that certain *levees, dikes* and *flood gates* and *barriers* thereto be constructed to such extent as may be necessary *to carry off the surplus or flood waters* and to properly drain and protect the lands within said drainage districts and within the areas hereinbefore described", and "that the lands and territory likely to be affected * * * * are all the lands lying in the valley of the Big Sioux River and included within the present boundaries of said drainage districts, *as well as* all of the lands in the valley of the Big Sioux River between the mouth of said spillway and the city of Dell Rapids, South Dakota, that are subject to overflow if said outlet to said drainage ditches be abandoned and said outlet closed and that said district should be so *extended* and *enlarged* as to include all lands and property benefitted thereby as far down the valley of the Big Sioux River as the mouth of said outlet or spillway". An examina-

tion and comparison of the petition at bar with the petition in the Sorenson case (Supra) will disclose that this petition was evidently drawn and patterned upon the petition in the Sorenson case. What the petition prayed be done by the Board, what was done by the Board, and the cost thereof is shown by the record in this case, namely, that the original ditches were forty (40) feet wide and cost approximately $127,706.21, (Record pp. 119, 155, 203), while the new enlarged drainage ditch was ninety (90) feet wide and diked, and the river canalized, at a cost of over $250,000.00, (Record p. 304), providing a ditch of over twice the capacity, at a cost of over twice the amount of the cost of the original ditches. The enlarged ditch is longer than the combined old ditches. The enlarged ditch and spillway cares for approximately 3,000 cubic feet of water per second or one-third of the maximum flood stage run-off of this drainage basin, while the old ditches cared for but 1400 second feet of water. The board by resolution abandoned the outlet to the old ditch thereby throwing the flood water into Covell Lake and thence following the river around the City of Sioux Falls. The enlarged ditch keeps this flood water from passing around the City of Sioux Falls. All of which shows that there was, in fact, an additional drainage established and given to the properties below the old drainage district, included in which are the properties of the appellees for keeping flood waters off of land and property is equivalent to draining the water off after it is once on. This large expenditure and this additional drainage was clearly not intended by the petitioners, nor by the Board, as repair or maintenance, and should not be held by the Board or by any court to be maintenance and repair, which can mean only replacing and keeping in its original condition.

In the Sorenson case (Supra), the petitioners asked for an enlarged drainage. The Board granted the petition only in part, and denied it in part, and the Supreme Court of South Dakota held that this was a final and an appealable order, and, in substance, that the Board

had no authority to modify the petition, or to determine whether the ditch should be only repaired and not enlarged. But on the other hand the Board was entirely governed by the petition filed, and could either grant or reject the same. In the present case, the petitioners requested an enlarged drainage project, and upon notice duly given, the Board granted the prayer of the petition and an enlarged drainage was established, (Record p. 58), and later constructed at an expense of over twice the expense of the original ditches. This is the evidence and the only evidence under the law applicable thereto, as interpreted by the Supreme Court of South Dakota, and which evidence was entirely overlooked by the trial court in its findings in the case at bar, and which was again overlooked by the Circuit Court of Appeals. What the Board of County Commissioners may think should be done with an inefficient ditch previously constructed, or what a court might think should be done under the circumstances as to whether that ditch should be repaired or enlarged, is absolutely immaterial, for their action is, and should be, entirely governed by the petition filed, as truly as a court's decision is governed by the issues made by and confined to pleadings in an action in court. It is the pleader's choice to place his issues where he desires, and so it is the petitioners' choice in drainage matters to ask for exactly what they desire, and it does not lie within the province of the Board of County Commissioners or of a court to tell the petitioners that what confronts them is not an enlarged drainage ditch, but the maintenance of a ditch already constructed. The only competent evidence in this case of what confronted the Board of County Commissioners at the time the present project was instituted, or at the time these cases were tried in the United States District Court, was the petition, Exhibit "A", in this record, (Record, p. 50), and there was absolutely no evidence before the trial court, and there is no evidence in the record, in the absence of a pleading and proof of fraud, which substantiates the trial court's finding that the present proceedings were a maintenance project, and not

an enlarged project. It is, therefore, clear that the trial court's finding that "The thing that confronted the Board of County Commissioners at that time, having charge of these two drainage districts, was the *maintenance* of the ditches. * * * The situation that confronted them was not drainage of agricultural land, it was maintenance of the ditches that had been established by them, and the prevention of dangers threatened", (Record p. 86), is absolutely unwarranted under the evidence and the law applicable thereto. It is not within the authority of the court to determine what should have been done, and then to say that what was done was in effect what the court thinks should have been done, namely, repair and maintenance work.

The highest court of South Dakota, in interpreting the drainage law in the Soreson case, (supra), held that the determination of the Board of County Commissioners upon the petition filed for enlargement of that ditch, was a quasi-judicial act, and if that be true, then that determination cannot be changed or altered by another court, in the absence of a plea and proof of fraud, except upon appeal, as provided by the drainage law of the State, and no appeal was taken from the determination in establishing Drainage Ditch No. 1 and 2.

The case of *Curtiss vs. Pound*, 34 S. D., 628, 633, was a mandamus proceeding brought against Pound and others, as supervisors of a township, to require them to levy a tax to pay a drainage ditch assessment. When the commissioners decided to construct the ditch described in the petition and notice, certain interested parties appealed from the order of the commissioners, and the Circuit Court entered a judgment directing the construction of a ditch in accordance with the original petition, but thereafter the commissioners constructed a ditch twice the length of the one petitioned for, and the township then set up this fact as a defense in the mandamus proceedings, and the Court said: "If the commissioners exceeded their jurisdiction in the length of the ditch, and size of tiling, its only effect, so far as

appellants were concerned, was to increase the amount assessed against them, above the amount that should have been assessed. This is a matter which should have been settled at the time of assessment of benefits, and appellant's remedy for an unjust or unwarranted assessment was through an appeal to the Circuit Court from such assessment"; thereby holding that the order of the Board was a final judicial order, and could not be attacked collaterally, in the absence of a pleading and proof of fraud.

In the case of *Milne vs. McKinnon*, 32 S. D., 627, 631, which was an action in equity to restrain the sale of real property in satisfaction of a special assessment made under the drainage law, and in which it was claimed that the Board acted without jurisdiction, and that the land assessed was not benefitted, the Court said: "Whether (the land) would receive any benefits from the drainage system, and the extent of such benefits, was a matter clearly within the jurisdiction of the Board to determine, and its determination thereon *honestly made*, can only be reviewed upon an appeal", and "error, if any, in the method of assessment by which a wrong result may have been reached, would be a matter to be considered by the reviewing court upon an appeal from the determination of the Board."

In the case of *Gilseth vs. Risty*, 47 S. D., 374, 379, the Court said: "The Board, after a full hearing, found the drainage as petitioned for in said petition, to be conducive to the public health, convenience and welfare, and necessary and practical for the drainage of agricultural land. No appeal was taken from the order establishing the *new district*. Therefore, the order became final." True there was an estoppel found, but it in no way detracts from the above ruling. (See also *Sanborn County vs. Estabrook*, (S. D.) 207 N. W. 164, 165.

In all of the foregoing cases the Supreme Court of South Dakota has consistently held in their interpretation of this drainage law, that the determinations of

the Board of County Commissioners acting as a drainage Board, are *quasi-judicial determinations,* and that such judgments cannot be attacked collaterally, in the absence of fraud. Can the Federal Courts do otherwise than follow the interpretations given to the drainage statutes by the highest Court of South Dakota?

These are collateral actions, and no fraud has been pleaded, and there is no evidence of any fraud whatsoever in the record. The judgment of the Board establishing this new *enlarged* drainage, cannot be set aside by a State Court in a collateral action, and that judgment is just as binding on the Federal Courts, and upon a non-resident in Federal Court as upon the State Court or a resident in State Court, when there is neither plea nor proof of extrinsic fraud.

In *Steenburg vs. Kyle,* (Ind.) 121 N. E., 537, under a state of facts similar to the facts found here by the trial Court, it was contended that the new ditch established along the line of an old ditch in no way affected the jurisdiction of the old ditch proceeding. The Court said: "It seems to us that the fair interpretation of the facts leads to the conclusion that the (old) ditch was superceded by the (new) ditch. * * * However that may be, it should have been presented to the * court. It had jurisdiction to determine the character of the proposed (new) drain, and we must presume that it did so and rendered judgment which is conceded to be fair upon its face. That judgment is entitled to full faith and credit by courts of coordinate jurisdiction, as well as by this Court, until set aside, either on appeal or by a direct proceeding brought in the Court rendering it for that purpose."

Applying this holding to the case at bar, where no appeal was taken from the Resolution establishing the new enlarged drainage, such establishment is now conclusive as against these collateral attacks.

CONCESSIONS IN TWO CASES.

This Court, in its opinion, entirely overlooked the concession made by the Appellees Milwaukee, No. 96, and the Omaha, No. 97, in both their briefs and arguments, in this Court and in the Circuit Court of Appeals, that the appellants' contention that the work done was not repair or maintenance work, but that the proceeding known as Drainage Ditch No. 1 and 2, was a new drainage project. Counsel in his Brief (M., p. 13), uses this language:

> "We accept the position of counsel for the appellants that Drainage Ditch No. 1 and 2 was an original and independent ditch proposition".

With this concession made, it can hardly be said, as to these two cases at least, that the trial Court's finding that "Drainage Ditch No. 1 and 2 was not a new project, and that no new or additional drainage was established", can be sustained. With the concession made that the trial Court's finding of fact is not an issue in said cases, and that the same is not true, then that question, the appellees concession, was not before the Court, and the Court could not pass on a non-issuable fact, and find it different than the parties concede the fact to be.

III.

CONSTRUCTION OF ASSESSMENT STATUTES.

Our third proposition is the proper construction of, and the construction given by the Supreme Court of South Dakota to Section 8458 and Section 8476, Revised Code.

This Court in its opinion recognizes the fact that Section 8458 authorizes the Board of County Commissioners as a drainage Board to do equally, three distinct things, viz: (1) May establish a new ditch, (2) may straighten or enlarge a watercourse or ditch previously constructed, and (3) may provide for the maintenance of such ditch, drain or watercourse previously constructed.

But this Court overlooked the connection between

Section 8458 and Section 8476 by misconstruing, as we believe, and giving an improper interpretation to, Section 8467 covering "assessments for further costs"; by construing that section to apply to assessments for costs of maintenance of an old ditch and overlooking the connection, between that part of Section 8464 providing for assessments for paying *damages* and the provision of Section 8465 as to the payment of such damages before any physical construction of the ditch is undertaken and Section 8467 which provides for an assessment for the physical construction of the drainage after an assessment for damages has been made and such damages paid. The Court's conclusions were arrived at by reasoning from what the Court claims the method of assessment provided for by the statute and by either overlooking the three separate provisions of Section 8458 or by recognizing the three and then placing an *enlarged* drainage and a *maintenance* project in the same category, while in truth the statute places an enlarged drainage and a new ditch in the same category. This Court's conclusion is a misconception of Section 8458 and Section 8467 and the plan of assessment pointed out by the Court seems to be a misconception of Section 8467, which latter section applies *only* to assessments for further costs of the physical contruction of a *new* ditch or its equivalent.

In order to understand what Section 8467 is intended to cover, it is necessary to apply previous sections of the law. A petition signed by the owners of land likely to be affected accompanied by a bond may be presented to the Board and is filed with the County Auditor. (Sec. 8459). Upon the filing of the petition, the County Auditor transmits a copy to the State Engineer, who with the Board inspects the proposed route and if the Board and Engineer deem necessary, a survey is made. When this is made, the County Auditor furnishes a copy of the report to the State Engineer. The surveyor's report is filed with the petition and the Board personally inspect the proposed project and determine the line and width of the ditch, if not fixed in the petition, and fix a

time and place for hearing the petition and give notice thereof, which notice "shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage, to present their claims therefore at such hearing." (Sec. 8461).

At such hearing persons interested may appear and contest the statements of the petition and the surveyor's report as to the width and route of the proposed drainage and after such hearing, the drainage may be established along the line set forth in the petition or findings of the Board or the Board may vary the route or width thereof. If the Board deem it best to vary the route or to change its initial or terminal points "so that it will pass through other lands than those described in the notice of hearing, or to increase the width of lands to be taken for the proposed drainage, the Board shall adjourn the hearing and give the owners of such lands notice as in case of the original hearing" and "any persons interested may be heard in the matter of damages or compensation for land and the determination of the Board of County Commissioners shall be final unless an appeal therefrom shall be taken; failure to prosecute such appeal or to appear and contest an award of damages by the Board is to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimant's right to have the same assessed by a jury". (Sec. 8462).

The Board is not authorized to start work or to let any contracts for the same until after the damages caused by the proposed drainage or compensation for the lands to be taken as right of way and spoil banks has been paid for. "After the establishment of the drainage and the *fixing of the damages,* if any, the Board shall fix the proportion of benefits of the proposed drainage among the land affected, and shall appoint a time and place for equalizing the same". (Sec. 8463). "After the equalization of the proportion of benefits, the Board may make an assessment against each tract and prop-

erty affected in proportion to the benefits as equalized, for the purpose of *paying* the *damages* and the *cost* of *establishment* (not construction) *thus* far incurred or to be incurred." (Sec. 8464). "Whenever sufficient money shall be collected, the *damages* occasioned by the construction of such drainage and fixed as herein provided *shall be paid*, and *thereupon* the Board of County Commissioners shall proceed to construct such drainage and shall let contracts for the construction of the same." (Sec. 8465). From the foregoing quotations, it will be observed that after the ditch is established, damages fixed, apportionments made, equalization had, the Board must then make an assessment to pay for the property damaged and property taken for right of way, etc., and that the Board cannot proceed to construct the drainage nor to let contracts for the construction of the same until such damages have been paid. The costs, etc., thus far incurred, are known or are ascertainable but the costs of the construction of the ditch whether by contract or by the County Commissioners, is unknown and unascertainable and as said By Section 8465 when the damages shall be paid, "*Thereupon* the Board shall proceed *to construct* such drainage and let contracts for the construction of the same." It is evident that more than one assessment is ordinarily necessary and required on a new or enlarged ditch, and the Board having established the ditch, made the apportionment, equalized the same, made an assessment to raise money with which to pay the damages occasioned by taking the right of way, etc., and such damages having been paid under such first assessment, that "assessments for further costs" are necessary and must be made to pay the physical construction of the drain. It is for the purpose of paying such additional costs that Section 8467 provides for "assessments for further costs" of construction in addition to the assessment to pay for the damage to property and land taken for right of way. This section clearly has nothing whatever to do with assessments for "maintenance" of a drainage ditch previously established and completed.

It provides that the Board may issue assessment certificates or warrants and that such interest bearing certificates shall be perpetual liens upon the property assessed and enforcible as such first assessment and certificates and that the contractors may agree to take the same in payment of their services or the Board may sell such assessment certificates at not less than par and thereby raise funds with which to pay the costs of the construction of such drainage.

On the other hand Section 8470 being one of the "maintenance" statutes provides that "certificates may be issued (upon assessments made in like manner and upon the apportionment made for the construction of the drain) and such assessment and certificates shall be liens, interest bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the Board of County Commissioners or turned over to persons contracting for such cleaning and maintenance or may be collected directly by the Board of County Commissioners."

If Section 8467 was intended to cover the procedure of assessments for maintenance as indicated by the Court's opinion in this case, then we ask, for what purpose would the Legislature include in Section 8470 the above quotation, as the same matter is contained in Section 8467?

Section 8467 is premised upon the first sentence in the same, to-wit: "At any time *after* the *damages* arising from establishment and construction of such drainage are *paid* and the lands for such drainage are taken, assessment may be made for further costs and expenses of construction". And this section further provides that if there are no damages, then only one assessment need be made and provides: "If there be no damages to be paid before taking the lands for such drainage or if the damages have been paid by the proceeds of the sale

of warrants, only one assessment need be made". It is evident from this section and Section 8465 that the payment of damages arising to lands and the compensation to be paid for the taking of lands for right of way, if damages are claimed, is made a condition precedent to their proceeding to construct the drainage and letting contracts for construction. And the payment of such damages contemplates and necessitates a prior assessment. The notice of assesment provided by this section is required in order to fix the due date of such assessment and give the property owner an opportunity to pay the same before its becoming delinquent and thereby save the five per cent penalty as provided by Section 8464, and to give notice to and permit the property owner to exercise his option under Section 8471.

From the foregoing quotations we find that the Board, upon equalization having been had, must then make an assessment based upon such equalization, in an amount sufficient to pay for such damages, surveying, etc., thus far incurred. After this has been done, then for the *first* time the Board is authorized to enter into contracts for the actual construction of the drain and may also after such assessment has been made and the damages paid, make "assessments for further costs" at any time for the further construction costs and expenses of such drain. No time is fixed by the law when this second assessment need be made; it may be made at the time the contracts are entered into or it need not be made until the drainage project is completed but when it is made, it is of necessity made upon the same apportionment and equalization upon which the assessment was made for the payment of damages. This is true because it contemplates the same identical drainage project. For these reasons Section 8467 has application only to the assessments for the cost of a new drainage or its equivalent, and has no reference to maintenance.

By Section 8477, the Board of County Commission-

ers are placed in charge of all drains which must be kept open and in repair by them and "The costs of such drains shall in all cases be assessed, levied and collected *in the same manner* as provided in this article for the construction of drains *originally*"... (See Sec. 8464). Maintenance or repair can mean only to keep in its original state or to replace in its original state. Hence, this section contemplates only the original ditch and territory affected. There is no provision here for a new apportionment and no provision for a new equalization and none is necessary because the apportionment and equalization have already been made and the cost of such maintenance or repair is and must be assessed against the property originally affected in the same proportions as the assessment was made for the construction of the drain.

It frequently happens that drains have been constructed which do not function properly or the original construction has not been fully completed, when it becomes necessary to either make such drain function or at the time of the completion of the drain to clean out the debris collected in that part previously constructed, in each of which cases no assessment has previously been made. Section 8477 provides for these cases as follows "and in all cases when no assessment of benefits shall have been made, the Board of County Commissioners having charge of such drain shall make such assessments", for the cleaning out of the old drain as indicated above.

How shall such maintenance and repair projects be instituted? Section 8470 provides "upon the petition of any person setting forth the necessity thereof and after due inspection by the Board of County Commissioners" and further says "Such assessments shall be made as other assessments for the construction of drainage". (See Sec. 8464). There is no provision here for a new notice to give all persons interested an opportunity to be heard

whether such repair or maintenance shall be done, because by Section 8477, the authority to determine that matter is placed entirely in the hands of the Board of County Commissioners, upon the petition being presented under Section 8470. No new apportionment is provided for because the territory to be assessed and the territory affected necessarily is the territory of the original district, being identical with that upon which the repair work is to be done, and likewise no new equalization is necessary as all parties have had their day in Court as to their apportionment. In all this, however, the law does not contemplate that the ditch is to be made larger or a more efficient drain or affect more territory than that of the original drainage ditch.

Placing the ditch back in its original condition or keeping it there, or in other words, repair and maintenance, does not contemplate more than one assessment being made and does not contemplate the assessments for further costs provided for under Section 8467. That section deals entirely with a new drainage project or that which is equivalent to a new drainage project.

Section 8476 provides: "The powers conferred by this article for establishing and construing drains (Sections 8458, 8459, 8460, 8461, 8462, 8463, 8464, 8465, 8466, 8467, 8468 and 8469) *shall extend to and include* the *deepening and widening of any drains* which have heretofore been or may hereafter be constructed, also to *straightening, cleaning out* and *deepening* the channels of creeks and streams and *constructing,* maintaining, remodeling and repairing *levees, dikes* and *barriers* for the purpose of drainage; but no proceedings affecting the right of persons or property shall be had under this section except upon *notice and the other procedure* prescribed herein for t heconstruction of drains".

Section 8458 says: "The Board of County Commissioners * * * may provide for the straightening or

enlargement of any watercourse or drain previously constructed". How is this done? By the procedure pointed out in Section 8476 supra. What is meant by enlarging a drain, It certainly intends something more than placing the ditch back into or keeping it in its original condition — original width — original depth — original length — in short, maintaining its original water carrying capacity. If such was not the case then there would be no purpose for the two statutory provisions, supra.

The extent to which a ditch can be enlarged is illustrated by the extent of the enlargement in the Sorenson Case (supra), in which the Supreme Court of the State held that the ditch petitioned for was practically a new ditch.

An examination of the South Dakota drainage law discloses that there is no requirement in the construction of a drain, that the complete drainage of a definite area shall be provided for in one project; that there is no mandatory provision requiring a topograhical survey for the entire drainage basin in which a proposed drainage ditch is to be constructed. In fact in this case, one W. H. Lyon was the sole petitioner for the establishment and construction of the old Drainage Ditch No. 1, which was approximately 3 miles in length. Thereafter Drainage Ditch No. 2 starting at a higher elevation and extending into the initial point of Drainage Ditch No. 1, was petitioned for and established and constructed, yet both of these old ditches drained a part of the water collected in the water shed of the Big Sioux Valley and carried by the Big Sioux River. All that is required under the South Dakota law is that one or more owners of land likely to be affected by a proposed drainage, file a petition for a ditch designating therein the proposed route, the necessity therefor, and a general statement of the territory likely to be affected thereby and if these conditions are found by the Board to exist, the ditch may be established and constructed although other lands within the same drainage basin, which require drainage, — and the drainage from which must pass over the same

route as the proposed ditch, — are not provided for by such initiated proceedings. In the case at bar was Drainage Ditch No. 2 a new drain or was it repair or maintenance of No. 1 and the owners of land and property affected by No. 1 only assessable thereof, An examination of the respective petitions of Drainage Ditch No. 1, Drainage Ditch No. 2 and Drainage Ditch No. 1 and 2, and the records of assessments made, as disclosed in this record, show that some of the petitioners for Drainage Ditch No. 1 and 2 were owners of property not included within either of the former old districts. Can it be said that the Legislature intended that the construction of a ditch at the instance of certain property owners draining only a part of a drainage basin or only a partial drainage of such drainage basin should operate, as a bar to the construction of another drainage ditch of greater carrying capacity, with twice the bottom width as the previous ditches, with dikes thrown up on both sides, with controling works built and a more efficient outlet thereto draining a larger territory or making a more complete drainage at the instance of other property owners, although to establish and build such new and enlarged ditch, the line of the same extended along the line of the two older ditches?

Section 8476 gives the same right to those who petitioned for Drainage Ditch No. 1 and 2, to initiate their project, that it gave to W. H. Lyon who petitioned for Drainage Ditch No. 1, and to the petitioners who initiated Drainage Ditch No. 2. There is no provision in the South Dakota law that requires Drainage Ditch No. 1 and 2 to be confined to territory not embraced in Drainage Ditch No. 1, or in Drainage Ditch No. 2, or in both of these former areas. In fact the powers conferred upon the Board by Section 8458 dissipates such a contention, because it expresly autorizes the Board to provide for the enlargement of any drain previously constructed. If it were to be held by any Court that the construction of Drainage Ditch No. 1, or the construction of Drainage Ditch No. 2 exhausted the power granted to the Board

of County Commissioners in that particular area, and that therefore no other or additional drainage ditch can be constructed within such drainage basin, such a holding would hinder the drainage of wet lands and defeat the purposes of the drainage law. This would be equal to holding that a power granted to a Board, once used by the Board, is destroyed. To repair and maintain a ditch does not take into consideration the basic objects and purposes of the drainage law. Such object in final analysis is the complete drainage of lands in the drainage basin.

Keeping water off the land is equivalent to draining the land after water is upon it. That is what this enlarged ditch does to the properties below the old districts. Can it be said that this last mentioned ditch does not drain a greater territory and that it only affects those who are within the original territory? If others are affected and the record in this case shows that there are such, then such others must under the law of the land be given their day in Court as to the confines of that drainage district and the amount of their assessment. For these reasons the Legislature of South Dakota provided by Section 8476 that where a drainage ditch was to be enlarged, deepened and widened and channels or streams straightened or cleaned out or when dikes or barriers were constructed, that all proceedings looking to that end and affecting the right of persons or property shall be had upon like notice and upon like procedure prescribed for the construction of drains and thereby placed the procedure for an enlarged drainage in the same category and class as a new drainage ditch and district.

In the Sorenson Case (supra), the Supreme Court of South Dakota recognized the fact that what is now Section 8458 and Section 8476 are to be read and interpreted together and doing so in that case said: "The petition of the appellants and associates, while not demanding the construction of an entirely new ditch, does

demand an enlargement of a ditch already constructed to such an extent as, in effect, to constitute a drainage ditch and a denial by the board of the application, except to a very limited extent, was in effect a denial of the proposed drainage", and thereafter said, "As before stated, therefore, *in effect,* the appellant and his associ- quires all the procedure of a new drainage project; new ditch of a greater capacity, extending through their lands, to protect them from such overflow as might occur during heavy rains". An enlarged drainage proceeding being by the statute placed in the same class and category as a new drainage project, the enlarged project requires all the procedure of a new, drainage project; new petitions to establish, a new notice of hearing upon the petition, a new fixing of damages, a new apportionment, and a new equalization and assessment and possibly additional and further assessment might be required, as permitted by Section 8467, in the same manner and to the same extent that this procedure is required and necessary in the establishment and construction of a new ditch and district.

Sections 8470 and 8477 furnish to the Board complete authority and instructions to make, spread and collect the assessments required for maintenance and repair work. Both of these sections provide that assessment for maintenance and repair shall be made as other assessments and in the same manner as provided by the law for the construction of drains originally (on the same apportionment and equalization — after notice given in all respects as provided by Section 8464). These sections of the law further provide for the issuance of certificates with which to pay for such repair and maintenance, making such certificates interest bearing, perpetual and enforcible liens in all respects as original assessments and they give to the Board the alternative to either pay for the work with such certificates or they may sell them

and from the proceeds thereof pay for such work. No additional authority or instructions are necessary for or needed by the Board to do the repair and maintenance work on an old ditch and to pay for such work by assessment upon the equalization previously had in such district, after notice is given of the time the certified assessment will be filed with the County Treasurer; thereafter collecting such assessments, all as provided by Section 8464.

No additional authority is granted and no additional instructions are given to the Board by Section 8467 as to the assessments for maintenance and repair work.

Appellants, therefore, respectfully contend that there are three distinct powers granted to the Board of County Commissioners (Section 8458), (1) to establist and construct a new drain, procedure for which is provided by Sections 8458-8469 inclusive; (2) to provide for the enlargment of any drain previously constructed, procedure for which is provided by Sections 8476, 8458-8469 inclusive; and (3) to provide for the maintenance of a ditch, drain or watercourse previously constructed, procedure for which is provided by Sections 8477, 8470 and 8464.

Upon the foregoing showing we respectfully assert that the opinion of this Court dated March 1, 1926, should be withdrawn and a decree entered reversing the judgment and decree of the District Court ordering the vacation of the injunctions granted herein.

Respectfully submitted,

BENJAMIN I. SALINGER,

ELBERT O. JONES,

NORMAN B. BARTLETT,

Solicitors for Appellants.

We hereby certify that the foregoing Petition for Rehearing is well founded in law and fact, and is not filed for delay.

BENJAMIN I. SALINGER,

ELBERT O. JONES,

NORMAN B. BARTLETT,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 454.

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS ET AL., APPELLANTS,

vs.

NORTHERN STATES POWER COMPANY, APPELLEES.

RESISTANCE TO MOTION TO DISMISS APPEAL.

WHAT THE QUESTION IS.

A plaintiff sought to enjoin what is said to be in effect an attempt to compel it to contribute to the cost of a ditch project. It has diversity of citizenship. But that is not the sole ground upon which it invokes the chancery jurisdiction. It invokes it also on properly worded constitutional questions raised in its bill. While the trial court holds that these questions are substantial, genuine and not colorable, it held on full consideration that there has been no violation of the Constitution, but still gives decree on the merits to the plaintiff.

Defendant appeals to the Circuit Court of Appeals and plaintiff re-asserts the constitutional questions. The appellate court agrees these are substantial, genuine and not colorable, but declares it can again decree for plaintiff on the merits without deciding those questions—and it does just this. From this decree defendant appeals here—and it is the plaintiff who presented the constitutional questions, and still does not say they are colorable, who seeks to dismiss the appeal to this court. In other words, the issue is on whether a plaintiff who does not invoke the jurisdiction solely on account of diversity, but so presents a substantial Federal question as that when his bill is filed he has created a suit in which appeal may be taken under the Act of March 3, 1891, can, after winning on the merits, insist that the benefit of the Act has been lost to defendant because the lower courts have decided that in fact the Constitution has not been violated. Our position is that *status* as to appealability is fixed by the questions raised in the bill and that said *status* is not affected by the decision of such questions; and that when plaintiff wins the substance and defendant the shadow, plaintiff cannot ask that the actual defeat of defendant shall not be reviewed on appeal because plaintiff's Federal question has been decided against plaintiff.

The Record.

In Paragraph Eighteen of the Bill, this defendant in error (now movant) first avers that a "purported" statute of the State of South Dakota annexed as Exhibit "A," and enforcement of which the Bill seeks to enjoin, is in violation of a state provision of the Constitution of the State of South Dakota. And it continues:

"And in that the same is in violation of the fourteenth amendment of the Constitution of the United States; that said statute Exhibit A is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area, and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies or other corporations, and upon the property of municipal and quasi municipal corporations and upon platted property, in cities and villages. Said purported law Exhibit A is further unconstitutional and void in that the same provides for an assessment against property without the right of the property owners to be heard thereon and without notice of any character to the property owners; that if said apportionment of benefits be made as threatened by the said Board of County Commissioners of said Minnehaha County and as is provided in said notice, Exhibit C, the same will constitute the taking of the property of the plaintiff and of the other property owners affected by said notice without due process of law and will deny and deprive plaintiff of the equal protection of the laws." (Printed transcript 14).

In dealing with said plea the District Court said:

"The case made by the bills filed by the plaintiffs in these various actions involves a real and substantial question under the Constitution of the United States, the amount involved in each case is greatly in excess of three thousand dollars exclusive of interest and costs. On the question of the jurisdiction of this court I am of the opinion that each plaintiff states a

> case in his bill plainly cognizable in this court, all of the plaintiffs except the City of Sioux Falls allege diversity of citizenship in addition to the constitutional question, and the proper amount involved. I repeat that there can be no question as to the bills involving a real and substantial question under the Constitution of the United States, and in such a case the jurisdiction of this court extends to every question involved whether a Federal or State law, and enables the court to rest its judgment or decree on the decision of such of the questions as in its opinion effectively dispose of the case." (Printed transcript 89).

As seen, the court fully considered the Federal question so raised by said plea (Printed transcript 86, *et seq.*). But it overruled said contention that there was a violation of the Federal constitution and held that notice and opportunity to be heard are provided by the State Statute. (Printed transcript 87). It gave plaintiff an exception "to the order of the court denying the plea of the constitutionality of the drainage statute as applied to agricultural lands." (Printed transcript 100.) It entertained jurisdiction in case 455, in which there was no diversity of citizenship and therein also entered decree for plaintiffs, on the merits.

Risty *et al.* appealed to the Circuit Court of Appeals for the Eighth Circuit. There appellees re-asserted said constitutional question. And the Court said:

> "The constitutional questions raised are grave, serious and doubtful. Their determination is not necessary to the solution of these cases. But because of the reluctance to deciding constitutional questions, "we leave these questions aside." (Printed transcript No. 451, pp. 253, 254.)

BRIEF.

I.

As the right to sue in Federal court must exist before any defense is made, as the Federal question is created by apt and honest allegation in the bill, and as such allegation invokes and causes jurisdiction to attach, it must follow that the status created by the bill governs, as to appealability, no matter what happens after the bill is filed.

It does not matter what Federal question the answer may or does inject.—Colorado Central, 150 U. S. 138; Shulthis, 225 U. S. 561.

The inquiry as to Federal jurisdiction must be limited to the time at which the bill is filed. The jurisdiction must be made to appear at the outset. Therefore, it does not matter what develops in the course of the proceedings—Borgmeyer, 159 U. S. 408—say, the arising of an additional Federal question.—Boyse, 230 U. S. 98; *Ex parte* Jones, 164 U. S. 691; Third Street Co., 173 U. S. 457.

The allegations of the bill invoke and cause the attaching of jurisdiction.—Huguley, 184 U. S. 297; Vicksburg, 231 U. S. 259.

The test on whether it has attached is whether the necessary facts were made to appear when jurisdiction was invoked.—Colorado Co., 150 U. S. 138.

Say as to diversity, for illustration—the applicability of the Act of March 3, 1891, is to be determined by the showing made in the summons and the filing of claim or declaration. —Borgmeyer, 159 U. S. 408.

1-a.

If the allegations of the bill create, and if because of them jurisdiction has attached—Colorado Co., 150 U. S. 138; City

of Fergus Falls (C. C. A.), 72 Fed. 883; Lovell, 227 U. S. 412; *Ex parte* Jones, 164 U. S. 691.—If, so, the jurisdiction has become complete—Loeb, 179 U. S. 472—it must follow that the jurisdiction *remains* complete, and that the nature of the suit remains for all purposes what the bill made it—including all rights to appeal that exist in such a suit.

The jurisdiction is determined by the allegations of the bill.—Shulthis, 225 U. S. 561; Colorado Central, 150 U. S. 138.

It depends on these allegations and not upon the facts as they subsequently turn out to be.—City *v.* Railway, 166 U. S. 319. Jurisdiction having so attached, it cannot be affected by subsequent developments. The inquiry goes to the time when the suit is commenced.—Colorado Central, 150 U. S. 138.

And as without such allegations there is no right to use the Federal Court, and they alone create that right—see also Metcalf, 128 U. S. 588; Florida Co. *v.* Bell, 176 U. S. 321; State *v.* Tennessee, 152 U. S. 454—it must follow that those allegations fix the Federal right and the nature of the suit.

1-*b*.

It is the presentment and not the decision of the Federal question that controls on appealability—Lovell, 227 U. S. 412. And if on one question the judgment of the Circuit Court of Appeals is final and on another is reviewable, the reviewable question controls—MacFadden, 219 U. S. 288; 31 Sup. Ct. 240.

All that is necessary is a good faith claim that a contract is being impaired—a good claim as to, a constitutional ques-

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One test is whether it appears from the plaintiff's own statement in legal and logical form such as is required by good pleading that a substantial Federal question dispute exists—American Sugar Refining Co., 161 U. S. 277.

And the validity of the claim set up is not the test.—Southern Pacific Ry., 118 U. S. 109.

The jurisdiction does not depend on the validity of the claim set up but on the fact that the claim involves a real and substantial dispute.—Nashville (C. C. A.), 86 Fed. 169.

It is elementary that though diversity be set forth, appeal lies under the Act of March 3, 1891, if in addition other Federal questions are properly raised in the complaint.—Warner, 191 U. S. 195; 24 Sup. Ct. 79 (in which, by the way, it was the bill of plaintiff that was dismissed). Huguly, 184 U. S. 297; Amato, 144 U. S. 465.

The judgment is not final where in addition to diversity there are Federal questions which appear in the record by a statement in legal and logical form such as good pleading requires.—Telegraph Co. *v.* Railroad, 178 U. S. 238.

It suffices to sustain the appellate jurisdiction if it is claimed in a way that is not colorable, but is real, that the law of a state is in contravention of the Federal Constitution. And it does not suffice to assert that the claim as alleged in the bill is legally unsound.—Penn Co., 168 U. S. 685.

The questions, here, were not colorable, and movant does not deny that they were honest and substantial questions—and the whole record stamps them to be that.

The attitude of both the lower courts in attesting to the genuineness and substantiality of the questions is of the highest importance.—City *v.* Ry., 166 U. S. 653.

These questions are substantial because they assert oppressive discriminatory legislation—Nashville (C. C. A.), 86 Fed. 178, 179—and assert unequal exactions and taxation.—*Idem.*

And such questions are not frivolous when as here they require analysis and exposition for decision.—Milheim, 262 U. S. 710; 43 Sup. Ct. Rep. 694.

1-*c*.

Nor may movant have the effect it contends for from the fact that the lower courts could find for it on the merits, though they held against it on the merits of the Federal question presented by it. First, because it is not vital on appealability how that question was decided, and, second, because it is not vital on appealability that the decision did not turn on said question.

The jurisdiction does not depend upon the outcome. It suffices that if the claim on the merits failed the Court may be turned to the Federal question—that if it appears in any aspect which the case may assume that the right of recovery may depend upon a construction of Federal acts; and if the Federal claim is not merely a colorable one, but rests upon construction of the Constitution, there is a Federal question which is adequate.—St. Paul Railway, 68 Fed. 2 (C. C. A.).

It does not matter that there is sufficient allegation of diversity and that relief is asserted on another ground which does not involve the consideration of a Federal question. It does not matter, so far as jurisdiction is concerned, that the Court may not be compelled to construe an Act of

Congress; for its jurisdiction does not depend on the nature of the question that is ultimately decisive of the plaintiff's right to recover.—St. Paul Railway (C. C. A.) 68 Fed. 4.

It may be conceded the rule is that the statement of the plaintiff must exhibit the Federal question to be a necessary part of his claim. But, as construed, this but means that in some phases that a case may develop, the claimant will be driven to rely on this Federal question.—Weir, 216 U. S. 607.

It is said to be elementary that there is a Federal question if "it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the constitution or sustained by the opposite construction."—Southern Pacific Ry. 118 U. S. 109.

It suffices that in some aspect which the case might assume the right to recover may depend on the construction of Federal statute. It being apparent that the claim is not merely colorable.—St. Paul Ry. *v.* Ry. (C. C. A.) 68 Fed. 2.

It does not exclude the jurisdiction that questions are involved which do not at all depend on the Constitution. It is enough that the constitutional question is an ingredient of the original cause, although other questions of fact or of law may be involved.—Railroad *v.* Mississippi, 102 U. S. 141.

I-*d*.

Plaintiff having injected an appealable Federal question, the Appellate Court gets the whole case, whether the ultimate decision turns on the merits or on Federal or on local law—and in number 455, one of the six cases with which the one at bar was tried, the lower courts decreed for plaintiff on the merits, though there was no diversity, and though it was defeated on its only Federal question (the additional one raised in the case at bar).

Where the constitutionality of an Act of Congress is drawn in question, the Appellate Court has power to dispose, not merely of the constitutional question, but of the entire case, including all questions whether of a jurisdictional question or of the merits.—Chappell, 160 U. S. 499, 509.

In the case of Spencer, 191 U. S. 526, the Appellate Court reversed a decree in favor of the plaintiff Spencer. It is there held that the appellate jurisdiction is not limited to the constitutional question, but extends to the determination of the whole case.

There is not a limitation to the constitutional question, but the review includes the whole case.—Loeb, 21 Sup. Ct Rep. 178; citing Whitten, 160 U. S. 231; Penn. Co., 168 U. S. 685.

Under section five of the Act of March 3, 1891, if constitutionality is drawn into question, the Supreme Court acquires jurisdiction of the entire case and of all questions involved in it and not merely of the question of constitutionality of the law of the United States.—U. S. *v.* Horner, 143, 570, 576.

If the case presents a Federal question, there is jurisdiction over the whole case and decision is not limited to merely deciding the single Federal question.—Omaha Horse Railway Co., (C. C. A.) 32 Fed. 729, 730; Horner, 143 U. S. 570; Chappell, 160 U. S. 499; Press, 163 U. S. 700.

If on the face of the complaint a Federal question is presented the Court has the right to decide every issue that may subsequently be raised whether the decision ultimately turns on Federal, local or general law, and jurisdiction is not affected.—St. Paul Railway (C. C. A.) 68 Fed. 10; citing Mayor, 6 Wall. 247; Railroad *v.* Mississippi, 102 U. S. 135, 141; Tennessee *v.* Davis, 100 U. S. 257, 264; Horse Railway Co., 32 Fed. 727 (C. C. A.); and see City of Fergus Falls (C. C. A.), 72 Fed. 883.

The case was brought directly to this court, because the constitutionality of the statute was drawn in question. The question has since been settled adversely to plaintiffs in error. Hoke *v.* United States, 227 U. S. 308. Nevertheless, we must retain jurisdiction for the purpose of passing upon the other questions in the record.—Horner *v.* United States, 143 U. S. 570, 576; Burton *v.* United States, 196 U. S. 283, 295; Williamson *v.* United States, 207 U. S. 425, 432; Wilson *v.* United States, 232 U. S. 563; 34 Sup. Ct. Rep. 348.

1-*e.*

The plaintiff cannot be allowed to say that his own failure to sustain a Federal question claim denies defendant an appeal when plaintiff might have sustained an appeal—that defendant can be deprived of the substance by being given a shadow. For this we cite the Loeb case, 179 U. S., 472:

If the lower court had adjudged against the constitutional question raised by defendant and had given a judgment for plaintiff, the one who raised the constitutional question could have brought the case to the Supreme Court. If that party on denial of its claim could invoke the jurisdiction of the Supreme Court, there is no principle on which the plaintiff can be denied the like privilege if the State law upon which his action depended was on the claim of his adversary held to contravene the Constitution. This right cannot be limited to being possessed of but one of the parties.

It is the unsuccessful litigant who may come to the Supreme Court directly from the Circuit Court in every case where the claim is made that the State law contravenes the Constitution.

It is unnecessary that the writ shall be sued out by the party that made the claim of Federal jurisdiction.

No matter which party claims rights or protection under the Constitution, that is decisive as to jurisdiction, and all questions may then be reviewed in the Appellate Court.—Mayor *v.* Cooper, 73 U. S., 252, 253.

1-*f*.

Movant having prevailed on the merits is in no position to have a decision here on how its Federal question ought to be decided, or to say it is no longer of consequence. But, passing that, it may not have a motion to dismiss determine the validity of its contentions.

It is not required that a constitutional question asserted shall be a well-founded claim. Whether it is meritorious must be decided on the merits after jurisdiction is taken.—Penn., Co., 168 U. S. 685, citing Horner, 143 U. S. 570.

It is sufficient that a genuine Federal question is claimed to exist and it is not essential that the claim be well founded. That is a question that must be decided after the court takes jurisdiction.—Nashville (C. C. A.), 86 Fed. 178, 179, and cannot be raised by motion to dismiss.—Chicago Life Co. *v.* Needles, 113 U. S. 574, and see Cohen, 6 Wheat. 264.

It is but necessary to show that the complainant claimed in good faith to have a contract which the other party had attempted to impair. Whether it was in fact impaired may not be tried out on motion to dismiss, where the claim in the bill was that the action of the city had that effect. It suffices that the bill presents a constitutional question, irrespective of the actual sufficiency of the facts alleged to justify the relief sought or of the facts as they may subsequently turn out.—Pacific Co., 194 U. S. 112.

II.

Movant relies upon detached excerpts in disregard of what the cases cited from decide. On its interpretation its citations would overrule the elementary law to which we have called attention, and overrule a very large number of decisions in this and the lower Federal courts, hitherto unquestioned, and do so without so much as mentioning those decisions.

And nothing found in what it cites can be strained into holding that where a plaintiff so presents Federal questions as that the invoking of jurisdiction does not rest on diversity alone, such plaintiff can dismiss the appeal of defendant who has lost on the merits, merely because the lower court had decided that while the Federal question presented by plaintiff was substantial, genuine and not colorable, plaintiff could not prevail upon it.

Let us turn to what movant relies upon.

Arbuckle—191 U. S. 405.—(Brief — 6)—In that case it is said that a right to a hearing *does* arise if there be a substantial controversy "upon the determination of which the case depends." It is *not* said that there is no right to appeal under the Act of March 3, 1891, *unless* there is not only a substantial Constitutional controversy, but one upon which the determination of the whole suit depends. No such limitation is found in the Act. To put it in by court action would overrule the decisions that it suffices if the case *might* take a turn that would make it necessary to decide the Federal question; and the decisions that if the question is substantial it does not matter, so far as the right to appeal is concerned, how the question was finally dealt with below; and the decisions that the presenting of such a question authorizes decision on matters other than such question. What the case *decides* is that *plaintiff who was dismissed* had failed to raise a substantial Federal question—that none such "appears on the record by a statement in legal and logical form such as is

required in good pleading." Hardly a decision that plaintiff may have the appeal of defendant dismissed because the court decided against plaintiff a substantial Federal question presented by plaintiff—hardly a decision that the Act does not mean what it says, to-wit; that appeal is denied only where the *sole ground presented* is diversity of citizenship.

2-*a*.

Defiance Water Company—191 U. S. 184.—(Brief — 6)—The only claim of Federal jurisdiction was a claim by the Water Company against the City that the obligation of a rental contract with the City was impaired by an ordinance which, though it denied the validity of the contract, still allowed the claim for rentals with a saving clause to prevent estoppel. The Federal question is held to be colorable, and the circuit court of appeals had ordered a dismissal of the bill.

2-*b*.

Shulthis v. McDougal—225 U. S. 561.—(Brief — 7)—Some language as to "the determination upon which the result depends." The *decision* is that no ground of Federal jurisdiction is sufficiently set forth. And it was the complainant who was ruled against.

2-*c*.

Lovell v. Newman—227 U. S. 412.—(Brief — 7)—Some more language upon "right to recover depends," and it, too, deals with the plaintiff. The *decision* is that he had not asserted a substantial Federal question.

2-*d*.

Empire Co. v. Hanley, 198 U. S. 292.—(Brief — 7)— Some more and kindred detached words, and a deduction from them that this appeal should be dismissed because "the Federal questions pleaded here were not those upon the determination of which the final result depended." Another disregard of the rule that if the question be substantial, the decision upon it will not oust the right to appeal created by the presenting of the question, nor exclude decree for the one whose Federal question is finally decided against him. The *Hanley* case is another in which the *decision* is, simply, that nothing is raised that authorizes appeal under the Act of March 3, 1891. The following statement by this Court makes that plain.

The averments of this complaint did not suggest that the courts of Idaho would hold the proceedings of the probate court if attacked by Hanley directly, effectual to overthrow his purchase, or charge that by taking any such action as had been taken they had committed error so gross as to amount in law to a denial by the State of due process of law; Hanley's contention was in effect that the lower proceedings were void for lack of jurisdiction, and he did not pretend that he could not have obtained redress by direct suit in the State courts. The Constitution and laws of the United States were not mentioned in the complaint, nor was any dispute or controversy raised as to the effect or construction of the Constitution or laws, nor was any privilege or immunity specially set up or claimed under the Constitution or law; that if this had been a writ of error to said Court, the averments would not have brought it within Section 709 of the Revised Statutes, and if it had been a direct appeal from the circuit court under the Act of March 3, 1891, it could not have been sustained

because the construction or application of the Constitution of the United States was not distinctly presented for decision in the court below.

2-*e*.

Henningsen, 208 U. S. 404.—(Brief — 8)—The circuit court had affirmed decree of the court below enforcing the right of a surety on the bond of a public contractor for first lien upon sums due under the contract.

It was said here:

A motion is made to dismiss on the ground that the jurisdiction of the circuit court was invoked solely on the ground of the diversity of citizenship of the parties, and hence the decree of the circuit court of appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and for relief were also based on the statutes of the United States, as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the circuit court of appeals, and were necessary elements.

As seen, the appeal was entertained. In so doing this Court said: "Those statutes entered as elements into the decision of the Circuit Court of Appeals, and were necessary elements."

We have exhibited above what *was decided.* But because the quoted words state the fact to be that certain elements were vital ones and entered into the decision, movant deduces that there can be no appeal where the Circuit Court of Appeals affirms a holding that a certain question is grave and substantial, itself declares this to be true, but finds it unnecessary to decide that question for itself. But be all that as it may, the quoted words are mere argument, or, rather,

one argument in support of the grounds upon which the *decision* rests. Such words so spoken, should not be the means of overriding the settled law which permits the appeal at bar.

2-*f*.

Cary Co. v. Acme, 187 U. S. 427.—(Brief —10)—The Acme Company brought suit in the trial court for alleged infringement of letters patent which went to decree sustaining the validity of the patent and adjudging that the Cary Company had infringed it. The defendant appealed to the C. C. A. and there was an affirmance. Subsequently, proceedings in contempt were instituted by the Acme Company to punish alleged violation of the injunction issued by the decree. A fine of $2,000 was imposed. The Cary Company sued out a writ of error from the Circuit Court of Appeals to review its judgment and there was an affirmance. Thereupon, writ of error to the Supreme Court of the United States was allowed. It was said by the Court:

Judgments and decrees of those courts in all cases arising under the patent laws and under the criminal laws are made final by section 6 of the judiciary act of March 3, 1891. Although it is conceded that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the denial of constitutional rights, and hence that this court has jurisdiction under section 5 of that act; but it is settled that even if a party might be entitled to come directly to this court under that section, yet if he does not do so, and carries his case to the circuit court of appeals, he must abide by the judgment of that court.

The decree at bar is not one in a patent case; nor is it a judgment in a criminal cause, made final by the Act.

And defendant could not have gone directly to this court. The direct appeal is available only where the jurisdiction of the district rests solely on a Federal question. It is no more available where diversity also exists than in a case wherein diversity is the sole ground upon which jurisdiction is invoked.—See American Co. *v.* City, 181 U. S. 279; Cary, 187 U. S. 211; Watkins, 118 Fed. 532; Huguly, 184 U. S. 452. And it is where the jurisdiction rests on diversity and the *defendant* injects a constitutional question, that he may take direct appeal. American Refining Co., 161 U. S. 277; 21 Sup. Ct. 647.

Again, it cannot be that the taking appeal to the Circuit Court of Appeals destroys the right to appeal to this court. For appeal *does* lie from the decision of that court to this; and one cannot appeal from the Circuit Court of Appeals unless he first enters it. In other words, since the Act of March 3, 1891, permits appeal here to any who enter the Circuit Court of Appeals where diversity is not the sole basis of jurisdiction, then, if entering that court takes away that appeal, the statute means nothing.

Where the plaintiff injects the constitutional question and is defeated on it, it is no waiver of rights under the Act of March 3, 1891, that thereupon direct appeal was not taken to the Supreme Court.—Northern Pacific Co., 113 U. S. 574; 12 Sup. Ct. Rep. 742.

2-*g*.

Ayres v. Polsdorfer, 187 U. S., 427.—(Brief 11.)—The headnote clearly expresses the essence of the decision, to-wit: that where, below, jurisdiction is invoked solely on the ground of diversity of citizenship there may not be a review in the Supreme Court on writ of error because a Fed-

eral question arose in the course of the proceedings, even though it be a question which could not be brought directly from the Circuit Court to the Supreme Court.

The declaration of Polsdorfer alleged ownership, possession and entry of defendant Ayres. It invoked the Federal jurisdiction *solely* on the ground of diversity of citizenship. There was verdict and judgment for the plaintiff Polsdorfer. Ayres sued out a writ of error to the Circuit Court of Appeals and the writ was dismissed in that court on the motion of Polsdorfer and on the ground that there had been no summons and severance of the defendant, Price. This being the bill, it is manifest that whatever Federal question got into the case must have gotten into it after the filing of the complaint setting up diversity of citizenship only.

For the right to appeal to the Supreme Court from the action of the Circuit Court of Appeals, the argument was in effect that the Federal question *arose in the course of the proceedings in the trial court,* consisting, as is claimed, upon a basing on grants of land from different states and a conflict between the grants under which the parties respectively claimed title—it is held that this did not make a non-final judgment—which is but affirming that the *status* at the time the complaint is filed is what is controlling. It is merely an affirmance of the Turck case, 150 U. S. 138. For the Turck case, the Ayres case says:

In it the jurisdiction of the trial court was invoked on the ground of diversity of citizenship, but defendant claimed to have set up in defense a Federal question arising under Section 2322 of the Revised Statutes, and on that ground insisted that the judgment of the Circuit Court was not final; that this contention was rejected, and the Supreme Court held that before such defense under this statute had

been set up jurisdiction had "already attached and could not be affected by a subsequent defense;" that jurisdiction "depended entirely upon diverse citizenship when the suit was commenced and to that point of time the inquiry must necessarily be referred."

It is added that the same idea was expressed in subsequent cases, though in somewhat different language.

Lampasas, 180 U. S. 276.—(Brief 13.)—This case and its reference to *Clark's* case, 176 U. S. 114, but affirms the self-evident proposition "that the objection of the unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance." Why movant thinks this is relevant is set forth as follows:

> "If there was a grievance involved in the disposition of the Federal question raised in the lower courts, that grievance belonged to appellee, and appellants were strangers to it. Indeed, they were the direct beneficiaries of the disposition of those questions, when they were set aside by the lower court." Brief 14.)

Of course, this again disregards that the right of appeal depends on whether or not diversity *only* was *presented*, and not on how grounds other than diversity were decided. And it is a complete "swap" of a stone for bread. Plaintiff brings and holds defendant in court by so presenting substantial grounds for invoking jurisdiction as that diversity is not the *sole* ground. Some of these grounds are decided against plaintiff, but still the decree on the merits goes against defendant. Yet defendant is "a direct beneficiary" (one wonders in what way), and it is the victorious plain-

tiff who alone has been "aggrieved." That is, its "grievance" is that it won its whole case, but won it on one of its claims instead of another, or did not win on all of its reasons for demanding victory. And the defendant who has lost everything of substance is a "stranger" to all "grievance," and is in the position of one who attacks a statute for unconstitutionality when that statute in no way affects him.

It was rightly said in the *Hanley* case that appellant was making a grievance of its success; and movant urges the words against defendants, but they are relevant only to the position taken by movant. That position is in essence that because movant won the substance but lost an "argument for jurisdiction," asserted wholly to enable the court to give it the substance, such "defeat" entitles it to take from the truly defeated party a right to review which that party would have had if it had been defeated both on said "argument" *and* the substance. To have many such victories as defendants had would place them with Dickens' ruined "Fortunate legatee." And on the theory of movant its "grievance" through its academic defeat is truly an asset. And it claims a preference which we submit it is not entitled to unless the *Loeb* case is to be overruled and it is to be held that in the right to appeal the parties are not equals. That is to say,—when the bill was filed it created the right of appeal under the Act of 1891 for all parties. Now, had plaintiff lost the substance *and* its Federal question its right to appeal would have remained. Had defendants lost *both* substance and the Federal question they would have had the right to appeal. So, if the decision had rested solely on finding the Federal question for plaintiff. And in that case defendants would have been heard here on the substance, too. But they are not to be

heard at all under the Act because, foresooth, they lost the substance but won on one ground put in solely to enable the court to defeat them as to the substance.

2-*i*.

For some reason, reliance is had on the case of *Loeb*, 179 U. S. 472. The argument is against the position of movant. It points out it was asserted in the Loeb case that review of the judgment of the highest court of a State can be had *only* by the one who in that court made claim under the Constitution. This court held against that contention, and said:—Brief — 14)—

> "In other words, if a claim is made in the circuit court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant."

And in the Loeb case, the attack was on and not by the plaintiff. This, standing alone, surely does not sustain movant. But the point urged seems to be that this, plus *Louisville v. Telegraph Co.*, 234 U. S. 369, establishes that all that was available after the Federal question was decided against plaintiff was *it* had the right to direct appeal to this court. Of course, the Loeb case does not hold that, and the *Louisville* case holds but this:

> "On a direct appeal under section 238, Judicial Code, from a judgment of the District Court dismissing the bill for want of jurisdiction on the ground

that neither of the parties was a resident of that district and that the suit was one that could only be brought in a district in which one of the parties resided, this court is only concerned with the jurisdiction of the District Court as a Federal court; whether appellant is entitled to the relief sought is not a jurisdictional question in the sense of section 238."

"When the matter in controversy is of the requisite value and diverse citizenship exists, the question is simply whether the case is cognizable in the particular District Court in which the case is brought."

2-*j*.

Robinson v. Caldwell, 165 U. S. 359.—(Brief — 10)— Caldwell brought suit in State court against Robinson and claimed to be the owner of certain lands in Idaho, the complaint stating that the validity of his title depended partly, if not altogether, upon the construction of the treaty between this Government and the Nes Perces Indians. It also appears there was drawn into question the constitutionality of an Act of Congress. Robinson had the cause removed, and in Federal court it was heard on the merits. There was final decree adjudging Caldwell to be the true owner of certain lands described in the complaint and quieting his title against Robinson. Robinson was allowed to appeal to the Supreme Court. He also prosecuted an appeal to the Circuit Court of Appeals which determined his case against him on February 4, 1895, and the citation on the appeal to the Supreme Court was for July 1, 1894. The opinions in both lower courts considered all the questions requiring construction of the treaty and involving the validity of said Act of Congress. The appeal

involved in the Robinson decision here was brought to the Supreme Court directly from the final decree in the Circuit Court of the United States. The holding is that one may not take appeals on a whole case both to the Supreme Court direct and also to the Circuit Court of Appeals, and that where the Circuit Court of Appeals affirms on the merits and decides all the questions raised, then, by invoking the jurisdiction of the Circuit Court of Appeals on the whole case, defendant waives his right to a decision by the Supreme Court on his direct appeal to it and the latter appeal must be dismissed. It is as to this that the court wrote the extract upon which movant relies:

> "It was not the purpose of the Judiciary Act of 1891 to give a party who was defeated in the Circuit Court of the United States the right to have the case finally determined upon its merits, both in the Supreme Court and in the Circuit Court of Appeals. As no question of jurisdiction was certified by the Circuit Court, and as the defendant chose not to await the action of the Supreme Court upon the appeal to it from the Circuit Court, but invoked the jurisdiction of the Circuit Court of Appeals on the whole case, he must be held to have waived his right to any decision by the Supreme Court on his direct appeal from the Circuit Court."

Of course, these words must be read in the light of the record upon which they were uttered, and, thus read, they have nothing to do with a case where a plaintiff is seeking to take away appealability because a Federal question raised by him has been decided against him.

2-*k*.

Anglo-American, 191 U. S. 376.—(Brief — 15)—More detached excerpt. The headnote states the *decision* well:

> "When the Circuit Court has decided the question of its jurisdiction and the alleged unconstitutionality of a state law in favor of the plaintiff, but has decided against him on the merits, the *plaintiff* cannot appeal directly to this court under the act of March 3, 1891, chapter 517, section 5, for the purpose of a revision of the judgment on the merits.

In other words, there was in that case no basis for *direct appeal to this court from the action of the trial court.* No such appeal is being attempted by us.

In a word, the jurisdiction was not based *solely* on diversity. Therefore, appeal lies under the Act of March 3, 1891.

What appellee seeks is the right to elect and regulate as to whether its suit may be brought here. If it be defeated in the C. C. A. the suit can be brought higher. If it be victorious in that court, then it claims the right to in effect amend by changing the bill to rest on nothing but diversity, and so to stop further appeal.

We submit respectfully that the motion should be overruled.

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Of Counsel.

Office-Supreme Court, U. S.
FILED
JAN 16 1933
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 93

A. G. REED ET ALIAS
Comptroller of the Treasury
of the State of Maryland,
Appellant,
vs.
NORTHERN CENTRAL POWER COMPANY,
Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF MARYLAND.

BRIEF FOR APPELLEE.

[illegible]
Counsel for Appellee.

[illegible]
[illegible]
[illegible]

FILED
OCT 1 1894
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted] 95

A. G. RISTY, et al, as County Commissioners, etc., et al,

Petitioners,

CHICAGO, ROCK ISLAND and PACIFIC RAILWAY COMPANY,

Respondent.

BRIEF ON BEHALF OF RESPONDENT CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, IN RESISTENCE TO PETITION FOR WRIT OF CERTIORARI.

W. F. DICKINSON, Chicago, Ill.
THOMAS D. O'BRIEN, St. Paul, Minn.
ALEXANDER E. HORN, St. Paul, Minn.
EDWARD S. STRINGER, St. Paul, Minn.
Counsel for Respondent,
Chicago, Rock Island and
Pacific Railway Company.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 451.

A. G. RISTY, et al, as County Commissioners, etc., et al,

Petitioners,

CHICAGO, ROCK ISLAND and PACIFIC RAILWAY COMPANY,

Respondent.

BRIEF ON BEHALF OF RESPONDENT CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, IN RESISTENCE TO PETITION FOR WRIT OF CERTIORARI.

Petitioners seek a writ of certiorari to review the decision of the Circuit Court of Appeals of the Eighth Circuit. For the opinion written by Judge Kenyon, see Risty vs. Chicago, Rock Island and Pacific Railway Company, 297 Federal 710, which affirmed Chicago, Rock Island and Pacific Railway Company vs. Risty, 282 Fed. 364.

Petitioners advance five reasons for the granting of the writ. All but the first are so clearly and

conclusively disposed of contrary to petitioners' contention, by Judge Kenyon's opinion as to require nothing further than a reference thereto.

COPY OF THIS OPINION IS MADE A PART OF THIS BRIEF AS AN APPENDIX, PAGES 8 TO 39.

I.

Petitioners claim that there is such conflict between Risty vs. Chicago, Rock Island & Pacific Railway Company, 297 Fed. 710, the decision below, and Gilseth vs. Risty, 193 N. W. 132 by the Supreme Court of South Dakota, as to justify a writ. *There is in fact no conflict between the two cases as an analysis will show.*

Some years ago the County Commissioners established Drainage Ditch 1, levying an assessment upon certain adjacent property. A few years later the Commissioners established another ditch known as Drainage Ditch 2, likewise levying an assessment for this ditch upon adjacent property. Ditch 1 and Ditch 2 were physically connected and in reality constituted one ditch, although established separately.

While the terminology may not be accurate because in fact no assessment districts were ever established, as is pointed out by the Circuit Court of Appeals in its opinion, we shall, for the convenience, refer to the property which was assessed for the establishment of Ditch 1 and Ditch 2 as the old assessment district.

This respondent, the Rock Island Railway Company, had no property whatever in the old assess-

ment district, and was not assessed for the construction of either Ditch 1 or Ditch 2.

In 1916 the spillway connecting Ditch 1 and Ditch 2 with the Sioux River washed out. A very large expenditure was required to make these ditches function at all.

The Board conceived the plan of establishing a new ditch which it was pleased to call "Ditch 1 and 2". This ditch, so-called, was established over the identical route traversed by Ditch 1 and by Ditch 2, and the only work done in building it, was to clean out and widen the old ditches, and rebuild the spillway. The Board proposed to assess for this ditch, so-called, not only all property included in the old assessment district, but also certain additional property, which additional property will be designated, for convenience, the new assessment district.

The Rock Island, this respondent, had, as indicated, no property in the old assessment district but did have property within the new assessment district. Respondent had no notice of any intention to assess its properties, within the new assessment district, until the tentative assessment was made.

The Board having made a tentative assessment, of over $8,000, this suit was brought seeking an injunction against further action looking towards assessment of respondent's properties. Jusisdiction was based on diversity of citizenship,—the Rock Island being an Illinois corporation and the defendants (petitioners here) residents of South Dakota

and upon the asserted unconstitutionality of the South Dakota drainage statute.

Judge Elliott, judge of the lower court, held that the establishment of "Ditch 1 and 2" was a mere subterfuge for repairing Ditch 1 and Ditch 2, and for assessing additional property for such repairs *when the South Dakota law* (Section 8740 Revised Code of South Dakota for 1919) *limited assessments for repairs to the property originally assessed for construction.* Judge Kenyon on appeal expressed a similar view.

The district court entered a decree enjoining any assessment against any of this respondent's properties as all of its properties lay outside the old assessment district. This decree the circuit court of appeals affirmed.

The decree did not enjoin or restrict or in any way deal with the right of the Board to assess property within the old assessment district.

On the other hand, the South Dakota Supreme Court in the Gilseth case had before it for determination the validity of an assessment for Ditch 1 and 2 *upon property lying within the old assessment district.* The court was careful to say (page 133):

> "Plaintiff * * * was the owner of agricultural land within the drainage area of Drainage District No. 2".

The South Dakota Supreme Court reached the conclusion that the particular assessment for Ditch 1 and 2 upon property in the old assessment district, should be upheld because:

1. Even assuming the project to be the repair of the old ditches and not the construction of a

new one, still an assessment for repairs was proper under the constitution and statutes of South Dakota *upon the land originally assessed,* (Sections 8458 and 8470).

2. The land owner, the plaintiff in that case, was estopped to question the assessment, he having acquiesced and participated in the proceedings. A reading of the opinion makes it apparent that this was the real reason for the decision.

The South Dakota Supreme Court, therefore, upheld at most the validity of an assessment upon land *within the old district.* It is therefore apparent that there is absolutely no conflict between the holdings of the two courts.

Taking the view most favorable to petitioner and eliminating entirely the question of estoppel, the most that could be claimed for the decision of the State Supreme Court, is that, the *court held that land WITHIN the old district COULD be assessed for Ditch 1 and 2.*

The Federal Circuit Court of Appeals held that land WITHOUT the old district COULD NOT be assessed for Ditch 1 and 2.

The rule of conflict of decision so strongly urged by petitioners is not in the case at all.

Eliminating this proposition, there is nothing in the case which would call for or justify certiorari, even if this court were of the opinion that the decision of the Circuit Court of Appeals was wrong on the merits. However, nothing could be added to Judge Kenyon's opinion to demonstrate that the decision on the merits was correct. The only ques-

tion determined by the Court below was the construction of the South Dakota Drainage Statute, and a determination of the facts applicable. There is no Federal question in the case now. There was a very serious Federal question at the inception of the case, namely: the validity of the drainage statute under the Due Process of Law clause of the Federal constitution. This Federal question was expressly decided in petitioners' favor in the District Court by Judge Elliott; the Circuit Court of Appeals expressly refused to determine the question on the ground that it was unnecessary to the decision. *The Court below determined only the construction and not the validity of the state statute.* It is apparent that it was the intention of Congress to leave the final determination of such a question to the Circuit Court of Appeals. Section 128 of the Judicial Code.

II, III, IV and V.

We shall not attempt to follow petitioners' brief through the arguments upon these propositions. These portions of the brief deal with the jurisdiction of the Court below, it being claimed, as we understand it, that there was a plain, adequate and complete remedy at law, that there was no equity in the bill, that the action was premature, and that the necessary jurisdictional amount was not involved. All of these questions were carefully and exhaustively considered by the Circuit Court of Appeals and determined contrary to the conten-

tions now made by petitioners. Nothing could be added in support of the conclusion reached by the Circuit Court of Appeals and to the convincing reasoning by Judge Kenyon.

It is apparent that this application has no merit and it is respectfully urged that the petition for a writ of certiorari be denied.

Respectfully submitted,

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THOMAS D. O'BRIEN, St. Paul, Minn.
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APPENDIX.

297 Federal 710.

RISTY et al. v. CHICAGO, R. I. & P. RY. CO., and five other cases.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1924.)

Nos. 6312-6317.

1. Constitutional law—46(1)—Federal courts will not pass on constitutionality of statutes unless absolutely necessary.

Federal courts will not pass on the constitutionality of statutes unless absolutely necessary.

2. Drains—71—County commissioners held without authority to take in lands not benefited in assessing cost of repairs and maintenance.

Where a river broke through a natural barrier and flowed into drainage ditches and because of the inadequate construction of the ditches washed out a spillway, leaving the water uncontrolled, and threatening serious damage where the water emptied over a steep bluff into the river, the county commissioners could clean and maintain the ditches under Rev. Code S. D. 1919, § 8470, or abandon the ditches and construct new ones in the same location by complying with section 8489; but they had no power, by pretending to abandon the ditches, to assess part of the cost of maintaining and repairing the old one on lands outside of the original drainage district in no way benefited thereby.

3. Drains—2(3)—Draining of other than agricultural lands must be by drainage districts established under legislative authority.

Under Const. S. D. art. 21, § 6, drainage of lands for any public use other than the drainage of agricultural lands must be carried out by drainage districts established under legislative authority.

4. Courts—262(2)—Federal equity court cannot give relief where there is "plain, adequate and complete remedy at law."

Under Judicial Code, § 267 (Comp. St. § 1244), federal equity courts cannot give relief where there is a "plain, adequate and complete remedy" at law, but the remedy at law must be as certain and efficient as that in equity.

5. Court—262(2)—Remedy in federal court necessary to defeat suit in equity; "remedy at law."

The "remedy at law" which will prevent the bringing of a suit in a federal court of equity must be a remedy on the law side of the federal court, and not a remedy in the state courts.

6. Courts—262(2)—Landowner's remedy at law for illegal drainage assessments held inadequate.

Where the only remedy against unauthorized drainage assessments was to appear before the county commissioners and to appeal from their finding to the state, *held*, that the remedy at law was inadequate under Judicial Code, § 267 (Comp. St. § 1244).

7. Taxation—498, 608(2)—Right to restrain assessment or collection of state tax for illegality must be clear.

A suit in equity will not lie to restrain the assessment or collection of a tax on the sole ground that it is illegal, but there must be special circumstances bringing the case under some recognized head of equity jurisdiction, and the right to such relief must be clear where court is asked to restrain collection of a state tax.

8. Taxation—498—An assessment putting cloud on title gives rise to equitable jurisdiction.

An assessment putting a cloud on title gives rise to equitable jurisdiction unless there is an adequate remedy at law.

9. Drains—91—Assessment of benefits for drainage held to create cloud on title giving equity jurisdiction.

An assessment of benefits against land affected by a drainage improvement, or fixing the proportion of benefits thereof, under Rev. Code S. D. 1919, §§ 8463, 8464, *held* to create a cloud on the title giving equity jurisdiction.

10. Action—62—Suits to enjoin drainage assessments held not premature.

Suits in federal court to enjoin drainage district assessment proceedings on the ground that they were unauthorized *held* not premature.

11. Courts—328(11)—Threatened drainage assessments held to exceed $3,000 giving federal court jurisdiction.

Where the proportion of benefits for drainage improvements had been assessed on a unit basis and it was merely a matter of computation to determine the amount assessed against each tract of land, the apportioning being subject to change only if landowner should convince the county commissioners that their conclusion was erroneous, the federal court had jurisdiction of suits attacking such threatened assessments as exceeded $3,000.

12. Courts—263, 278—Federal court did not lose jurisdiction by failing to decide constitutional question.

The jurisdiction of the federal court in a suit presenting a constitutional question extended to all questions involved in the case, and it did not lose jurisdiction by omitting to decide the constitutional ones.

13. Estoppel—74—Acts of landowners outside of original drainage district held not to estop them from attacking validity of drainage assessments.

The fact that railroads and other landowners had been in close touch with drainage ditch proceedings and had in several instances encouraged the work and had been assessed for benefits to other lands in the original drainage district without protest *held* not to estop them from attacking the validity of the assessment as to property outside the original district, where they had no notice at the time of such acts that benefits would be assessed on such property.

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suits, by the Chicago, Rock Island & Pacific Railway Company, by the Chicago, Milwaukee & St. Paul Railway Company, by the Chicago, St. Paul, Minneapolis & Omaha Railway Company, by the Northern States Power Company, by the City of Sioux Falls, and by the Great Northern Railway Company, respectively, against A. G. Risty and others, as County Commissioners, and others. From decrees for plaintiffs (282 Fed. 364) the defendants in each case appeal. Affirmed.

In the year 1907 the board of county commissioners of Minnehaha county, S. D., acting under the drainage statutes of that state, established and had constructed a drainage ditch known as drainage ditch No. 1, bottom width of 40 feet, at an expense of $46,600. This ditch was north of Sioux Falls and ran first in a southerly direction from its initial point; thence easterly past the pumping station of the city of Sioux Falls; thence southeasterly about 1,000 feet to the Big Sioux river near the north limits of Sioux Falls. It passed through a ridge and descended approximately 100 feet in the terminal thousand feet. A spillway was constructed to carry the water down the descent. This ditch was approximately three miles in length, and there was a spur 670 feet long extending northwest into a bayou about 2,000 feet south of the initial point.

In 1910 the board of county commissioners established another drainage ditch known as drainage

ditch No. 2, which extended north from the northern terminal of drainage ditch No. 1, for a distance of about 12 miles. This ditch likewise had a 40-foot bottom and was constructed at a cost of $81,-106.19. These two ditches, making in fact one continuous ditch, drained certain agricultural lands, and traversed the land north of the city of Sioux Falls near the gravel bed from which the city obtained its water supply. It also passed near the state penitentiary lands and emptied into the Big Sioux river north of the falls in said river.

In the year 1916 there was a breaking of the river through the natural barrier into the bayou drained by the lateral branch. This, coupled with the large volume of water passing through these ditches, made it impossible for the spillway to carry the same, and it was washed out and destroyed. The waters therefore being uncontrolled descended from the steep bluff to the level of the Big Sioux river, and serious damage was threatened to various interests. There was danger that the Big Sioux river which flowed through the city of Sioux Falls would be diverted from its course and flow through these ditches cutting off the water supply of the city of Sioux Falls, injuring the Northern States Power Company, and depriving it of its water power.

The board of county commissioners attempted to devise some plan to reconstruct the spillway and to protect these various interests from the threatened damages.

April 8, 1916, certain parties filed a petition with the board of county commissioners asking

that that portion of drainage ditch No. 1 containing the old spillway be closed and abandoned, and the course of said ditch extended in a southerly direction through Covell's Lake to the Big Sioux river; and said board did pass a resolution that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof.

August 3, 1916, a petition of F. L. Blackman and other parties was filed entitled, "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to said Drainage Ditch Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefited Thereby." This petition was transmitted by the board to the state engineer, and on August 14, 1916, a survey was ordered.

September 13, 1916, a report of the survey was made and filed by the engineer in charge. A resolution was thereupon adopted by the board fixing the line and width of said new proposed ditch in the exact location of old ditches No. 1 and No. 2, and providing for the time and place of hearing the petition. Notice was published for three successive weeks describing the route of the proposed drainage, and the tract of country likely to be affected thereby, in the general terms provided by the statute; also, the separate tracts of land through which the proposed ditch would pass, and the names of the owners of said tracts. Such notice informed all persons affected by the proposed drainage to appear at such hearing and show cause

why the same should not be established. Upon the return date of the notice the commissioners adopted a resolution purporting to establish the so-called drainage ditch No. 1 and 2, and providing for the reconstruction of the spillway.

No appeal was taken from this order establishing the purported new project.

The commissioners then caused ditches No. 1 and No. 2 to be cleaned out, widened, deepened, and diked so as to increase the carrying capacity; caused the spillway to be reconstructed, and certain portions of the Big Sioux river to be straightened. This work cost approximately $255,000, and drainage warrants were issued to be paid out of taxes assessed against the property determined to be benefited within the area of the purported new drainage ditch No. 1 and 2. The largest holders of these warrants are interveners in this action.

In April, 1919, notice was published of a hearing upon the matter of equalizing benefits resulting from said drainage ditch No. 1 and 2, and this was the first intimation that certain of appellees had that benefits might be assessed against them. The property of some of the appellees was not covered by the notice. However, the proceedings under this notice were abandoned.

June 10, 1921, appellant board by resolution fixed a proportion of benefits in units, which had been decided upon as a fair method of arriving at the same, on drainage ditch No. 1 and 2, and designated Monday August 1, 1921, at the office of the county auditor, as the time and place for a

hearing on the question of equalizing benefits, and caused notice of such hearing to be published as provided by the statute. Under the unit system adopted by the board upon recommendation of their engineer, the various appellees had units allotted against them as follows:

Chicago, Rock Island & Pacific Railway Company, out of a total of 32,549.62 units, 839.45.

Chicago, Milwaukee & St. Paul Railway Company, 1,681.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, 839.45.

Northern States Power Company, 5,351.63.

Great Northern Railway, 613.85.

City of Sioux Falls, 3,147.95.

The amount due on warrants issued for this work at the time the actions were brought was about $300,000. The total units of benefit aggregate 32,549.62, so each unit of benefit amounts to slightly in excess of $9. If no changes had been made by the board, had they been permitted to proceed; the amounts charged against various appellees would have ranged from $50,000 against the Northern States Power Company to substantially $6,000 against the Great Northern Railway Company.

Appellees brought suit to restrain appellants from proceeding further with the equalization of said purported benefits and from levying any assessment upon their property to pay therefor. Some of the appellees had no property in original ditch district No. 1 and No. 2; others of appellees

did have, and some difference is made in the contention of those not having property in the original ditch district and those who did have, but the issues in the main were the same as to all the parties.

All of the appellees contended in the trial court that the South Dakota drainage law was unconstitutional, violating the Fourteenth Amendment to the Constitution of the United States; that it also violated sections 2 and 3 of article 6 of the Constitution of the State of South Dakota. Some of the appellees contended that the board exceeded its powers in what it attempted to do, in that the same was not for the drainage of agricultural lands, but being for other public purposes, could only be carried on by the corporate authority of drainage district entities established for that purpose, which had not been done, and that consequently the proceedings were void.

Others of the appellees contended that the proceeding seeking to establish drainage ditch No. 1 and 2 was a subterfuge to impose liability on new territory to pay for the maintenance of the former ditches, and that the proceedings were for maintenance and repair of the old drainage ditch and were not carried on as provided by section 8470 of the Code of South Dakota relating to assessments for the maintenance of drainage already established; that drainage ditch No. 1 and 2 was not a new ditch and not a new enterprise.

Further claim is made by the railroad appellees that the South Dakota drainage law is unconstitutional so far as respects assessments of railroad

property, in that it provides for the giving of no notice whatever of the apportionment and equalization of benefits to railroad companies.

All appellees claim that the attempted assessments upon their property are arbitrary, unjust and illegal, and constitute a discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law; and that the proceedings create a cloud upon their title.

It was the position of appellants, on the other hand, that the statutes referred to were constitutional; that the federal court in equity had no jurisdiction because there was a complete remedy at law; that there was no equitable question involved; no irreparable injury shown; no facts sufficiently pleaded to show any threatened cloud upon title; that the amount involved was not sufficient to give jurisdiction; that the bringing of the suit was premature; that ditch No. 1 and 2 was legally established as a new drainage project under the statutes of South Dakota; and that the board of county commissioners had full jurisdiction to do each and every act which they performed.

The trial court held that section 8461 of the Revised Statutes of South Dakota, being the statute particularly attacked as unconstitutional, gave sufficient notice and opportunity to be heard before an assessment became a lien against the property, and was constitutional. The court also held that the proceedings of the commissioners were proceedings for the maintenance of the original ditches No. 1 and No. 2; that there was no abandonment of the old ditches; that the formation of the new

ditch was a pretense and subterfuge carried on for the purpose of compelling property outside of the original ditches No. 1 and No. 2 to share the burden of the repair and maintenance of these ditches, and held that the proceedings of the commissioners with relation to ditches No. 1 and No. 2, by attempting to constitute a new drainage district and calling it district No. 1 and 2, were void.

The court further found that the complaints presented a real and substantial question under the Constitution of the United States; that the amount involved was in excess of $3,000 exclusive of interest and costs, and that each complainant stated a case in his bill cognizable in equity in the federal court; and that there was no adequate remedy at law. Also found that diversity of citizenship existed as to all appellees, except as to the city of Sioux Falls; also, that the method of attempted assessment was discriminatory and arbitrary. The injunctions as prayed were granted.

N. B. Bartlett and E. O. Jones, both of Sioux Falls, S. D., for appellants.

A. B. Fairbank, of Sioux Falls, S. D. (Edward S. Stringer, Thomas D. O'Brien, and Alexander E. Horn, all of St. Paul, Minn., on the brief), for appellee Chicago, R. I. & P. Ry. Co.

C. O. Bailey, of Sioux Falls, S. D., and E. L. Grantham, of Aberdeen, S. D. (H. H. Field, of Chicago, Ill., and J. H. Voorhees, P. G. Honegger, T. M. Bailey, and C. O. Bailey, Jr., all of Sioux Falls, S. D., on the brief), for appellee Chicago, M. & St. P. Ry. Co.

C. O. Bailey, of Sioux Falls, S. D. (R. L. Kennedy, of St. Paul, Minn., and J. H. Voorhees, P. G. Honegger, T. M. Bailey, and C. O. Bailey, Jr., all of Sioux Falls, S. D., on the brief), for appellee Chicago, St. P., M. & O. Ry. Co.

Harold E. Judge, of Sioux Falls, S. D. (R. M. Campbell, of Chicago, Ill., on the brief), for appellee Northern States Power Co.

C. O. Bailey, of Sioux Falls, S. D. (Roy B. Marker, of Sioux Falls, S. D., on the brief), for appellee City of Sioux Falls.

Harold E. Judge, of Sioux Falls, S. D., for appellee Great Northern Ry. Co.

Before KENYON, Circuit Judge, and TRIEBER and DYER, District Judges.

KENYON, Circuit Judge (after stating the facts as above). [1] It is earnestly contended by appellees that the entire South Dakota drainage law is unconstitutional, not only as violative of the due process clause of the Fourteenth Amendment of the Federal Constitution, but also sections 2 and 13 of article 6 of the South Dakota Constitution. The constitutional questions raised are grave, serious, and doubtful. Their determination is not necessary to the solution of these cases. Therefore, under the well-established rule that federal courts will not pass upon the constitutionality of statutes unless absolutely necessary, we leave the questions aside. Howat et al. v. State of Kansas, 258 U. S. 181, 42 Sup. Ct. 277, 66 L. Ed. 550; Weyman-Bruton Co. v. Ladd, 231 Fed. 898, 146 C. C. A. 94; Allen, U. S. Atty., v. Omaha Live Stock Commission Co. et al. (C. C. A.) 275 Fed. 1.

[2] The original drainage ditches No. 1 and No. 2 were properly established for the drainage of agricultural lands. When the spillway washed out, the maintenance of the ditches was impaired. Not only that, but the situation was fraught with grave consequence to many interests. The steep bluff was being torn away by the uncontrolled waters; the waterworks and water supply of the city of Sioux Falls, as well as the penitentiary lands of the state, were endangered. A not improbable result of the Big Sioux river breaking through the natural barrier into the lateral ditch would be the enttire diversion of its waters from their natural channel causing them to flow through said ditches and empty into the river north of the city, leaving Sioux Falls with an intermittent dry river bed.

The board of county commissioners under these conditions took steps to remedy the situation, and upon petition filed stating its object in its caption as follows: "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon Property, Persons and Corporations Benefited Thereby," proceeded to establish what is termed drainage ditch No. 1 and 2, Minnehaha county, S. D.

Appellees who have property within the area of the original drainage ditches, No. 1 and No. 2, insist that the proceedings established a new drain-

age ditch known as No. 1 and 2, which is also the position taken by appellants. Other appellees claim that the work was in truth and in fact a project for the repair of drainage ditches No. 1 and No. 2. The court held that the forming of the new ditch was a pretense and subterfuge resorted to for the purpose of attempting to burden appellees with the cost of maintenance of ditches theretofore constructed; that the commisisoners did not act as by law provided for the maintenance and repair of the ditches; and that the proceedings attempting to establish the new drainage ditch were void. We think the court was correct in this holding. It clearly expressed the situation as follows:

"Under these circumstances the board of county commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the state when they assumed the right to reach out and attempt to assess the benefits for the repair and maintenance of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage ditch No. 1 and 2 was ever established and has no existence.

"I am of opinion that the proceedings of the board of commissioners in the repair and maintenance of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it district No. 1 and 2, and to assess benefits to the property of the plaintiffs, in so far as they are located in the city of Sioux Falls, are void. Entertaining this view, it follows that plaintiffs' prayer for an injunction should be granted."

Record, p. 90, Case No. 6313.

The proceedings, regardless of how designated, were in fact for repaiar and maintenance, and were governed as to assessments to pay for the same by section 8470 of the South Dakota Statutes, which section is as follows:

"*Assessments for Maintenance.*—For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens, interest-bearing, perpetual and enforceable, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance, or may be collected directly by the board of county commissioners." Section 13, c. 98, 1905; section 13, c. 134, 1907.

There is no provision in this statute for the taking in of other lands to help bear the assessment of burdens created in maintaining the original drainage. This was the statute under which the board of county commissioners could have provided for payment of maintenance and repairs to the established ditches.

Section 8489 provides for a method of abandonment of drains under certain circumstances and the construction of new ones in the same location. Said statute is as follows:

"*Invalid or Abandoned Proceedings.*—If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned, or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned proceeding, the board of county commissioners shall proceed to ascertain the real value of the services rendered, money expended and work done under such invalid, abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may be at the same time or at

any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate therefrom, but the board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by any board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons." Section 33, c. 134, 1907.

The proceedings establishing drainage ditches No. 1 and 2 have never been set aside or abandoned under this statute. It is true a small portion of old ditch No. 1 was abandoned by the resolution adopted in the Covell's Lake proceeding, but the ditches were in no way abandoned. The Covell's Lake proceeding was itself abandoned and the ditches were left as they originally were, so it is apparent that the action of the board was not taken under section 8489. Either the proceedings were to repair and maintain ditches already constructed, or they were to take care of a situation resulting from their imperfect or inadequate construc-

tion. By reason of the water of the river breaking through into the lateral threatening a change of the river's course and the possible destruction of state lands, a situation was presented, not with relation to the drainage of agricultural lands, but rather to the failure of the ditches, due to inadequate or imperfect construction, to carry the increased flow of water. In other words, the project, if an entirely new one, was not for the drainage of agricultural lands. The court said in his opinion:

"Pursuant to this provision of the Constitution, the Legislature of the state has provided for the drainage of agricultural lands; but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands 'for any public use.'"

[3] We are satisfied that under the South Dakota Constitution, section 6, art. 21, drainage of lands for any public use other than the drainage of agricultural lands, must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Whichever way, therefore, the matter is viewed, the board was acting without legal authority in its apportionment of benefits and threatened assessment of taxes.

[4, 5] Appellants challenge the jurisdiction of the court, claiming there was a plain, adequate, and complete remedy at law; that there was no equity in the bill; that action was premature, and that the necessary jurisdictional amount was not involved. These in their order.

It is fundamental that equity cannot give relief where there is a plain, adequate, and complete remedy at law. It is provided by the federal Judicial Code, Compiled Stat. 1918, § 1244, as follows:

"*Suits in Equity.*—Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (R. S. § 723. March 3, 1911, c. 231, § 267, 36 Stat. 1163.)"

It must be a remedy as certain, complete, prompt, and efficient to attain the ends of justice as that in equity. Monmouth Inv. Co. et al. v. Means, 151 Fed. 159, 80 C. C. A. 527; McMullen Lumber Co. v. Strother et al., 136 Fed. 295, 69 C. C. A. 433; Morgan v. Beloit, City and Town, 74 U. S. (7 Wall.) 613, 19 L. Ed. 203; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82; Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796; Greene, Auditor, et al., etc., v. Louisville & Interurban Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Coler et al. v. Board of Com'rs of Stanly County et al. (C. C.) 89 Fed. 257.

It must be a remedy on the law side of the federal court. A remedy in the state court that cannot be pursued in the federal court is not an adequate remedy. Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; Smyth v. Ames, 169 U. S. 466, 516 18 Sup. Ct. 418, 42 L. Ed. 819; United States Life Ins. Co. in

City of New York v. Cable, 98 Fed. 761, 39 C. C. A. 264; Brun et al. v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

[6] The question is: Has party the adequate remedy at law in the federal court?

In Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 391, 14 Sup. Ct. 1047, 1052 (38 L. Ed. 1014), the court said:

"Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts."

It has been held that where the state statute provided an action at law against the county for the recovery of sums paid on account of invalid taxes that the same constitutes a plain, speedy, and adequate remedy at law. Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., 217 Fed. 540, 133 C. C. A. 392. The Supreme Court of the United States has held that the North Dakota statute permitting actions respecting title of the property or accruing on contract to be brought

against the state the same as against a private person does not clearly allow an adequate remedy; and there, injunction restraining defendants from taking steps to enjoin certain taxes, was upheld. Wallace et al. v. Hines, Director General of Railroads, et al., 253 U. S. 66, 40 Sup. Ct. 435, 64 L. Ed. 782. There was no such proceeding as discussed in Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., supra, in the South Dakota statutes. The only remedy was to appear before the board of county commissioners (claimed by appellees to be acting without authority), and then appeal from their finding to the state court. Such was not the adequate remedy contemplated by the federal statute.

[7] While the frequent exercise of equity jurisdiction is in staying the collection of taxes illegal in whole or in part, a suit in equity will not lie to restrain the assessment or collection of a tax on the sole ground that it is illegal. There must be special circumstances bringing the case under some recognized head of equity jurisdiction. The right to such equitable relief must be clear where it is asked to restrain the collection of a state tax.

In Hannewinkle v. Georgetown, 15 Wall. 547, 548 (21 L. Ed. 231), it is said:

"It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is appre-

hension of multiplicity of suits, or some cause presenting a case of equity jurisdiction."

In Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 525, 526, 5 Sup. Ct. 601, 605 (28 L. Ed. 1098), the rule is clearly laid down by the court:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any grounds for equitable interposition. In ordinary cases a

party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in courts of equity.' This statement is in general accordance with the decisions of this court as well as of many state courts."

See, also, Dows v. City of Chicago, 78 U. S. (11 Wall.) 108, 20 L. Ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Ogden City v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; Pittsburgh, etc., Railway v. Board of Public Works of W. Va., 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737.

In Keokuk & Hamilton Bridge Co. v. Salm et al., 258 U. S. 122, 42 Sup. Ct. 207, 66 L. Ed. 496, the alleged invalidity consisted in discriminatory overvaluation. There was no claim of absolute illegality in the assessment. Appellant had a remedy with the board of review to correct the assessment, and the court said that resort to the suit to prevent either a sale for an illegal tax creating a cloud upon title or other irreparable injury had no basis.

In Union Pacific R. Co. v. Board of Com'rs of Weld County, 217 Fed. 540, 133 C. C. A. 392, this

court said with reference to the casting of a cloud upon real property creating an "equitable circumstance" that the remedy which the statute prescribes will dissipate any such cloud, and says:

"Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief are not applicable, when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the courts shall hold to have been illegally exacted."

There is no such provision in the South Dakota statute.

In Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796, it was held that equity should not enjoin the collection of a tax on the ground of cloud on title when the tax can only be collected in suit at law in which the defense of its illegality is open, and further it not appearing that the tax is a lien on any of complainant's property.

In Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651, certain assessments upon shares of stock in a corporation were involved. The court found that as there was no lien created on real estate there was no cloud on title.

[8, 9] It is well settled that an assessment that will put a cloud on title gives rise to equitable jurisdiction unless there is an adequate remedy at law. Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; Greene, Auditor, et al., etc., v. Louisville & Interurban

Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

Section 8463 of the South Dakota Statutes provides for the board of county commissioners fixing the proportion of benefits of proposed drainage among the lands affected.

Section 8464 provides for the board making an assessment against each tract and property affected, and this is collectible by the treasurer's office. Clearly the assessment would create a cloud upon the title. Fixing the proportion of benefits being preliminary to the assessment and a part of the machinery of assessment, likewise, we think, creates a cloud upon the title and gives equity jurisdiction. Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; Hopkins et al. v. Walker et al., 244 U. S. 486, 37 Sup. Ct. 711, 61 L. Ed. 1270.

[10] Was the case prematurely brought? It is claimed that inasmuch as the board of county commissioners had not assessed the taxes complained of consequently the suit is premature.

In Western Union Telegraph Co. v. Howe et al., 180 Fed. 44, 103 C. C. A. 398, it was held by this court that the suit was prematurely brought because the telegraph company did not pursue the remedy afforded by law to have its assessment corrected by the state board of equalization. That was not a case, however, where it was claimed that the entire proceedings were without authority and illegal, as is the case here. The jurisdiction to act was not questioned.

In Keokuk & Hamilton Bridge Co. v. Salm et al., 258 U. S. 122, 42 Sup. Ct. 207, 66 L. Ed. 496, the question involved was the amount of the tax. It was not claimed that the proceedings were illegal.

In the late case of Milheim et al. v. Moffat Tunnel Improvement District et al., 262 U. S. 710, 43 Sup. Ct. 694, 67 L. Ed. 1194, there was no question of jurisdiction of the taxing body as there is here. Plaintiff's property was by legislative act placed within the taxing district.

The proceeding here involved, being without authority, the situation is quite different from where the only question involved is the inequality of taxes levied by a board having jurisdiction to act. The actions, we are satisfied, were not premature.

[11] Appellants urgently insist that it does not appear from the record that the amount in controversy, exclusive of interest or costs, exceeds the sum or value of $3,000, and that the statements in the various complaints of appellees so alleging are false, and stated with the fraudulent purpose of imposing upon the jurisdiction of the federal court; that no tax has in fact been assessed; that the apportionment of benefits is tentative and subject to correction; and that there is no way of determining what the amount of the assessment against the respective appellees would have been had the proceedings not been interrupted by the injunctions; and that there is in fact no sum whatsoever in controversy between the parties hereto.

It has been held that future, undetermined, unaccrued, or unspecified taxes cannot be taken into

consideration to give jurisdiction; that the court cannot engage in speculation as to such taxes. Holt v. Indiana Manufacturing Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374; New England Mortgage Security Co. v. Gay, 145 U. S. 123, 12 Sup. Ct. 815, 36 L. Ed. 646; Citizens' Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951. Also, that where there is a suit to enjoin collection of a tax the amount of the tax is the test of jurisdiction. Linehan Ry. Transfer Co. v. Pendergrass, 70 Fed. 1, 16 C. C. A. 585; Eachus v. Hartwell et al. (C. C.) 112 Fed. 564; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951; Board of Trustees of Whitman College v. Berryman et al. (C. C.) 156 Fed. 112; Citizens' Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; City of Ottumwa, Iowa, v. City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

It has also been held that where the complaint alleges the amount in controversy to equal the jurisdictional requirement and the contrary does not appear to a certainty from the evidence, that the jurisdiction will be sustained. Maffet v. Quine (C. C.) 95 Fed. 199; Von Schroeder v. Brittan (C. C.) 93 Fed. 9.

What is the situation here? Each one of the appellees is threatened with an assessment of more than $3,000. The Northern States Power Company is threatened with one of $50,000. And fur-

ther, certain appellees who have no property within the original drainage districts No. 1 and No. 2 are brought into the district and made liable to future assessments for maintenance and repair of ditches. It appears from the record that the board of county commissioners had fixed against the different appellees the proportion of benefits on a unit basis. It is without question that the county commissioners have issued approximately $255,000 worth of warrants for this work, and that the amount due thereon is about $300,000. It is a matter then of mere mathematical calculation to arrive at the threatened assessment against each one of appellees.

Exhibit C is the notice to the various parties against whom proportions of benefits have been fixed. It provides as follows, to wit:

"All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed as stated, and the said determination of said board made final."

If no action whatever were taken by appellees the amounts would be final, and under these circumstances we believe the amount in dispute in each case exceeds the jurisdictional requirement. The claim of amount is evidently made in good faith, and not for the mere purpeos of giving the federal courts jurisdiction. We do not believe that where the board has passed a resolution fixing benefits which exceed the jurisdictional amount and are the basis of a proposed assessment, and which

parties claim are fixed by the board without authority, that because said board may equalize the benefits or even find that no benefits exists the parties must wait until the final action of the board. It is suggested that the board may so equalize benefits that the jurisdictional amount will not be involved, but as the matter stood when the case was brought each appellee was threatened with the levying of a tax for more than the jurisdictional amount, and some of the necessary steps had already been taken.

As the proportion of benefits had been fixed subject to change by the board only if appellees should convince them that their conclusion was erroneous, and in view of the claim in apparent good faith in each of the bills that the amount involved exceeded the jurisdictional amount, we hold, from a careful survey of the entire record, that the necessary amount existed in each case to give jurisdiction to the federal court.

[12] All bills of complaint raise questions under the federal Constitution that are substantial and not merely colorable. Hence the court has jurisdiction exclusive of diversity of citizenship, which existed as to all appellees except the city of Sioux Falls, necessary amount being involved, to determine all questions in the record, and it has not lost jurisdiction by omitting to decide the constitutional ones. Siler et al., etc., v. Louisville & Nashville R. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; Louis. & Nash. R. R

Co. v. Finn, 235 U. S. 601, 35 Sup. Ct. 146, 59 L. Ed. 379; Greene, Auditor, et al., etc., v. Louis. & Interurban R. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

[13] Appellants plead estoppel against all of the appellees, and claim that appellees are not in position to maintain their actions, for the reason that as to some of the railroad companies the engineering departments have been in close touch with the drainage ditch proceedings; that some of them were assessed for benefits received upon the construction of the original drainage ditches in the same territory, received benefit thereby, and have not protested before the bringing of this action. As to some of the appellees it is claimed that their officers showed interest in the construction work and encouraged the board of commissioners to do the work; that some of the appellees, for instance, the Chicago, Milwaukee & St. Paul Railway Company, hauled men and materials used in the construction work, and stopped trains between stations to unload men and materials. As to the city of Sioux Falls, it is claimed by way of estoppel that under due authority the mayor and city auditor signed the petition for the project. There can certainly be no just claim of estoppel as to those appellees whose property was not within the area of the original drainage ditches No. 1 and No. 2. As to the other appellees, the decree related only to the property outside of the original assessment areas of drainage ditches No. 1 and No. 2. So we are to consider the situation as bearing on the

question of estoppel only as to the property outside of the original assessment areas up to the time of the notice of the fixing of benefits. The various appellees as to such property had no notice, when the acts constituting the alleged estoppel took place, that the same was to be affected by the drainage construction or would be assessed for the cost thereof. Hence the claimed acts of agents and officers of appellees would not constitute estoppel. The situation is quite different from that presented in Gilseth v. Risty (S. D.) 193 N. W. 132—at least as to all appellees except the city of Sioux Falls. We do not pass on the question of estoppel as to any appellees, as to assessments that may be made on their property within the original area of ditch No. 1 and ditch No. 2, for the purpose of maintaining such ditches.

Other questions are presented which we think are not involved in the determination of these cases.

The decree of the trial court in each case is affirmed.

(30,416)

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WM. R. STANS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 95.

A. G. RISTY, et al, as County Commissioners, etc. et al.,
Appellants,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Appellee.

BRIEF OF APPELLEE.

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CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF FACTS.

This is an appeal from a judgment of the Circuit Court of Appeals of the Eighth Circuit, affirming a judgment of the District Court of the District of South Dakota, Southern Division. For the opinion of the courts below, see

Chicago, R. I. & P. Ry. Co. v. Risty et al., 282 Fed. 364 (District Court);

Risty et al. v. C. R. I & P. Ry. Co., 297 Fed. 710 (Circuit Court of Appeals).

The Circuit Court's judgment of affirmance was entered March 18, 1924. The record was filed in this court on June 16, 1924, and was printed and in the hands of counsel prior to November 11, 1924. Almost a year later, on October 26, 1925, appellants' brief was served.

Appellants' brief would indicate that the facts are complicated. While the case is an important one, the facts necessary to a decision are comparatively simple. A concrete statement of the essential facts for which we have searched appellants' brief in vain, will, we think, be of aid to the court.

This action was originally brought by the Chicago, Rock Island & Pacific Railway Company, a corporation organized under the laws of Illinois, against the Board of County Commissioners of Minnehaha County, South Dakota, and the Auditor and Treasurer of that County, to enjoin the defendants (the appellants in this court) from making any apportionment of benefits, or from levying or collecting any assessment against the property of the Railway Company on account of the construction of "Drainage Ditch No. 1 and 2", in Minnehaha County.

Pursuant to permission duly granted (R. 21-22), certain banks which had purchased warrants of the County for this work, intervened, aligning themselves on the side of the county officials. The case was heard by Judge Elliott, Judge of the District Court of South Dakota, who filed an exhaustive opinion, holding that plaintiff was entitled to the injunction prayed for (R. 81-101). This opinion is reported in

Chicago, R. I. & P. Ry. Co. v. Risty et al., 282 Fed. 364.

A final decree was entered perpetually restraining the defendants (appellants here) from apportioning, levying or collecting any assessment against plaintiff's property (R. 101-103).

From this decree the county officials and the intervening banks appealed to the Circuit Court of Appeals. It was claimed by the appellants that the assessment in question was authorized by Sections 8458 to 8491, Revised Code South Dakota, 1919. This law is said to be reproduced in full in Appendix B of Appellants' Brief, pages II-XVI, but appellants have omitted printing Sec. 8470, upon which the case was decided against them. See appendix to this brief.

The Circuit Court of Appeals affirmed the lower court, the opinion being found on pages 249-263 of the Record, and reported in 297 Fed. 710. From the Circuit Court of Appeals, the intervening bankers and the county officials appealed to this court (R. 265). They likewise, at the same time, filed an application for a writ of certiorari, but this application this court denied.

The statement of facts contained in Judge Kenyon's opinion in the Circuit Court of Appeals cannot be improved upon (R. 249-253). For a ready grasp of the situation however, it may be shortened by eliminating certain facts not bearing directly upon the points to be decided.

On July 1, 1917, William H. Lyon filed with the County Board of Minnehaha County, his petition for the establishment of a drainage ditch (R. 123-124). On December 31, 1907, the County Board pursuant to this petition, passed a resolution establishing "Drainage Ditch No. 1" (R. 125, 126). On April 11, 1908, the County Board passed a resolution assessing benefits for this ditch against the property benefited (R. 129-130). Later these assessments were equalized, levied, and fully paid. The entire cost of Drainage Ditch No. 1, was $46,600.10 (R. 131).

On April 10, 1908, Iver R. Peterson, et al., filed with the County Board a petition for the establishment of another

drainage ditch through territory adjacent to that served by Drainage Ditch No. 1 (R. 131-133). On January 8, 1909, a petition by A. L. Berg, et al. was filed asking for an extension of this ditch (R. 133-134). On May 6, 1918, the Board passed a resolution acting on these petitions, establishing "Drainage Ditch No. 2" (R. 137-138). On October 7, 1910, the Board assessed the benefits arising by reason of the construction of this Drainage Ditch No. 2. These assessments were equalized, levied and thereafter paid. The total cost of Drainage Ditch No. 2, was $81,006.19 (R. 138-144).

In none of the proceedings with respect to either Drainage Ditch No. 1, or Drainage Ditch No. 2, were any of the properties of the Chicago, Rock Island & Pacific Railway Company mentioned as being subject to assessment, nor was any assessment of benefits made against the Railway Company, or any of its properties.

Drainage Ditch No. 1, combined with Drainage Ditch No. 2, ran in a general northerly and southerly direction, adjacent to the Sioux River. The two ditches were in reality one, although established separately. Ditch No. 2 emptied into Ditch No. 1, which in turn emptied into Sioux River by a spillway. A reference to Great Northern's Exhibit 1, page 185 of the Record, shows the situation at a glance. In red is shown "Drainage Ditch No. 1 and 2" which will presently be mentioned and which is the subject of this suit, but as appears from the Record and will be hereafter pointed out, "Drainage Ditch No. 1 and 2" was located in exactly the same place and along the identical route as that traversed by Drainage Ditch No. 1 and Drainage Ditch No. 2 combined.

Will the Court please distinguish between "Drainage Ditch No. 1" and "Drainage Ditch No. 2," and "Drainage Ditch No. 1 and 2." It is important that this distinction be borne in mind.

Hereafter, for convenience, we shall refer to the property which was assessed for the establishment of Drainage Ditch No. 1 and Drainage Ditch No. 2, as the "old assessment district." This appellee, the Chicago, Rock Island & Pacific Railway Company had no property whatever in the old assessment district and was not assessed for the construction of either Drainage Ditch No. 1 or Drainage Ditch No. 2.

In 1915, the spillway through which Drainage Ditch No. 1 emptied into the Sioux River, was washed away. What occurred at this time can best be stated by quoting from the opinion of the trial court:

> "In 1915 the force of the waters conducted by these two drainage ditches was so great as to wash out what is called the spillway, through the bluff adjacent to the point where the waters from the ditches entered the river. The ditches in the meantime also became out of repair, and at one point several miles above the City where the ditch approached the river, the water was cutting from the river into the ditch, threatening to turn the entire course of the Sioux River at this point into the ditch, and through the ditch back into the river, leaving the Sioux River from that point and for about twelve miles around to where the ditch flowed into the river, without water. The spillway from the ditch through the bluff down into the river was so unskillfully, inefficiently and unscientifically constructed that it would not stand the force of the water with a fall of one hundred feet into the river. It was washed out, and the bluff being of soil and sand, washed out of the entire depth of the river and began washing back through the bluffs, threatening to cut clear back to a point where the water cut through from the river to the ditch, thus taking away from the City of Sioux Falls the benefits of the river, its sewer system and the advantages of the stream, and take the water from the plaintiff, The Northern States Power Company, that naturally

flowed down the river except for the interference by this drainage ditch. And in the cutting into this bluff also threatened to cut into the gravel bed in which the water supply of the City is located, a few miles west of it, and thus drain and destroy and take away from the City of Sioux Falls, its water supply. This was the situation in 1916." (R. 92.)

In this situation is was of course necessary that something be done. A petition was filed asking that a portion of Drainage Ditch No. 1 be abandoned. Later this petition was withdrawn, and on August 3, 1916, F. L. Blackman, et al. filed a petition reciting that Drainage Ditch No. 1, and Drainage Ditch No. 2, were insufficient, and asking for the establishment of a ditch along the same identical route as that traversed by the two ditches theretofore established. This petition was entitled: "A petition to reconstruct and improve Drainage Ditches Nos. 1 and 2, etc." (R. 42). The petition recited that it would be necessary to "reconstruct, deepen, widen and improve said Drainage Ditches Nos. 1 and 2 (R. 43-44). It was obvious that in order to make either of the ditches function at all, it was necessary to spend a large amount of money, and to accomplish this purpose, the Board conceived the plan of going through the form of making a new ditch out of the two old ones. Therefore, on October 2, 1916, it passed a resolution establishing what it was pleased to term "Drainage Ditch No. 1 and 2" *over the same identical territory and located along exactly the same route* which was traversed by Drainage Ditch No. 1, combined with Drainage Ditch No. 2 (R. 50-54). A notice of this hearing was given by publication to "all persons affected." While certain railways were mentioned in this notice as likely to be benefited by the establishment of the ditch, the Rock Island was not mentioned (R. 55-64).

The only difference between "Drainage Ditch No. 1 and 2," and Drainage Ditch No. 1 combined with Drainage Ditch No. 2, was that the old ditches were widened, and the spillway strengthened and improved. As already indicated "Drainage Ditch No. 1 and 2" so-called, traversed the identical route occupied by the two old ditches. The only work done in constructing this new ditch so-called, was to clean out and widen the old ditches, and rebuild the spillway. The Board proposed to assess for this new ditch so-called, not only all property included in the old assessment district, but also certain additional property, which additional property will be designated for convenience as the "new assessment district." The Rock Island had as indicated no property in the old assessment district, but it did have property within the new district, although it never had any notice of intention to assess this property within the new assessment district until the tentative assessment was made.

On June 10, 1921, the Board, without notice of any kind or character to anyone, by resolution fixed the proportion of benefits on "Drainage Ditch No. 1 and 2." The properties of the Rock Island all in the new "assessment district, were assessed 839.45 units, out of 32,549.62 units. Each unit was fixed at $9.50. A mere mathematical computation shows that the amount of the Rock Island assessment was therefore $7,974.78. As already indicated, the Rock Island had no notice that the Board contemplated assessing its properties until it fixed the proportion of benefits on June 10, 1921.

After the proportion of benefits were fixed, the Board fixed August 1, 1921, in the Auditor's office "as the time and place for equalizing the proportion of benefits" (Exhibit C, R. 19). This notice was the first intimation to the Rock Island of any assessment.

On July 25, 1921, this action was commenced; and the defendants restrained from proceeding with the assessment. After a hearing before three judges, as required by the Judicial Code, a temporary injunction was issued. The case was thereafter heard before Judge Elliott, and on Feb. 8, 1922, a final decree permanently enjoining the defendants from in any way proceeding with the assessment was issued (R. 101-103).

Five other cases were commenced by certain other railways, the Northern States Power Company, and the City of Sioux Falls, to restrain similar assessments against their property. All six cases were tried together, and substantially similar decrees entered in each. Upon appeal to the Circuit Court of Appeals, all six cases were argued together and determined by one opinion (R. 247-264). Each one of these cases is now by separate appeal before this court, appellants having presented their views in all six cases by one brief.

In the bill of complaint, the following grounds were asserted as the basis of an injunction against the assessment:

(1) The statute of South Dakota, under which the Board assumed to establish the ditch, was unconstitutional and repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

(2) Even though the Statute were not unconstitutional, yet the establishment of "Drainage Ditch No. 1 and 2" the new ditch so-called, was a mere evasion and subterfuge for repairing Drainage Ditch No. 1 and Drainage Ditch No. 2, and that since by the South Dakota statute, the Board was limited to assessing for repairs, the lands which had been originally assessed for building the two old ditches, the Board had no jurisdiction to assess for "Drainage Ditch No. 1 and 2," any lands not originally assessed for building Drainage Ditch No. 1 and Drainage Ditch No. 2.

(3) That the assessment was partial, inequal and discriminatory in that the lands of plaintiff were assessed upon an entirely different basis from other lands.

The District Court held against us on the first proposition; ruling that the South Dakota drainage statute was not repugnant to the Federal Constitution, but ordered an injunction upon the second and third grounds.

The Circuit Court of Appeals upheld the District Court on one ground alone, namely that the South Dakota drainage statute properly construed did not authorize an assessment for repairs to a drainage ditch except upon the land originally assessed for its construction, and that the establishment of this new ditch, so-called, was a subterfuge, and that no lands lying outside of the old assessment district were subject to assessment. As to the constitutionality of the drainage statute, the Circuit Court of Appeals said:

> "It is earnestly contended by the appellee that the entire South Dakota drainage law is unconstitutional not only as violative of the due process of law clause of the Fourteenth Amendment of the Federal Constitution, but also Sections 2 and 13, of Article VI of the South Dakota Constitution. The constitutional questions raised are grave, serious and doubtful. Their determination is not necessary to the solution of this case. Therefore under the well established rule that the Federal courts will not pass upon the constitutionality of statutes unless absolutely necessary, we leave the questions aside." (R. 253-254).

The claims of the appellee are particularly set forth in the summary of the argument immediatly following.

SUMMARY OF ARGUMENT.

I.

There is no Federal question now in the case, because the only Federal question was decided by the lower courts in appellants' favor. Hence the appeal should be dismissed.

Defiance Water Co. v. Defiance, 191 U. S. 184,
Arbuckle v. Blackburn, 191 U. S. 405,
Empire State Co. v. Hanley, 198 U. S. 292,
Shulthis v. McDougal, 225 U. S. 561,
Lovell v. Newman & Son, 227 U. S. 412,
Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404,
Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 376,
Browne v. Union Pacific, 267 U. S. 255.
Hammond v. Johnston, 142 U. S. 73,
Enterprise Irrigation District v. Canal Co., 243 U. S. 157,
United States v. Jahn, 155 U. S. 109,
McLish v. Roff, 141 U. S. 661,
Robinson v. Caldwell, 165 U. S. 359.

II.

The court below had Federal equity jurisdiction because of diversity of citizenship and because:

(a) Plaintiff (appellee) had no adequate remedy at law.
Upshur v. Rich, 135 U. S. 467,
U. S. Life Ins. Co. v. Cable, 98 Fed. 761,
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.
Smyth v. Ames, 169 U. S. 466,
Sheffield v. Witherow, 149 U. S. 574,

Paine v. Ward, 138 Pac. 967,
Union Pacific v. Cheyenne, 113 U. S. 516,
Green v. Railway, 244 U. S. 499,
Union Pacific Ry. v. Board, 217 Fed. 540.

(b) More than $3,000 was in controversy in this action.
Western and Atlantic Ry. v. Railroad Commissioners, 261 U. S. 264,
Butte & Superior Copper Co. v. Clark, 249 U. S. 12.

(c) The suit was not prematurely brought.
Milheim v. Moffat Tunnel Imp. Dist., 262 U. S. 710.

III.

The South Dakota drainage statute is unconstitutional because repugnant to the Fourteenth Amendment to the Federal Constitution.

Norwood v. Baker, 172 U. S. 269,
Gast Realty Co. v. Snyder Granite Co., 240 U. S. 55,
Martin v. District of Columbia, 205 U. S. 135,
Road Improvement Dist. No. 2 v. Missouri Pacific, 275 Fed. 600,
Turner v. Wade, 254 U. S. 64,
Central Railway of Georgia v. Wright, 207 U. S. 127,
Londoner v. City and County of Denverm, 210 U. S. 373,
Fall Brook Irrigation Dist. v. Bradley, 164 U. S. 12,
Soliah v. Heskin, 222 U. S. 522,
Kansas City Ry. Co. v. Road Improvement District No. 6, 256 U. S. 658.

IV.

The establishment of "Drainage Ditch No. 1 and 2" was a mere subterfuge for repairing the old ditches, hence is governed by the South Dakota law relating to repairs. Since assessments for repairs can only be made against the property assessed for the original construction of the ditch, such assessments cannot be levied against the Rock Island property in the new assessment district which was not assessed for the original construction of the old ditches.

Gilseth v. Risty, 193 N. W. 132.

Sec. 8470, Revised Code of South Dakota 1919.

V.

The assessment of plaintiff's property constitutes a discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law.

Thomas v. Kansas City Southern Ry Co., 277 Fed. 708,

Thomas v. Kansas City Southern Ry. Co., 261 U. S. 481.

VI.

Plaintiff (appellee) is not estopped by its conduct to contest the validity of the assessment of its property.

ARGUMENT.

I.

THERE IS NO FEDERAL QUESTION FOR THIS COURT'S DETERMINATION, AND THE APPEAL SHOULD BE DISMISSED.

The exact situation in which this case reaches this court, should be borne in mind. The bill alleged two grounds for Federal jurisdiction: (1) diversity of citizenship and jurisdictional amount; and (2) that the case arose under the Constitution of the United States because the state drainage statute under which the defendants were proceeding violated the Fourteenth Amendment.

The District Court held that the state statute was valid, but construing it, held that it did not permit the assessment which the county authorities were making. In other words, the appellants were successful on the only Federal question.

The Circuit Court of Appeals in affirming the lower court, expressly refused to consider the Federal question, because a determination of it was unnecessary but sustained the lower court on non-federal grounds, to-wit: in its construction of the statute. Again, appellants were successful in repelling an attack on the law on constitutional grounds.

In other words, the court below has eliminated from this cause any claim of invalidity of the statute, by holding that the statute is valid, leaving the case at the present time so far as the merits are concerned, exactly as though the appellee had never attempted to insist that the statute should be stricken down. Counsel vigorously assert that the constitutional question asserted in our bill is so frivolous and unsubstantial as not to present a Federal question, or to constitute the basis

of Federal jurisdiction. Although both courts below refused to sustain our position as to the unconstitutionality of the statute, both courts held that the question was substantial. However, assuming counsel's position that the Federal question was without sufficient substance to form a basis of Federal jurisdiction, it certainly does not help counsel in sustaining this court's jurisdiction, because if his claim is true the only basis of Federal jurisdiction was diversity of citizenship.

Clearly under the act of February 13, 1925, appellants would have no right to appeal to this court. But since the judgment below was entered and the appeal taken prior to May 13, 1925, the question of this court's jurisdiction depends upon the law as it existed prior to the amendment.

Under Section 241 of the Judicial Code, this court had appellate jurisdiction of the Circuit Court of Appeal's judgments involving $1,000 "where the judgment or decree of the Circuit Court of Appeals is not made final." Section 128 of the Judicial Code provided that "the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely on the opposite parties being * * * citizens of different states." If counsel are right in their position that the claim of unconstitutionality of the state statute asserted in the bill is so unsubstantial as to give no basis of Federal jurisdiction, then the only basis of jurisdiction of the court below is diversity of citizenship, and the judgment of the Circuit Court of Appeals is under the broadest construction of Section 128, final. But while we assert that the courts below had jurisdiction on two grounds, it is our position that since appellants were successful in the court below in resisting an attack on the statute, they cannot make the issue upon which they were successful a basis of appeal to this court on another proposition. If this court

should consider the constitutionality of the statute it could not affect the ultimate result. If this court held the statute constitutional, it would leave the case exactly where the Circuit Court of Appeals started. If it held the statute unconstitutional, it would only add another reason for affirmance of the court below.

It is well established that a suit does not arise under the Constitution of the United States "unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution *upon the determination of which the result depends.*

Defiance Water Co. v. Defiance, 191 U. S. 184,
Arbuckle v. Blackburn, 191 U. S. 405,
Empire State Co. v. Hanley, 198 U. S. 292,
Shulthis v. McDougal, 225 U. S. 561,
Lovell v. Newman & Son, 227 U. S. 412,
Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404.

It is apparent that the result of this case in this court does not in any way depend upon the determination of whether the statute of South Dakota is constitutional or unconstitutional. So far as this court is concerned it depends only upon the construction to be given to the state statute. No decision of this court could place appellants in any stronger position so far as may concern the validity of the state statute than did the decision of the Circuit Court of Appeals. Appellants were entirely successful on that issue. They cannot therefore in effect appeal from a decision in their own favor by making their success a means of access to this court.

This court has squarely decided this proposition at least twice; (1) in the case of *Empire State Co. v. Hanley,* 198 U. S. 292, where the court said:

> "Appellants succeded in their defense as to the one-third interest, and Hanley accepted the result on the second appeal. *They now make a grievance of their own success* and ask that the supposed *constitutional question* as to the third interest only be made the basis of jurisdiction here, although, if the decree disposed of any such question, *it was in their favor.* In our opinion this cannot be permitted.

(2) In the case of *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 376, the court said:

> "If a party comes into the Circuit Court alleging that a state law is unconstitutional, and the Circuit Court decides for him on that point, the mere fact that there was such a question in the case does not authorize him to appeal to this court on grounds that otherwise would not support an appeal."

It is true that this language was used with reference to a direct appeal to this court from a Circuit (now District) Court. But it applies with equal force to our situation.

In *Brown v. Union Pacific*, 267 U. S. 255, 45 Supreme Court Reporter, 315, this court affirmed the rule laid down in *Hammond v. Johnston*, 142 U. S. 73, and *Enterprise Irrigation District v. Canal Co.*, 243 U. S. 157, and numerous other cases cited in the last mentioned decision, that where a decision of the court below is placed upon two grounds, one Federal and the other nonfederal, this court will not consider the Federal question when the nonfederal ground is sufficient to support the judgment. It is true that these cases dealt with writs of error to the state courts, but no reason is perceived why the same doctrine should not apply to an appeal from the Circuit Court of Appeals.

In short, there is nothing for the court to determine here but the construction of the South Dakota statute. This is purely a nonfederal question with which this court is not concerned.

It is true that the appellants have attacked the jurisdiction of the court below on many grounds which will be discussed later, among them, lack of jurisdictional amount and lack of ground for equitable relief. It is perhaps true that appellants could have gone directly to this court on these jurisdictional questions under Section 238 of the Judicial Code. See *United States v. Jahn*, 155 U. S. 109, where the court said on page 155:

> "If the question of jurisdiction is in issue, and the jurisdiction sustained and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court."

But since appellants elected to go to the Circuit Court of Appeals on all questions, the only right to obtain a decision of this court on the question of jurisdiction was by writ of certiorari from this court under Section 240, or by the Circuit Court of Appeals certifying the question to this court under Section 239.

Appellants did not ask the Circuit Court of Appeals to certify the question under Section 239, nor did that court do it of its own motion. Appellants did apply for a writ of certiorari from this court under Section 240, but that writ was denied.

Appellants are not entitled as a matter of right, to a decision of this court on the jurisdiction question after they have appealed to the Circuit Court of Appeals. They would perhaps be entitled to a determination of it by certiorari, if this court saw

fit to grant such a writ, but this court has already refused such an application. See

McLish v. Roff, 141 U. S. 661,

Robinson v. Caldwell, 165 U. S. 359.

In the latter case, this court said:

> "After the final decree upon the merits in the Circuit Court of Appeals this court under the circumstances stated, could properly take cognizance of the case in respect to any question involved in it *only upon certiorari.*"

This court should therefore decline jurisdiction.

What is said in the remainder of this brief becomes material only in the event that this court should reach the conclusion that it will consider on the merits the various propositions asserted in appellants' brief.

II.

Jurisdiction of Court Below.

It has been determined by three courts that the court below properly exercised its equitable jurisdiction to-wit by:

(1) The three judge court.

(2) The District Court.

(3) The Circuit Court of Appeals.

Nevertheless, appellants again urge that the District Court had no jurisdiction to determine the case at all, because:

(a) Plaintiff had an equitable remedy at law.

(b) The jurisdictional amount of $3,000 was not in controversy.

(c) The action was prematurely brought.

(a) *Adequate Remedy at Law.*

It is urged by the appellants that the plaintiff had a plain, adequate remedy at law, the contention being that such remedy at law consisted in the right to appear before the County Commissioners in response to the notice of equalization of benefits, and if dissatisfied with the decision of the Board, to appeal to the state court. This is not true for several reasons, (1) If with respect to the plaintiff, the county officials have acted in excess of the authority given them by law, they have no jurisdiction, and plaintiff cannot be required to submit to a body without jurisdiction. (2) It has been uniformly held that the plain, adequate and complete remedy at law referred to by Section 267 of the Judicial Code refers to a common law remedy in the Federal courts.

Counsel asserts without citation of authority that after appeal to the state court the Railway Company could remove the case to the Federal Court. This is not correct, because such a proceeding is not a suit "of a civil nature," and it is only a suit of a civil nature that can be removed.

Upshur v. Rich, 135 U. S. 467.

In the case of *United States Life Insurance Co. v. Cable,* 98 Fed. 761, 31 C. C. A. 264, a decision by the Circuit Court of Appeals of the Seventh Circuit, the following rule is laid down:

> "It must, we think, be conceded that the bill in this case alleges facts constituting a good cause of action in equity for the cancellation of the policy unless the plaintiff has a full and adequate remedy at law for the same cause. A suit at law has been commenced in the state court of Illinois to recover upon the policy, and if it be an adequate remedy at law to turn the plaintiff over for litigation of its rights in the state court under the circumstances set out in the bill, then the United States Circuit Court in equity

should disclaim jurisdiction. But there are two reasons why we think the remedy thus open to the plaintiff of having its rights determined in an action at law does not meet the requirements of the rule. The first is that the plaintiff, being a citizen of New York and the defendant a citizen of Illinois, the plaintiff under the constitution has the right to come to the federal court for an adjudication. *For a person entitled to litigate in the federal court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights.* * * * The remedy at law in order to defeat the right to proceed in equity should be full and adequate. It should be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. * * * In the federal courts it is well settled that the court will not turn a suitor in equity over to a remedy at law in the state courts, but only to the law side of the federal court."

In the case of *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, the Supreme Court of the United States said:

> "Whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. *A state cannot tie up a citizen of another state having property rights within its territory invaded by unauthorized acts of its officers to suits for redress in its own courts.*"

This was quoted and cited with approval in the case of *Smythe v. Ames*, 169 U. S. 466 (517).

See also *Sheffield v. Witherow*, 149 U. S. 574.

The plaintiff was entitled to litigate the validity of the assessment in a Federal court because of diversity of citizenship,

and as we shall later point out, more than $3,000 was involved. Since it was entitled to maintain its rights in the Federal Court, and since there was no law action maintainable *in the Federal courts* available to the plaintiff, there was no plain and adequate remedy at law, and plaintiff was entitled to equitable relief in the Federal courts.

This sufficiently establishes that there was no adequate remedy at law, but in addition under Section 8464, these assessments when and if made, would be "valid and perpetual liens upon the respective tracts so assessed." These apparently valid but in reality invalid liens would cast a cloud on plaintiff's title. Such facts furnish a further ground for equitable relief because of no adequate remedy at law.

Paine v. Ward, 138 Pac. 967,

Union Pacific v. Cheyenne, 113 U. S. 516,

Green v. Railway, 244 U. S. 499.

Of course if the cloud upon the title to plaintiff's property could be removed by paying the assessment, and suing (in the Federal courts) to get the amount so paid back, this might provide an edequate remedy at law.

Union Pac. Ry. v. Board, 217 Fed. 540.

But there is no such remedy under the South Dakota statute. Once the assessment attaches there is no way in which its lien can be removed other than by a suit in equity.

b. *Jurisdictional Amount.*

The bill of complaint alleges that the amount in controversy is more than three thousand dollars ($3,000.00). The record shows that the Board of County Commissioners by resolution fixed the proportion of benefits against the Rock Island as

839.45 units out of a total of 32,549.62 units. The records of the County Commissioners show that approximately $255,000 worth of warrants had been issued, and that the amount due on them at the time the suit was brought was about $300,000. A mere mathematical computation, therefore, shows that a unit is about $9.50, and that the amount as fixed by the board against the Rock Island is slightly less than $8,000.

It is our contention that this amount has been fixed by the board against the plaintiff and that the only redress which the plaintiff has is to convince the board that this proportion was wrong. The board has therefore already acted and it has determined that the amount due from the Rock Island is about $8,000, unless the railroad should in some way convince them that their conclusion was erroneous.

Furthermore, this is not the end of the liability sought to be imposed against the railroad company. If the property of the railroad is brought within the territory benefited by the ditch, this property will be within that district for all time to come, and any future repairs whic hhave to be made against this ditch or spillway will be assessed in the same proportion against the railway property. The evidence shows that already the present spillway is being endangered by the washing out of water at its foot, and the time is soon coming when more money will have to be expended for its maintenance, and if this spillway should wash out there is no way in which it can be determined what amount will be in the future assessed against the Railway Company.

In view of these facts and the decision of this Court in the case of *Western & Atlantic Ry. v. Railroad Commission*, 261 U. S. 264, it can hardly be contended that $3,000 is not involved in this suit. This also shows conclusively that there was an irreparable injury.

Appellants claim, as we understand it, that since all steps necessary to make this assessment a lien to an amount exceeding $3,000 had not been completed that $3,000 was not involved in the proceeding. Appellants' claim is that it does not appear that there *was any amount whatever involved* (Pages 72-75 of their brief).

But in their petition for the allowance of an appeal, they allege (R. 267-270) "The controversy between appellants and appellee involves an actual controversy of over more than $1,000."

If it does not appear that anything is involved, how can $1,000 be involved to sustain the jurisdiction of this court? The very claim which appellants make, if taken seriously, deprives this court of appellate jurisdiction.

Butte & Sup. Copper Co. v. Clark, 249 U. S. 12, does not help counsel out of this dilemma in the least. This case rules that litigants both plaintiff and defendant must be consistent in their claims as to the amount in controversy. They cannot claim in one breath that nothing is involved, and in the next when it is to their advantage so to do, claim that more than $1,000 is involved. Of course appellee would be precluded from claiming that less than $1,000 is involved by the allegations of its bill, but no such claim is made. On the contrary we again assert that much more than $7,000 is involved. In view of the careful analysis of the situation in Judge Kenyon's opinion in the court below, further argument on this proposition seems unnecessary.

c. *Suit Prematurely Brought.*

As we understand appellant's claim it is that it was improper to restrain the board from proceeding with an assess-

ment until the hearing of August 1, 1921, because the board might have changed its mind and concluded not to levy any assessment on plaintiff's property at all. As indicated, however, the board had already passed a resolution apportioning the assessment. The only thing that the plaintiff could have done was to have asked the board to change its conclusion which it already arrived at.

Throughout appellants' lengthy brief it is vigorously insisted that the board had the right to levy an assessment on plaintiff's property. Nowhere is there a suggestion that it does not intend to levy an assessment as charged in the bill. It is therefore rather refreshing to have counsel claim that at this stage of the case the suit is premature until the board has determined whether it will in fact levy an assessment.

We charge in the bill that any assessment would be invalid and void because (1) the law was invalid, and (2) in any event the law did not permit any such assessment. The learned courts below upheld the latter contention. If *any assessment* which the board might make will be invalid, it can be enjoined at any stage of the proceedings. We complain not so much that the assessment made by the board's resolution was made upon an improper basis, *but that it was made at all.*

Since we charge that the board intends to levy an absolutely void assessment and the defendants admit at least inferentially that they expect so to do, claiming the right under the law to do so, such action on the part of the board may be properly restrained at any stage. This case is entirely different from the case of *Milheim v. Moffat, Tunnel Improvement District,* 262 U. S. 710. In that case the complaint was that the assessment made or to be made was on an improper basis, to-wit, an ad valorem basis, and the court merely held that an injunction would not lie until the final action by the board, upon the

theory that if the basis was erroneous it would probably be modified on hearing. Had it appeared that *they had no right to assess at all*, a different conclusion would have been reached.

III.

THE DRAINAGE DITCH STATUTE IS UNCONSTITUTIONAL IN THAT IT TAKES PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE 14TH AMENDMENT OF THE FEDERAL CONSTITUTION.

There are a few things in regard to drainage ditches well established by the decisions which are essential to due process of law as applied to such special assessments. They are as follows:

1. The only basis for a special assessment is a special benefit and, therefore, the assessment cannot be greater than the benefit conferred upon the party assessed.

Norwood v. Baker, 172 U. S. 269.
Gast Reality Co. v. Snyder Granite Co., 240 U. S. 55.
Martin v. District of Columbia, 205 U. S. 135.

In *Norwood v. Baker* Mr. Justice Harlan stated:

> "The principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited and, therefore, the owners do not in fact pay anything in excess of what they receive by reason of such improvement."

The court further said:

> "In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is to the extent of such excess a taking under the guise of taxation a private property for public use without compensation."

In *Gast Realty Company v. Snyder Granite Company* Mr. Justice Holmes said:

> "The Legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the 14th Amendment, unless its action is palpably arbitrary or a plain abuse. The front foot rule has been sanctioned for the cost of paving a street. In such a case it is not likely that the cost will exceed the benefit and the law does not attempt an imaginary exactness or go beyond the reasonable probabilities. * * * If the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

From these decisions and many others the law is settled that a special assessment cannot exceed the benefit conferred upon a given tract of land and there must, therefore, be some tribunal which determines this fact and a hearing must be had for that purpose, unless the Legislature has itself determined that fact when it passed the law.

2. It is also well settled that where the Legislature has not determined what lands are benefitted and the amount of the benefit, but leaves it to some Board or Commission to determine what will be benefitted and what the amount of the benefit is to each, the inquiry is of a judicial nature and property owners are entitled to an opportunity to be heard upon due notice.

Road Improvement District No. 2 v. Missouri Pacific Ry. Co., 275 Fed. 600.

Turner v. Wade, 254 U. S. 64.

Central Railway of Georgia v. Wright, 207 U. S. 127.

Londoner v. City and County of Denver, 210 U. S. 373.

Fall Brook Irrigation District v. Bradley, 164 U. S. 112.

In the case of *Road Improvement District No. 2 v. Missouri Railway Company,* 8th Circuit, Judge Sanborn said:

> "But in the case in hand the Legislature did not undertake itself to make the assessment on the property in this district, but it delegated that power to and imposed that duty upon the Board of the district, and when the Legislature delegates to a Board or to Commissioners the determination of the question of what lands will be benefitted or what the amount of benefit to such lands will be the inquiry becomes in its nature judicial in such a sense that property owners are entitled to a hearing or an opportunity to be heard after notice before these questions are determined."

In the case of *Turner v. Wade,* Mr. Justice Day said:

> "In considering certain sections of the Georgia tax laws this court held in Central Railway Company v. Wright, 207 U. S. 127, 52 L. Ed. 134, that due process of law requires that after such notice as may be appropriate the tax payer have opportunity to be heard as to the validity of the tax and the amount thereof, by giving him the right to appear for that purpose at some stage of the proceedings. This case with others was cited with approval in Londoner v. Denver, 210 U. S. 373, 52 L. Ed. 1103, wherein we said that if the Legislature of a state instead of fixing the tax itself commits to the subordinate body the duty of determining where and in what amount and upon whom the tax shall be levied, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed the tax payer must have the opportunity to be heard, of which he must have notice, whether personal, by publication or by some statute fixing the time and place of the hearing."

With these two general principles in mind let us examine the South Dakota Drainage Act. We contend that the South Dakota Act nowhere provides for any hearing upon the cost

of the drain or other improvement, the amount of the tax to be levied, what lands are benefited or whether the tax upon any particular piece of land exceeds the benefits to that piece of land and hence does not measure up to the standard of "due process of law" required by this court to be shown.

There are only two hearings provided for in the South Dakota Drainage Act. The first, under Section 8462, is the hearing upon the original petition. Upon that hearing the Board decides whether the proposed ditch is conducive to public health, convenience or welfare or is practicable for draining agricultural lands. The notice of this hearing does not describe any land except that through which the ditch passes. *In this particular case no property belonging to the Rock Island Railroad was described in that notice, nor was any notice given to the Railroad that its right of way and bridges were liable to be assessed to pay for the drainage ditch.* This hearing does not establish a drainage district as it does in Iowa where notice is served upon every tract of land that is to be included within the district. At this hearing the County Commissioners are not called upon to decide whether the benefits to the land will be greater than the cost of the ditch. The North Dakota statute contains such a provision and the Supreme Court sustained the constitutionality of that statute upon that theory.

Soliah v. Heskin, 222 U. S. 522.

We call the court's attention to the fact that at the time this hearing is had no survey has been made, no estimate of the cost of the ditch has been filed, no plans have been made, no contracts have been let and no one knows what the undertaking will cost. It is, therefore, impossible for the County Commissioners at the time of this first hearing to decide whether the *benefits received by the land sought to be taxed will be equal*

to or greater than the assessment. For the reasons pointed out this hearing certainly cannot be sufficient to comply with the rule which requires that a tax payer have an opportunity to be heard upon the amount of the tax and whether the assessment against him is greater than the benefit he has derived.

The second hearing is had under Section 8463. This hearing determines what lands are benefitted and fixes the proportion of benefits between the various lands. The statute states that the Board of County Commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected and shall appoint a time and place for equalizing the same. At the hearing the Board fixes the proportion of benefits for each tract of land, taking any particular tract as a unit, and the benefit which any Railroad Company may obtain for its property by such construction shall be fixed and equalized together with the proportion of benefits to tracts of land.

The statute contemplates that this hearing for fixing the proportion of benefits shall be had before the ditch has been constructed and before anyone knows how much will be actually expended in its construction. The hearing may be put off until after the ditch has been built, but at this hearing the amount of tax which any party will have to pay is not determined and there is no opportunity to determine whether the assessment will be greater than the benefit received. The statute provides that if further expense is incurred, or if for any reason some of the parties assessed do not have to pay the tax, a new proportion of benefits shall be fixed and new assessments made. At this hearing the tax payer cannot raise the question that the proceedings have been illegal, that the money has been wrongfully expended, that the cost of the improvement has been greater than the benefits derived from it, or that the tax which he will be required to pay is in excess

of any benefit which his property will receive. *The only thing passed upon at this hearing is the equalizing of the benefits between the different tracts.* It is of no value to the Rock Island Railroad to have a right to see that its taxes are no greater than those assessed against the Milwaukee Railroad provided that both of them are in excess of the amount of the benefit received and are confiscatory of their property.

Therefore, we contend that this hearing does not comply with the due process of law required in such matters.

3. A third proposition which has been well established in drainage matters is that the method provided for determining the proportion of benefits and the tax to be levied against particular person must be reasonable and not arbitrary.

This was well stated in the case of *Kansas City Railway Company v. Road Improvement District No. 6, Arkansas*, 256 U. S. 658. The court said:

> "The settled general rule is that a state legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the 15th Amendment, unless its action is palpably arbitrary or plain abuse. * * * Ordinarily the levy may be upon lands specially benefitted according to value, position, area or the front foot rule. * * * If, however, the statute providing for the tax is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

The court further said:

> "The statute under consideration prescribed no definite standard for determining benefits from proposed improvements. The assessors made estimates as to farm lands and

to town lots according to area and position and wholly without regard to their value, improvements thereon or their present or prospective uses. On the other hand disregarding both area and position they undertook to estimate benefits to the property of plaintiffs in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would inhance its value considered as a component part of the system."

The court held the Arkansas law unreasonable and unjust and not due process of law. We call the court's attention to the statute there passed upon. Section 11 of Act 338 of the Laws of 1915 of Arkansas provides the method of assessment as follows:

"The assessors shall assess the benefits to be received by the several and particular tracts of land, railroads, tram roads and other real property within the district by reason of the improvement. All lands embraced in said district shall be entered upon said book in convenient sub-divisions as surveyed by the United States and appear upon the assessment books in force at the time in said county in appropriate columns showing: (1) Name of the Owner. (2) Subdivision of the land. (3) Number of acres. (4) Present assessed value. (5) Assessed benefits per acre. (6) Assessed benefits to each tract. And if it be a railroad or tram road the name of the owner thereof, the supposed mileage in said district, the present assessed value of said railroad and other property belonging to said company, and the amount of assessed benefits per mile and the total amount of benefits assessed against said railroad or tram road."

Under the Arkansas statute above quoted they apparently did the same thing that they have done under the South Dakota statute. They compared tracts of land according to acreage

and value and determined thereby the benefit to each tract, but when they came to a railroad they had no method of comparison but simply assessed what they though fit against the railroad without any basis of comparison. This sort of an assessment the Supreme Court held to be arbitrary and unreasonable.

Will the Court please note the statute on the equalization of benefits, (Section 8463). The first part of the section states:

> "The Board of County Commissioners shall fix the proportion of the proposed drainage among the lands affected and shall appoint a time and place for equalizing the same."

This does not provide for the equalizing of benefits between the lands effected and between a railroad bridge or a railroad right of way, and there is nothing in the section which authorizes the County Commissioners to fix a proportion of benefits between a tract of land and a railroad company.

The part of the section in regard to notice provides for notice of such equalization of proportion of benefits to be given as therein designated. Since there is no proportion of benefits between the land and a railroad company's property, there is no notice provided for the railroad company and the notice served in this case that a day had been set for equalizing the proportion of benefits between a tract of land and the railroad right of way or railroad bridge is without any authority in the statute.

It will be noted that this section provides what the notice shall contain. It says:

> "Such notice shall state the description of each tract of land effected by the proposed drainage and the names of the owners thereof, as appears from the tax records in the County Treasurer's office, and the proportion of benefits

fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated."

This clearly does not contemplate the giving of notice to a railroad company that any proportion of benefits has been fixed against the company's right of way or its bridges, because the railroad property is not a tract of land and is not included in the proportion of benefits fixed upon tracts of land.

The statute then says:

"And the benefits which any railroad company, or other corporation or property owner, may obtain for its property by such construction shall be fixed and equalized together with the proportion of benefits to tracts of land."

This clearly draws a distinction between the method of fixing the proportion of benefits upon tracts of land and the method for fixing the benefit to a railroad company. There is in this section no provision for the fixing of a proportion of benefits between a tract of land and a railroad right of way and railroad bridges, such as has been attempted in this case. The statute clearly says that tracts of land be treated in one way by fixing the proportion of benefits between the different tracts, taking any particular tract as a unit, but the property of a railroad company shall be treated in an entirely different manner by arbitrarily assessing against the railroad company an amount of benefits which the County Commissioners may decide in their own judgment should be assessed against the railroad, without in any way comparing it with the assessment made against tracts of land. This we say is an entirely arbitrary assessment, is unreasonable and is not based upon any method of comparison which it can be assumed with result in justice to the parties taxed.

This brings the attempted assessment in this case under the South Dakota Statute clearly within the case of the *Kansas City Southern Railway Company v. Road Improvement District No. 6*, decided under the Arkansas law above cited. In that case the court said:

> "Obviously the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law.

In the case at bar the engineer for the County Commissioners has worked out an elaborate and ingenius scheme for determining the amount of benefit which a railroad company has received. It is, however, a scheme not contemplated by the statute and does not treat the railroad company the same as a private land owner is treated, for instance; he says that there are only about twelve acres of land belonging to the Rock Island which are considered in any way benefitted by the drainage ditch. This twelve acres is the mile of track between the city limits and the bridge southwest of town. If this was treated the same as the agricultural land the assessment against it would be about One Hundred Twenty Dollars ($120), but the assessment levied here against the Rock Island property is about Eight Thousand Dollars ($8,000).

So far as the method of assessment is concerned the statute might be held to be constitutional as to agricultural lands and at the same time be unconstitutional as to railroads as was said in *Gast Realty Company v. Schneider Granite Company*, 240 U. S. 55:

> "If the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

We contend that the evidence in this case shows from the manner in which the statute is sought to be applied to a railroad company that there is no reasonable presumption that substantial justice will be done under this statute. After all the elaborate calculation made by the engineer of the County Commissioners as to benefits to a railroad company the assessment to be levied against the company is purely a guess, speculative and arbitrary and the act itself provides no method of determining the amount of the tax or of equalizing it with the tax against agricultural land.

To re-state the proposition, the legislature has left it to the County Commissioners to determine what lands are benefited and what the amount of assessment against each shall be. The proceedings are of a judicial nature and the Rock Island Railroad must be brought within the jurisdiction of the Board of County Commissioners in some manner. No drainage district is formed. No notice of the hearing for establishing the ditch is served in any manner upon the Rock Island Railroad. Without notifying the railroad that its property is to be included within the property benefited or that it is in any way interested in the construction of the drainage ditch the County Commissioners go ahead, build the ditch and spend the money. Then after everything is done and complete they make a proposed assessment against the property of the railroad company and serve notice upon the company that it is supposed to be benefited by the building of the ditch and that an assessment has been made against it and ordered to show cause why this assessment should not become conclusive. At this hearing the only question that is to be determined is the proportion of benefits among the different parties assessed. This we claim does not constitute due process of law and does not furnish the railroad company with a reasonable notice and a legal hearing before taking its property.

IV.

THE DITCH PROCEEDINGS HAD SINCE 1916 ARE ASSESSMENTS FOR MAINTENANCE UNDER SECTION 8470 OF THE CODE, AND THE ATTEMPT TO ESTABLISH "DRAINAGE DITCH NO. 1 AND 2" WAS A SUBTERFUGE IN ORDER TO INCLUDE NEW TERRITORY TO HELP PAY FOR THE MAINTENANCE OF THE OLD DITCHES.

Section 8470 of the Code is as follows:

> "Assessments for Maintenance. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the land owners effected in the proportions detremined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the Board of County Commissioners." (See appendix.)

The so called Drainage Ditch No. 1 and 2 is not a new ditch and not a new enterprise. It is simply the two old ditches cleaned out, embankments raised, a new spillway put in to handle the water and controlling gates placed at the head of the new ditches.

The parties responsible for the building of Drainage Ditches No. 1 and No. 2 were responsible for what they did with the water that they had diverted from the Sioux River. They could not bring this water out of the Sioux River and carry it down to the hill above the City of Sioux Falls and turn it loose. Having brought the water out of its natural water course they must take care of it. The first spillway washed out. The ditch filled up. A new spillway had to be built and the ditch had to be cleaned out. The expense of the maintenance, however, under the statute and under the laws would have to be paid by the parties responsible for the building of

the ditch. Under the statute the new assessment for the cost of maintenance is levied upon the lands which were found benefited in the original ditch proceedings, and in the same proportion as the lands were originally benefited. Under this statute the Rock Island Railroad is not liable for the cleaning out of the ditch or the building of the spillway or any other repairs placed upon the ditch.

There is no provision in this statute for taking any other lands to assist in the maintaining of a ditch after it has been construed and the benefits for its building assessed.

In 1916 a petition was filed to have Drainage Ditches No. 1 and 2 repaired and to build a new outlet through Covells' Lake down to the Big Sioux River west of the city. Defendant's Exhibit 42 (page 228) is the resolution of the Board establishing a drainage ditch as an extension to the outlet of Drainage Ditch No. 1 and for the repair of Drainage Ditch No. 1 and 2. This project was later abandoned and a new petition was filed for the building of a new spillway, the cleaning out of the old ditch, the building of controlling gates and straightening of the river. This project was not the construction of a new ditch, but was the required improvement and maintenance of the old ditch, and the filing of a new petition and the attempt to take any new territory as if it were a new project is purely a subterfuge and both courts below have so found.

Section 8489 in regard to invalid and abandoned proceedings cannot be applied to what was done by the County Commissioners in this case. That section applies to proceedings where a drainage ditch has been enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned, and provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expense of the old ditch and give credit for any payment made upon the old ditch by

people benefited thereby. No such proceeding was had in this case. The old proceedings establishing Drainage Ditches No. 1 and No. 2 have never been held void, set aside or abandoned. They are in full force today. The assessments have been levied, the land benefited, determined and the assessments have been paid.

It is, therefore, the contention of the appellee that what was done under the proceedings of 1916 to Drainage Ditch No. 1 and Drainage Ditch No. 2 was in the nature of repair and maintenance and under the statute could be assessed only against the lands originally found to be benefited by the old ditches, to-wit: the old assessment district, and in the same proportion.

In this case the court below specifically found that the establishment of "drainage ditch No. 1 and 2" was a mere evasion and subterfuge to avoid the effect of the law of South Dakota, that for maintenance and repair of an existing ditch only the lands within the original district can be assessed, and that the work done was only a repair of the old ditches.

Such finding is amply and overwhelmingly supported by the evidence, and this court will not be behind the determination of the lower court. Road Improvement Dist. No. 2 v. Missouri Pac., 275 Fed. 600. Nothing could be added to the opinions of the trial court and the circuit court of appeals as to their reasons for arriving at this conclusion (R. 93 to 96; 255-257).

It is, however, asserted and re-asserted in appellant's brief that the case of *Gilseth v. Risty*, 193 N. W. 132, by the Supreme Court of South Dakota, reached a conclusion contrary to that of the Circuit Court of Appeals as to the construction of the South Dakota Drainage Statute. That the Gilseth case dealt with this same "drainage ditch No. 1 and 2" is true; but that there is anything in it in conflict with Judge Elliott's or with Judge Kenyon's decision, we deny.

To refresh the Court's recollection as to the meaning of the terms employed in this brief, as we have already indicated, the term "old asesssment district" means the property originally assessed for Drainage Ditch No. 1 and Drainage Ditch No. 2. The term "new assessment district" means the additional property attempted to be assessed for "Drainage Ditch No. 1 and 2".

This case at bar involves the right to assess property in the *new* assessment district, both Courts below holding that such property could not be assessed because the new project so-called, was a repair of the old ditches, assessments for which were by statute limited to the old assessment district.

On the other hand, Gilseth was the owner of property in the *old* district, and participated actively in the establishment of this new subterfuge ditch. Although one of the prime movers, when it came to paying his assessment, he attempted to avoid liability. He contested the assessment upon the ground that the Board was without juirsdiction because there were irregularities in the proceedings (this is not involved in our case) and because the establishment of this ditch was a repair only of the old ditch. The Supreme Court of South Dakota, after being careful to say "plaintiff in this action is the owner of agricultural land within the drainage area of drainage district No. 2", (the *old* assessment district), said in effect:

(1) That the fact that the new project might be a repair of the old ditch made no difference because the law "gives the board the same authority to repair an old ditch as it does to construct a new one." Therefore, as, under Section 8470, the Board was authorized to assess property in the old assessment district for repairs, and as Gilseth's property lay in the old district the Board had jurisdiction to levy the assessment.

The attempted assessment of property in the new assessment district was not involved.

(2) But (and this is clearly the reason for the decision the reference to the repair proposition being clearly by way of argument only) Gilseth was estopped by his conduct from contesting his assessment.

Will the Court please note the last portion of the South Dakota Supreme Court's opinion:

> "Appellant having stood by and seen all the work performed without protest and having received all the benefits that can result therefrom, should not now be permitted to escape payment for the same. The relief asked by appellant is equitable in its nature, but because of circumstances above shown, all the equities of the case are against appellant and in favor of the Board."

Taking the view of the Gilseth case most favorable to appellants, and eliminating entirely the question of estoppel, although we assert that the South Dakota Supreme Court did decide the case on the ground of estoppel solely, the most that could be claimed from its decision is that the *court held that land WITHIN the old district COULD be assessed for Ditch 1 and 2. The Circuit Court of Appeals held that land WITHOUT the old district COULD NOT be assessed for Ditch 1 and 2.*

The Gilseth case neither decides nor intimates anything contrary to the decision of the Circuit Court of Appeals as to the construction of the Drainage Statute.

V.

THE ASSESSMENT OF PLAINTIFF'S PROPERTY CONSTITUTES A DISCRIMINATION SO PALPABLE AND ARBITRARY AS TO AMOUNT TO A DENIAL OF THE EQUAL PROTECTION OF THE LAW.

Exhibit A (p. 175) is a map of the Rock Island tracks and right of way in the City of Sioux Falls. The acreage is slightly less than thirty acres. None of it is agricultural lands. It is all used for railroad purposes only. Its tracks are located from eight to fifteen feet above the average water of the Sioux River. (See testimony of B. F. Wait, pp. 174-180; Dean, at 180-182; Burkes, 182; Pilcher, 182-183.) As already indicated, the County Engineer estimated that the property of the Rock Island benefited by this ditch amounted to 12⅛ acres, (page 241) upon which were located one mile of track and two bridges. Assessing the Rock Island property upon the same basis as agricultural lands would put the assessment at about twelve units, or a little less than $120. Because, apparently there was a railroad track and two bridges upon this property, the property was actually assessed 839.45 units, or about $8,000. Therefore, the railway track and two bridges are assessed 827 units, or considerably over $7,000, in spite of the fact that the evidence conclusively shows that the water of the Sioux River at its highest point had never reached the track. Since the only possible theory upon which a benefit could accrue to the Rock Island track is that the ditch prevented overflow, it is apparent how arbitrary and discriminatory such assessment is as compared with the assessment against the lands of others. The case clearly falls within the rule announced in *Thomas v. Kansas City Southern Railway Co.*, 277 Fed. 708, where this court said:

> "Where a railroad in a drainage district comprising 12,000 acres owned only 40.43 acres and 3.61 miles of track along the extreme west and northwest boundaries, constructed mostly on high hills and a trestle above overflow, an assessment of one-half of the cost of the improvement which would increase land values at least $250,000 was so palpably discriminatory and arbitrary as to deny equal protection of the laws."

This case was affirmed in *Thomas v. Kansas City So. Ry.*, 261 U. S. 481.

No better argument could be made upon this proposition than that contained in the court's opinion (pp. 97-100 of the Record).

VI.

Estoppel.

Under this head appellant asserts that because the Railway Company's agent knew that the spillway was being rebuilt and the old ditches repaired the Railway Company is estopped to claim that the statute under which the county assumed to do this is repugnant to the Fourteenth Amendment, or that the Board had, under the law, no jurisdiction to assess its property. No such novel proposition has, in our experience, ever been asserted in any court. It is too elementary to require the citation of authorities that in order to constitute an estoppel the party against whom the estoppel operates must have done or omitted to do some act and that relying upon such act or omission the other party has changed his position to his detriment. When Mr. Pilcher, the company's agent, saw the spillway being rebuilt, the only thing possible would have been to go through the form of notifying the county authorities that the Railway Company claimed it was not benefited. This was,

however, the time when no one had ever asserted that it was so liable. The Railway Company was not required to take any action against an assessment under an unconstitutional statute or an unauthorized assumption of jurisdiction by the Board until such time as it is actually threatened with an assessment. This was not until June, 1921, when the Railway Company was for the first time notified that it was claimed that its properties were benefited. Promptly upon receipt of this notice it commenced this action. Under the circumstances we do not feel justified in consuming time by arguing the proposition that the company has not lost its constitutional rights because it saw the spillway being constructed. Neither court below had any difficulty with the proposition.

For the foregoing reasons, the decree appealed from was correct and should be affirmed, or the appeal dismissed.

Respectfully submitted,

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APPENDIX.

Sec. 8470. ASSESSMENTS FOR MAINTENANCE. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance, or may be collected directly by the board of county commissioners.

IN THE
Supreme Court of the United States
October Term 1925

No. 96.

A. G. RISTY *et al*, as County Commissioners, etc., *et al.*,
Appellants,

vs

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY
Appellee

BRIEF AND ARGUMENT FOR APPELLEE

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Brief and Argument for Appellee

Supreme Court of the United States

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No. 96.

A. G. RISTY *et al*, as County Commissioners, etc., *et al.*,
Appellants,

vs

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY
Appellee

APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE

The Chicago, Milwaukee & St. Paul Railway Company, Plaintiff and Appellee, filed its bill in the District Court of the District of South Dakota praying for an injunction. From a decree granting an injunction the Defendants and Appellants appealed to the Circuit Court of Appeals of the Eighth Circuit, in which latter court the decree of the District Court was affirmed. From the decision of the Circuit Court of Appeals the defendants appeal to this Court.

This suit involves the constitutionality of the Drainage Ditch Statute of the state of South Dakota under both the federal and state constitutions and also involves the regularity and validity of proceedings taken under that statute. The facts out of which this suit arises, are, as follows:

J43899

STATEMENT OF FACTS

At the election in November, 1906, there was adopted an amendment to the constitution of South Dakota which is known as Section 6 of Article XXI of that constitution and which is as follows:

"§ 6. The drainage of agricultural lands is hereby "declared to be a public purpose and the legislature may "provide therefor, and may provide for the organization "of drainage districts for the drainage of lands for any "public use, and may vest the corporate authorities there- "of, and the corporate authorities of counties, townships "and municipalities, with power to construct levees, drains "and ditches, and to keep in repair all drains, ditches and "levees heretofore constructed under the laws of this "state, by special assessments upon the property bene- "fited thereby, according to benefits received."

The legislature of South Dakota has never enacted any law to carry into effect the powers, conferred upon it by the foregoing constitutional amendment providing for the organization of drainage districts, but has enacted, or attempted to enact various laws vesting the corporate authorities of the several counties of the state with power to construct levees, drains, and ditches and to keep the same in repair by special assessments upon the property benefited thereby.

The first drainage ditch enactment was Chapter 98 of the Session Laws of South Dakota, 1905, which was passed prior to the adoption of Section 6 of Article XXI of the South Dakota constitution. After the adoption of that section a new law was passed which is known as Chapter 134 of the Session Laws of South Dakota, 1907. The 1907 law was amended by Chapter 102 of the Session Laws of South Dakota, 1909. The 1907 law was further amended by Chapters 207 and 208 of the Session Laws of South Dakota, 1917. In 1919 the entire drainage law was recompiled and re-enacted as Sections 8458 to 8507, South Dakota Revised Code of 1919. Further amendments were enacted in 1919 which appear as Chapter 46 of the Session Laws of the First Special Session of the Sixteenth Legislature of South Dakota and by Chapters 193, 194, 195, 196, 197 and 198 of the Session Laws of South Dakota, 1921.

For the convenience of the court we are printing as Appendix A of this brief the portions of the South Dakota constitution, and as Appendix B the portions of the South Dakota laws which bear upon the questions at issue in this suit.

The Big Sioux river has its origin in a lake in the northeastern part of South Dakota and runs thence in a generally southerly direction, and in the eastern part of South Dakota, (of which state it is in places the boundary line) for about 100 miles and empties into the Missouri river at a point a short distance north of Sioux City, Iowa. In its course the Big Sioux river passes through the center of the city of Sioux Falls. It strikes Minnehaha county, in which Sioux Falls is situated, at its north line and flows in a generally southerly direction, but with many bends and curves, for a distance, in a straight line, of twenty-four miles, running in its course two and one-half miles west of the business center of the city of Sioux Falls and south to a point three miles south of the business center. It then flows in an easterly direction for about three miles and then turns north, running through the business center of the city of Sioux Falls and northerly to a point two miles from the business center. It then runs in an easterly direction for several miles when it again resumes its southerly course towards its junction with the Missouri river. The consequence is that at the city of Sioux Falls the river runs like an inverted letter "S," upon the bar of which Sioux Falls is situated.

From a point about five miles south of where the Big Sioux enters Minnehaha county it runs through a valley or flat from two to four miles in width until it reaches a point about three miles southwest of the business center of the city of Sioux Falls. From there on until it reaches the northeastern portion of the city the river is confined by high banks on either side and with no valley interposing between them.

There is comparatively little fall between the point where the Big Sioux river enters the flat about fifteen miles north of the city of Sioux Falls and the northeastern section of the city where the river passes over a series of falls of an aggregate height of more than one hundred feet. The result is that the level of the river bed, as it

passes over the falls in the northeastern portion of the city of Sioux Falls, is over one hundred feet below the level of the river at a point, four miles to the westward, where it passes to the west of the city of Sioux Falls.

About 1878, a dam was constructed for water power purposes across the Big Sioux river within the limits of the city of Sioux Falls a short distance above the falls and, between that dam and the falls, other dams were subsequently constructed, all of which were in existence long prior to any of the transactions out of which this suit arises. These dams for many years have been utilized, without complaint from any source, by the Northern States Power Company and its predecessors, as a source of water power, and upon the dams and power works several hundreds of thousands of dollars have been expended with the consent, express or implied, of the public authorities of Minnehaha county and of the city of Sioux Falls and of the property owners along the Big Sioux river.

The city of Sioux Falls, something over twenty years ago, located its municipal waterworks upon the flat north of the city, between the Big Sioux river where it flows in a southerly direction to the westward of the city and where it flows to the northward after it passes over the falls in the northeastern portion of the city. The flat where the waterworks are situated is a few feet higher than the level of the river bed to the westward of the waterworks plant and more than one hundred feet higher than the level of the river bed to the eastward. Between the two channels of the river (at this point about 3½ miles apart) there is an extensive gravel bed underlying the surface of the ground, which gravel bed is filled with water and is the source from which the city of Sioux Falls obtains its municipal water supply.

For many years, and from in fact shortly after the settlement of Minnehaha county in the late sixties and early seventies, complaints arose in regard to the flooding of the land in the valley of the Big Sioux river north of the city of Sioux Falls. The topography of the country along this valley being level and there being but little fall in the river bed for a distance of nearly thirty miles, between the north end of the flats and the falls of the Big

Sioux river, the surface waters, in times of freshets, would accumulate upon the flats and remain there for several days, and sometimes for weeks, before they gradually flowed off through the narrow river channel south of the city of Sioux Falls and through the city until they reached the falls. This situation was made still worse by the construction of the dam upon the river above the falls in 1878 which hindered still further the passage of the water along the river bed before it reached the falls. As the state of South Dakota became more and more densely settled in the counties along the Big Sioux river north of Minnehaha county, numerous drainage ditches were established, the effect of which was still further to accelerate the flow of surface water during freshets and to cause a still greater volume of water to accumulate upon the flats north of the city of Sioux Falls.

In December, 1907, the Board of County Commissioners of Minnehaha county, purporting to act under the authority of Chapter 134 Session Laws of South Dakota, 1907, established a drainage ditch known as Drainage Ditch No. 1. This ditch was some three miles in length and extended, from a point on the Big Sioux river below the falls, northward to a point on the flat north of the city of Sioux Falls. In 1910, the Board of County Commissioners, again purporting to be acting under the authority of Chapter 134 of the Session Laws of South Dakota, 1907, as amended by Chapter 102, Session Laws of South Dakota, 1909, established a second ditch, known as Drainage Ditch No. 2, which commenced at the north end of Drainage Ditch No. 1 and extended in a northerly direction for about twelve miles.

At the point Drainage Ditch No. 1 empties into the Big Sioux river below the falls it passed over a hill in a descent of about one hundred feet. The bottom of the ditch was covered along this descent with concrete, making a spillway through which the water accumulating upon the flats could run to reach the channel of the Big Sioux river below the falls.

Drainage Ditch No. 1 and Drainage Ditch No. 2 operated more or less successfully in draining the flats until the spring of 1916 at which time, during a somewhat heavy rainfall, the concrete bottom of Drainage Ditch No.

1, (or its spillway) washed out and the water began cutting a channel through the hill.

The fact that the concrete spillway had washed out did not in any manner decrease the efficiency of Drainage Ditch No. 1 and Drainage Ditch No. 2 as drainage propositions. In fact, the washout of the spillway made them still more efficient for draining purposes, and if they had been left alone they would very speedily have settled the question of drainage for the lands upon the flats. The effect of the washout was to open a passage for all of the water which accumulated upon the flats into the channel of the Big Sioux river below the falls and this channel was amply sufficient to have taken care of all of the water which ever accumulated upon the flats. In fact, it was a perfect success as a drainage proposition.

Unfortunately, while Drainage Ditch No. 1, after its spillway was washed out, succeeded in doing all in the way of drainage that the owners of the lands upon the flats desired to have done, it seriously affected other interests. If the water had been allowed to go without hindrance through the new channel it would, within a very short time, have diverted the entire course of the water in the Big Sioux river and would have formed a new channel for the river across the flats north of the city of Sioux Falls, in which channel all of the water coming down the river could have flowed into the channel below the falls without passing around and through the city of Sioux Falls and over the falls, thus cutting off about twelve miles of the river channel. The further effect would have been to destroy the waterpower formed by the dams across the Big Sioux river in the city of Sioux Falls above the falls, as the only water which would have flowed in the Big Sioux river channel through the city of Sioux Falls and over the falls would have been the water from Skunk creek, a tributary of the Big Sioux river, emptying into that stream south of the city of Sioux Falls. Another effect of allowing the river to run through its new channel would have been to destroy the municipal water plant of the city of Sioux Falls by draining the water from the gravel bed from which the city obtained its water supply.

After the spillway at the outlet of Drainage Ditch No. 1 had washed out in March, 1916, various plans were

proposed looking toward the control of the water which flowed through the ditch. Many conferences were had between the Board of County Commissioners and the representatives of the various interests affected. The Appellee was not represented at any of these conferences and never took any part in any manner in them or in the subsequent proceedings.

In October, 1916, the Board of County Commissioners took proceedings by which they attempted to establish a new ditch project which they named "Drainage Ditch No. 1 and 2." Thereafter, all proceedings with respect to Drainage Ditch No. 1 and with respect to Drainage Ditch No. 2 were abandoned and all subsequent work was done by the Board of County Commissioners upon the new project, "Drainage Ditch No. 1 and 2."

The Board of County Commissioners, after attempting to organize Drainage Ditch No. 1 and 2, proceeded to construct additional ditches, cut-offs, and dams in the flats above the city of Sioux Falls, and at the former outlet of Drainage Ditch No. 1, to construct a spillway, and other water retaining works for the purpose of controlling the flow of the water through the ditches. This work was done by the Board of County Commissioners without any regard to the requirements of the South Dakota drainage statutes and without having first had plans therefore prepared and approved by the state engineer. The most of the work was done by the board without letting a contract therefor and upon the cost-plus plan. The result was, that at the end of the construction period, the cost of the work done by the Board of County Commissioners upon Drainage Ditch No. 1 and 2 had amounted to a sum in excess of $250,000, of which upwards of $150,000 was expended upon the spillway and other water retaining works at the outlet of the ditch. For the amount expended, the Board of County Commissioners issued warrants upon the Drainage Ditch No. 1 and 2. These warrants were taken by the laborers and material men employed upon the construction work and were in most instances discounted to the local banks in Minnehaha county.

After a number of abortive attempts to levy an assessment for the purpose of raising the money to pay the warrants issued for the work done upon Drainage Ditch No.

1 and 2, the Board of County Commissioners, in June, 1921, adopted a notice of time and place for equalizing the proportion of benefits for the construction of the work on Drainage Ditch No. 1 and 2, in which notice the proportion of benefits assessed against Appellee was 1681 units out of a proposed total of 32549.62 units, upon the basis of which proportion the assessment against Appellee and its property would be in excess of $15,000.

The plaintiff and Appellee brought this suit to enjoin the making of any assessment upon its property for the work done upon Drainage Ditch No. 1 and 2. A temporary injunction was granted *pendente lite*. The defendants named in the bill were the Board of County Commissioners of Minnehaha County, the Auditor, and the Treasurer of that county. Subsequently, the various banks and other persons holding drainage ditch warrants filed a petition for leave to intervene in the suit. This petition was granted and answers were filed both by the defendants and by the intervenors. Upon the hearing of the suit upon its merits, a final decree was entered enjoining the Board of County Commissioners from making any assessment for the expense of the work done under the proceedings establishing Drainage Ditch No. 1 and 2. The decree by its terms was without prejudice to the right of Appellee to contest any assessment upon the property owned by it which had formerly been assessed for Drainage Ditch No. 1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company vs Risty,* 282 Fed. 364.)

In its bill Appellee set up the facts concerning the construction of Drainage Ditches No. 1 and No. 2 and the subsequent construction of a spillway and attacked the constitutionality of the South Dakota Drainage Statute in the following allegations:

"That said purported statute of the state of South "Dakota 'Exhibit A' hereto, is unconstitutional and void, "in that the same is in violation of Section 2 of Article "VI, of the Constitution of the State of South Dakota, "and in that the same is in violation of the Fourteenth "Amendment of the Constitution of the United States; "that said Statute, 'Exhibit A', is further void and un- "constitutional in that the same provides no fixed and

"determinable method or rule for the apportionment of "benefits upon the property and property owners situat- "ed within the drainage area, and especially in that said "purported statute furnishes no fixed or determinable "basis for the apportionment of benefits upon the prop- "erty of railroad companies and other corporations, and "upon the property of municipal and quasi-municipal cor- "porations, and upon platted property in cities and vil- "lages. Said purported law, 'Exhibit A', is further un- "constitutional and void in that the same provides for an "assessment against property without the right of the "property owner to be heard thereon and without notice "of any character to the property owner; that if said ap- "portionment of benefits be made as threatened by the "said Board of County Commissioners of said Minnehaha "County, and as is provided in said notice, 'Exhibit C', "the same will constitute the taking of the property of "plaintiff and of the other property owner affected by "said notice without due process of law; that a cloud will "be placed upon the title of the plaintiff to its real prop- "erty situated within said drainage area affected by "said notice, 'Exhibit C' and that there will result a mul- "tiplicity of suits and that plaintiff and other property "owners affected will suffer irreparable injury." (Rec- ord, p. 15).

The bill also attacked the acts of the Board of County Commissioners of Minnehaha County in its proceedings relative to the construction of the spillway and other drainage works as being without jurisdiction on account of the unconstitutionality of the South Dakota Drainage Statute and also on account of such proceedings not being had in accordance with the provisions of the Statute. (Record, pp. 14-15). The apportionment of benefits made against the property of Appellee was further attacked as exorbitant, disproportionate to the assessment of other property and made upon an arbitrary and discriminatory basis. (Record, pp. 72-73).

In their answer, Appellants took issue upon the un- constitutionality of the South Dakota Drainage law and specifically set up the establishment by the Board of County Commissioners of a new ditch project under the title of "Drainage Ditch No. 1 and 2."

Upon the trial in the district court the issues involved were, under the pleadings:

1. The constitutionality of the South Dakota Drainage Ditch Statute.

2. The regularity of the proceedings of the Board of County Commissioners of Minnehaha county under the Statute.

3. The proper construction to be given to the provisions of the South Dakota Drainage Statute.

There was practically no dispute as to the facts out of which this suit arises. It was admitted by all parties to the controversy that originally the Board of County Commissioners of Minnehaha county had established two drainage ditches known respectively as Drainage Ditch No. 1 and Drainage Ditch No. 2. It was also conceded that after the spillway, at the outlet of Drainage Ditch No. 1, had been washed out, the Board of County Commissioners established a new ditch project known as Drainage Ditch No. 1 and 2.

This suit was one of six cases involving this same ditch project, but the positions taken by the plaintiffs in the various cases differed upon the proposition as to whether Drainage Ditch No. 1 and 2 was a new and independent proposition or whether it was merely a project for the maintenance and repair of Drainage Ditch No. 1 and Drainage Ditch No. 2 and consequently a continuation of those two propositions. In all of the six cases the contention of counsel for Appellants was that Drainage Ditch No. 1 and 2 was a new and independent proposition. This position was contested by plaintiffs in some of the cases who took the position that it was merely a maintenance and repair project. In the case at bar, the plaintiff (Appellee in this court) was content to coincide with the position taken by the defendants (Appellants in this court) and to base its right to an injunction upon a state of facts in which it conceded that Drainage Ditch No. 1 and 2 was a new and independent ditch proposition and not a continuation of the old Drainage Ditch No. 1 and Drainage Ditch No. 2.

In the District Court injunctions were granted to the plaintiffs in all the six cases, but in his opinion filed in the District Court, the District Judge took the position that

Drainage Ditch No. 1 and 2 was merely a maintenance and repair project and a continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company vs Risty,* 282 Fed. 364).

While we contend in this court, as we did in the Circuit Court of Appeals, that the decree of the District Court was properly entered and should be affirmed, we do not act as the defenders of the decree upon the grounds upon which it was based by the District Judge. The decree was, in our view of the controversy, properly entered, but the same decree should have been entered had the court been of the opinion that Drainage Ditch No. 1 and 2 was an independent and original ditch proposition and not a continuation and repair project of Drainage Ditch No. 1 and Drainage Ditch No. 2. In this position we do not coincide with the views expressed by counsel for the Appellees in other of the six cases now before this court. We accept the position of counsel for the Appellants that Drainage Ditch No. 1 and 2 was an original and independent ditch proposition and upon that basis shall proceed with our argument in support of the decree of the District Court and the decision of the Circuit Court of Appeals.

An appeal was taken by the defendants and by the intervenors to the Circuit Court of Appeals for the Eighth Circuit, in which court the decree of the District Court was affirmed. *Risty vs Chicago, Rock Island & Pacific Railway Company,* 297 Fed 710. The defendants and intervenors then filed a petition in this Court for a writ of certiorari and, at the same time, took this appeal. The application for a certiorari was denied. *Risty vs Chicago, Milwaukee & St. Paul Railway Company,* 266 U. S. 622. The case is now before this court upon the appeal.

The foregoing being the facts in this suit, we submit on behalf of the Appellee, the Chicago, Milwaukee & St. Paul Railway Company, the following:

BRIEF AND ARGUMENT

I.

THE SOUTH DAKOTA DRAINAGE LAW IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND IS THEREFORE UNCONSTITUTIONAL.

The first proposition which we desire to present for the consideration of the Court is that the entire South Dakota drainage law is unconstitutional, our contention being that it is in violation of the "due process of law" clause of the fourteenth amendment to the federal constitution. The consideration of this question involves an analysis of the provisions of the South Dakota drainage statute as it existed at the time the Board of County Commissioners of Minnehaha county attempted to establish Drainage Ditch No. 1 and 2 and did the work thereunder.

The first statutory step in the establishment of a drainage ditch is the filing of a petition. (§2, ch. 134, Laws of 1907; §8459, R. S. 1919). This petition must "set forth "the necessity for the drainage, a description of the pro- "posed route by its initial and terminal points and its "general course, or by its exact course in whole or in part, "and a *general statement of the territory likely to be "affected thereby*". It will be noticed that in the petition, which is the initial and jurisdictional step in the formation of a drainage ditch, it is not necessary to include a description of the property which will be affected and upon which assessments will be levied to pay the costs of the construction of the ditch. All that is required is a "general statement of the territory likely to be affected "thereby." The next step in the proceeding is for the County Auditor to transmit a copy of the petition to the State Engineer, who, together with the Board of County Commissioners is required to inspect the proposed route and "if in the opinion of the Board and the State Engi- "neer it is necessary," the Board of County Commissioners causes a survey of the proposed drainage to be made by a competent engineer, selected by the Board, but under the general supervision of the State Engineer. This survey is primarily for the purpose of aiding the Board in determining the necessity for the proposed drainage but

it may be a complete survey such as will be required for the construction of the drainage and the assessment of its cost. All this is within the jurisdiction of the Board of County Commissioners. The survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. (§ 3, ch. 134, Laws of 1907; § 1, ch. 102, Laws of 1909; §8460, R. S., 1919). While the survey may, at the option of the Board of County Commissioners, be a complete survey for the purpose of ascertaining all facts required for the construction of the proposed drainage and the assessment of its cost, such complete survey is not rendered obligatory by the statute and the Board of County Commissioners may have made only so much of the survey as may be necessary to determine the necessity for the proposed drainage.

After receiving the report of the surveyor, the Board of County Commissioners is required to determine the "exact line and width of the ditch, if the same shall not "be fixed in the petition, and shall file its determination "with the petition." The Board then fixes the time and place for the hearing of the petition and gives notice by publication in a newspaper for two weeks and by posting copies of the notice in three public places near the route of the proposed drainage. The notice "shall describe the "route of the proposed drainage and the tract of country "likely to be affected thereby in general terms, the sep-"arate tracts of land through which the proposed drain-"age will pass and give the names of the owners thereof "as appears from the records of the office of the Register "of Deeds on the date of the filing of the petition, and "shall refer to the files in the proceeding for further par-"ticulars." The notice shall also "summon *all persons* "*affected* by the proposed drainage to appear at such "hearing and show cause why the proposed drainage shall "not be established and constructed." (§ 4, ch. 134, Laws of 1907; § 2, ch. 102, Laws of 1909; § 8461, R. S. 1919). This notice is the only notice given to property owners prior to the establishment of a drainage ditch and is the only notice under which the Board can acquire jurisdic-

tion to make an assessment. The owners are named of the separate tracts of land through which the proposed drainage will pass but no description is given of the property *affected by the proposed drainage ditch or which will be assessed for the cost of the construction thereof.* The notice merely describes the route of the proposed drainage and the "tract of country likely to be affected thereby *"in general terms"* and then summons *"all persons af-"fected by the proposed drainage"* to appear at the hearing. A notice designating as the tract of country "likely "to be affected thereby in general terms" would be sufficient, if it named as such "tract of country" the entire county in which the drainage ditch is to be constructed. Nothing whatever is required in the notice by which any property owner, other than one owning land through which the ditch is to be constructed, is appraised that he is affected or that his land will be assessed for the construction of the proposed drainage ditch. In fact, all that the South Dakota law requires is for the Board of County Commissioners of a South Dakota county to publish and post a general notice summoning "all persons affected" to appear at the hearing, in order to support an assessment, for the construction of the ditch, upon all of the real property situated within the county limits. There is absolutely nothing in the statutory notice to inform any property owner that he will be called upon to pay an assessment. After the ditch is constructed, the Board of County Commissioners is at liberty, under the South Dakota statute, to extend the assessment to all property in every direction up to the county boundary lines. If this be sufficient notice, then after it is given, the Board of County Commissioners has the power to assess for the cost of the construction of any ditch every acre of property within the county limits.

At the hearing upon the petition, the South Dakota statute kindly permits "any person interested" to appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the Board as to the width and route of the proposed ditch. After the hearing, the County Board may establish the drainage ditch. (§ 5, ch. 134, Laws of 1907; § 3, ch. 102, Laws of 1909; § 8462, R. S. 1919).

After the establishment of the drainage ditch, the Board of County Commissioners "shall fix the proportion of benefits of the proposed drainage among the lands affected and shall appoint a time and place for equalizing the same." (§6, ch. 134, Laws of 1907; § 4, ch. 102, Laws of 1909; § 8463, R. S. 1919). There is no statutory requirement as to how soon after the establishment of the drainage ditch this shall be done and it is not necessary that it be done before the drainage project has been completed. It must be done before an assessment is made for the purpose of paying the cost of the establishment of the drainage project but the assessment, when made, includes all costs already incurred, or thereafter to be incurred. (§ 7, ch. 134, Laws of 1907; § 5, ch. 102, Laws of 1909; ch. 130, Laws of 1911; § 8464, R. S. 1919.)

The notice of equalization of proportion of benefits is given by publication once in each week for two consecutive weeks in a newspaper of the county and by posting copies of the notice in three public places near the route of the proposed drainage. The law requires that the "notice "shall state the route and the width of the drainage estab- "lished, a description of each tract of land affected by "the proposed drainage and the names of the owners of "the several tracts of land as appears from the records "of the office of the Register of Deeds, at the date of filing "of the petition, and the proportion of benefits fixed by "each tract of property, taking any particular tract as a "unit, and shall notify all such owners to show cause why "the proportion of benefits shall not be fixed as stated." (§ 6, ch. 134, Laws of 1907; § 4, ch. 102, Laws of 1909; § 8463, R. S. 1919). Here for the first time there is published a description of each tract of land "affected" by the proposed drainage and the names of the owners of such tracts. As in the case at bar, the work may have been completed and an expense of over a quarter of a million dollars incurred before the Board of County Commissioners determines what particular lands are "affected" by the proposed drainage and gives notice to the owners of such lands. A property owner for the first time notified that his land is "affected" by the proposed drainage has no right to object in any manner to the establishment of the drainage project. He has nothing to say in re-

gard to its manner or cost of construction; he has no voice in the selection of the particular tract of land taken as a unit; and all concerning which he can be heard is as to whether the proportion of benefits "shall not be fixed "as stated."

It is now too late for the property owner to escape. He is like a rat in a trap. All that he can do is to appear before the Board of County Commissioners and object to the proportion of benefits which has been assessed against him and ask to have that proportion reduced by raising the proportion of some other property owner. He is precluded from raising any question whatsoever as to the right to include his property within the drainage area. He has nothing to say as to the necessity for the drainage project or as to its manner of construction or its cost. Without any notice, either personal or constructive, his property has been included in the drainage area under the general proclamation of the Board of County Commissioners and he has no redress.

Theirs not to make reply,
Theirs not to reason why,
Theirs but to do and die,

even though

Someone had blundered.

The property owner cannot question the validity of the proceedings. All that is left for him to do is to pay.

Our contention is that the South Dakota drainage statute is in violation of the due process of law clause of the fourteenth amendment to the federal constitution for the reason that no opportunity is given a property owner, whose property is "affected" by the proposed drainage project, to appear prior to the doing of the work and the making of the assessment for the construction cost.

In support of the constitutionality of the South Dakota drainage statute, counsel for appellants have cited *Spencer vs. Merchant*, 125 U. S. 345. That case was decided by a divided court. The legislature of the state of New York had, by express enactment, determined that certain lands should be included within an assessment district in which the cost of the improvement was to be proportioned. The majority of the court held "that the deter-"mination of the territorial district which should be taxed

"for local improvement is within the province of legisla-
"tive discretion." The courts in this and a line of suc-
ceeding cases have made a clear distinction between cases in which a taxing district has been established by an act of the legislature and cases in which special assessments are to be made by some taxing body upon the property "beneficially affected" but not included within any taxing district established by legislative enactment. In the cases of taxing districts established by act of the legislature no notice need be given to the property owners of the inclusion of their property within the district, but a different rule applies in cases in which the taxing district is determined by the area of the land "beneficially affected."

Fallbrook Irrigation District vs Bradley, 164 U. S. 112, also cited by counsel in support of the constitutionality of the South Dakota drainage law, is, when carefully read, a strong authority against the constitutionality of the South Dakota statute. In the very elaborate opinion in this case the Court (p. 167) says:

"The legislature not having itself described the dis-
"trict, has not decided that any particular land would or
"could possibly be benefited as described, and, therefore,
"it would be necessary to give a hearing at some time to
"those interested upon the question of fact whether or
"not the land of any owner which was intended to be in-
"cluded would be benefited by the irrigation proposed. If
"such a hearing were provided for by the act, the de-
"cision of the tribunal thereby created would be sufficient.
"Whether it is provided for will be discussed when we
"come to the question of the proper construction of the
"act itself."

Later on in the opinion the court discusses the question whether the statute does provide for a hearing prior to the formation of the district and holds that under the provision of the statute under consideration and under the construction given it by the supreme court of California, by which state it was enacted, the right of hearing is given the property owner prior to the formation of the district. The court discusses the statute (pp. 170-172):

"We come now to the question of the true construc-
"tion of the act. Does it provide for a hearing as to
"whether the petitioners are of the class mentioned and

"described in the act and as to their compliance with the "conditions of the act in regard to the proceedings prior "to the presentation of the petition for the formation of "the district? Is there any opportunity provided for a "hearing upon notice to the land owners interested in the "question whetheir their lands will be benefited by the "proposed irrigation? We think the right to a hearing "in regard to all these facts is given by the act and that it "has been practically so construed by the Supreme Court "of California in some of the cases, above cited from the "reports of that court and in the case cited in the briefs "of counsel. We should come to the same conclusion from "a perusal of the act. The first two sections provide for "the petition and a hearing. The petition is to be signed "by a majority of the holders of title to lands susceptible "of one mode of irrigation, etc. This petition is to be pre-"sented to the board of supervisors at a regular meeting, "and notice of intended presentation must be published "two weeks before the time at which it is to be presented. "The board shall hear the same, shall establish and de-"fine the boundaries, although it cannot modify those de-"scribed in the petition, so as to except from the district "lands susceptible of irrigation by the same system of "works applicable to the other lands in the proposed dis-"trict, and the board cannot include in the district, even "though included in the description in the petition, lands "which shall not, in the judgment of the board, be bene-"fited by irrigation by said system.

"If the board is to hear the petition upon notice, and "is not to include land which will not, in its judgment, be "benefited by irrigation by the system, we think it fol-"lows as a necessary and a fair implication that the per-"sons interested in or who may be affected by the pro-"posed improvement have the right under the notice to "appear before the board and contest the facts upon which "the petition is based, and also the fact of benefit to any "particular land included in the description of that pro-"posed district.

"It is not an accurate construction of the statute to "say that no opportunity is afforded the landowner to test "the sufficiency of the petition in regard to the signers "thereof and in regard to the other conditions named in

"the act; nor is it correct to say that the power of the "board of supervisors is, in terms, limited to making such "changes in the boundaries proposed by the petitioners "as it may deem proper, subject to the conditions named "in the act.

"When the act speaks of a hearing of the petition, "what is meant by it? Certainly it must extend to a "hearing of the facts stated in the petition, and whether "those who sign it are sufficient in number and are among "the class of persons mentioned in the act as alone having "the right to sign the same. The obvious purpose of the "publication of the notice of the intended presentation of "the petition is to give those who are in any way interest-"ed in the proceeding an opportunity to appear before "the board and be heard upon all the questions of fact, "including the question of benefits to lands described in "the petition. As there is to be a hearing before the "board, and the board is not to include any lands which "in its judgment will not be benefited, the plain construc-"tion of the act is that the hearing before the board in-"cludes the question as to the benefits of the lands, be-"cause that is one of the conditions upon which the final "determination of the board is based, and the act cannot "in reason be so construed as to provide that while the "board is to give a hearing on the petition it must never-"theless decide in favor of the petitioners, and must estab-"lish and define the boundaries of the district, although "the signers may not be fifty, or a majority of the hold-"ers of title, as provided by the act, and notwithstanding "some other defect may become apparent upon the hear-"ing."

It will be seen in *Fallbrook Irrigation District vs Bradley* that the California statute differs from the South Dakota statute in that the petition must "particularly de-"scribe the proposed boundaries of such districts" and the petition itself must be published. After the petition is published and has been passed upon by the Board of Supervisors the question of the formation of the irriga-tion district is submitted to an election of the electors of the district who are also freeholders. (*Fallbrook Irriga-tion District vs Bradley*, 164 U. S. 112, pp. 116-117). These facts differentiate the statute passed upon in *Fall-*

brook Irrigation District vs Bradley from the South Dakota statute under consideration. Under the California statute the boundaries of the proposed district are fixed in the first instance and after they have been determined then the question of the formation of the district is put to a vote of the freeholder electors. We submit therefore, that the decision in *Fallbrook Irrigation District vs Bradley* is a distinct authority in favor of our position that the South Dakota drainage statute is unconstitutional. The court expressly determines in that case that notice must be given to the property owner of the formation of the district before his property can be included in it, and one of the requisites of notice is that the property owner be advised in some manner, either actually or constructively, that his land will be included within the limits of the proposed project.

Embree vs Kansas City Road District, 240 U. S. 242, is another case relied upon by counsel in support of the constitutionality of the South Dakota law. Here, again, is a case which we submit directly sustains our contention as to the invalidity of the South Dakota statute. The Court in the opinion (pp. 246-248) says:

"The district was not established or defined by the "legislature, but by an order of the county court made "under a general law. Whether there was need for the "district and, if so, what lands should be included and "what excluded was committed to the judgment and dis"cretion of that court subject to these qualifications: "First, that the district should contain at least 640 acres "of contiguous land and be wholly within the county; sec"ond, that the court's action should be invoked by a peti"tion signed by the owners of a majority of the acres in "the proposed district, and, third, that public notice—con"ceded to be adequate—should be given, by the clerk of "the court, of the presentation of the petition and the "date when it would be considered, and that owners of "land within the proposed district should be accorded an "opportunity to appear, either collectively or separately, "and oppose its formation. In this connection the statute "says: 'The court shall hear such petition and remon" 'strance, and shall make such change in the boundaries " 'of such proposed district as the public good may re-

"'quire and make necessary, and if after such changes "'are made it shall appear to the court that such petition "'is signed or in writing consented to by the owners of "'a majority of all the acres of land within the district "'as so changed, the court shall make a preliminary order "'establishing such public road district, and such order "'shall set out the boundaries of such district as estab- "'lished . . . but the boundaries of no district shall be "'so changed as to embrace any land not included in the "'notice made by the clerk unless the owner thereof shall "'in writing consent thereto, or shall appear at the hear- "'ing and is notified in open court of such fact and given "'an opportunity to file or join in a remonstrance.' The "order actually made shows that four of the present plain- "tiffs, with three others, appeared in opposition to the "petition, recites that 'the court, after hearing and con- "'sidering said petition and said protests and remon "'strances and all evidence offered in support thereof, "'finds that the public good requires and makes necessary "'the organization, formation and creation of such pro- "'posed public road district . . . with boundaries as stated "'in said petition,' and sets out the boundaries of the "district as established.

"The sole purpose in creating the district, as the "statute shows, was to accomplish the improvement of "public roads therein—the particular roads to be desig- "nated by the district commissioners and an approving "vote of the land owners.

"As the district was not established by the legisla- "ture but by an exercise of delegated authority, there was "no legislative decision that its location, boundaries and "needs were such that the lands therein would be benefit- "ed by its creation and what it was intended to accom- "plish, and, this being so, it was essential to due process "of law that the land owners be accorded an opportunity "to be heard upon the question whether their lands would "be thus benefited. If the statute provided for such a "hearing, the decision of the designated tribunal would be "sufficient, unless made fraudulently or in bad faith. "*Fallbrook Irrigation District vs Bradley,* 164 U. S. 112, "174-175.

"Did the statute contemplate such a hearing? We

"have seen that it required that adequate public notice "be given of the presentation of the petition for the crea- "tion of the district and the time when it would be con "sidered, made provision for the presentation of remon- "strances by owners of lands within the proposed district, "and directed that the petition and remonstrances be "heard by the county court, that the court make such "change in the boundaries 'as the public good may re- "'quire' and that the boundaries be not enlarged unless "the owners of the lands not before included consent in "writing or appear at the hearing and be given an oppor- "tunity to present objections. That a hearing of some "kind was contemplated is obvious, and conceded."

The case of *Soliah vs Heskin*, 222 U. S. 522, is strongly relied upon by counsel. That is a case arising under the North Dakota drainage law. The opinion at first glance would seem to support the contention of counsel for Appellants but an examination of the North Dakota statute, upon which the case arose, discloses the fact that the North Dakota law was not subject to the same objections which are urged against the South Dakota enactment. Under the North Dakota statute, a petition for the construction of the drain is filed with the board of drain commissioners. This petition designates the starting point and terminus and general course of the proposed drain. The board of drain commissioners then employs surveyors who prepare profiles, plans, and specifications of the proposed drain, an estimate of the cost thereof, and a map or plat of the lands to be drained in duplicate, showing the regular subdivisions thereof, one copy of which is filed in the office of the county auditor in the county in which the drain is proposed to be constructed and the other with the board of drain commissioners, subject to inspection. Upon the filing of the surveyor's report, the board of drain commissioners fixes a date and public place for hearing objections to the petitions and gives notice of such hearing. The notices must contain a copy of the petition and a statement of the date of filing of the surveyor's report and the date when the board will act upon the petition, must be signed by a majority of the members of the drainage board and "shall be sent by "registered mail to the last known address of each and

"every *owner of land which may be affected* by the pro-"posed drain." The North Dakota statute therefore requires that the names of "each and every owner of land "which may be affected" be determined and actual notice given these at the very inception of the project and this notice must be given by sending to each owner a copy of the petition and of a statement of the date of filing the surveyor's report and the date upon which the board will act upon the petition. That is a very different proposition from merely publishing notice "to all persons whose "property is affected" without first determining who are affected, as required by the South Dakota statute. The opinion in the case of *Soliah vs Heskin* must consequently be read in the light of the North Dakota statute which provides for the giving of notice at two stages of the proceedings to the property owner, first, a notice before the drainage district is formed, and, second, a notice when the assessment of benefits is made. The North Dakota statute provides exactly the thing for the want of which the South Dakota statute is unconstitutional.

Counsel for Appellants place great reliance upon the recent case of *Milheim vs Moffat Tunnel District*, 262 U. S. 710. That case is clearly to be distinguished from the case at bar. It is a case arising upon an assessment made in a taxing district, the limits of which had been fixed by act of the legislature of the state of Colorado. The supreme court held, following *Spencer vs Merchant*, 125 U. S. 345, and other similar cases, that the legislative authority of a state extends to the formation of taxing districts and that a state legislature can enact a law fixing the boundaries of a taxing district without giving notice to the owners of property included therein. That is an entirely different proposition from the one arising under the South Dakota drainage law and the decision of the supreme court in *Milheim vs. Moffat Tunnel District* is not an authority in support of the South Dakota statute which on its face does not attempt to form a taxing district by legislative enactment.

The case of *Voight vs Detroit City*, 184 U. S. 115, was cited by JUDGE ELLIOTT in his opinion deciding this case in the District Court. This case is one of a line of cases involving the making of special assessments in cities

for various municipal purposes. See also *St. Louis Land Company vs Kansas City*, 241 U. S. 419. In this line of cases the courts hold that cities organized under general laws or special acts of the legislature may impose special assessments under general statutes authorizing the levying of assessments in proportion to benefits. In all such cases, it is held by the courts, some opportunity must be given the taxpayer to be heard as to the proportion of the benefits to be assessed against his property but the property owner is not entitled to a hearing upon the question of the determination whether the improvements shall be made for which the special assessment is levied.

In the case of *Central of Georgia Railway Company vs Wright*, 207 U. S. 127, the Supreme Court held (quoting from the syllabus): "Due process of law requires "that opportunity to be heard as to the validity of the tax "and the amount of the assessment be given to a taxpay- "er, who, without fraudulent intent and in the honest be- "lief that it is not taxable, withholds property from tax "returns, and this requirement is not satisfied where the "taxpayer is allowed to attack the assessment only for "fraud and corruption."

In *Londoner vs Denver*, 210 U. S. 373, the Court, passing upon a Colorado statute, says:

"In the assessment, apportionment and collection of "taxes upon property within their jurisdiction the Con- "stitution of the United States imposes few restrictions "upon the States. In the enforcement of such restric- "tion as the Constitution does impose this court has re- "garded substance and not form. But where the legis- "lature of a State, instead of fixing the tax itself, com- "mits to some subordinate body the duty of determin- "ing whether, in what amount, and upon whom it shall "be levied, and of making its assessment and apportion- "ment, due process of law requires that at some stage "of the proceedings before the tax becomes irrevocably "fixed, the taxpayer shall have an opportunity to be "heard, of which he must have notice, either personal, by "publication, or by a law fixing the time and place of the "hearing. *Hager vs Reclamation District*, 111 U. S. 701; "*Kentucky Railroad Tax Cases*, 115 U. S. 321; *Winona &* "*St. Peter Land Co. vs Minnesota*, 159 U. S. 526, 537;

"*Lent vs Tillson,* 140 U. S. 316; *Glidden vs Harrington,* "189 U. S. 255; *Hibben vs Smith,* 191 U. S. 310; *Security* "*Trust Co. vs. Lexington,* 203 U. S. 323; *Central of* "*Georgia vs Wright,* 207 U. S. 127. It must be remem- "bered that the law of Colorado denies the landowner "the right to object in the courts to the assessment, upon "the ground that the objections are cognizable only by "the boards of equalization.

"If it is enough that, under such circumstances, an op- "portunity is given to submit in writing all objections to "and complaints of the tax to the board, then there was a "hearing afforded in the case at bar. But we think that "something more than that, even in proceedings for tax- "ation, is required by due process of law. Many require- "ments essential in strictly judicial proceedings may be "dispensed with in proceedings of this nature. But even "here a hearing in its very essence demands that he who "is entitled to it shall have the right to support his alle- "gations by argument however brief, and, if need be, by "proof, however informal. *Pittsburg &c Railway Co. vs* "*Backus,* 154 U. S. 421, 426; *Fallbrook Irrigation District* "*vs Bradley,* 164 U. S. 112, 171, *et seq.* It is apparent "that such a hearing was denied to the plaintiffs in error. "The denial was by the city council, which, while acting "as a board of equalization, represents the state. *Ray-* "*mond vs Chicago Traction Co.,* 207 U. S. 20. The as- "sessment was therefore void, and the plaintiffs in error "were entitled to a decree discharging their lands from "a lien on account of it."

In *Turner vs Wade,* 254 U. S. 64, the Court held (quoting from the syllabus) as follows:

"The Georgia Tax Equalization Act (Laws, 1913, p. "123 §§ 6-7), empowers the Board of County Tax Assess- "ors to assess property for taxation and requires it to "notify the taxpayer of changes made in his returns; it "gives him, if dissatisfied, the right to demand an arbitra- "tion, and provides that a majority of three arbitrators, "one appointed by him, one by the Board and the third by "the two so selected, shall fix the assessment; but the "arbitrators must render their decision within ten days "from the naming of the arbitrator by the board, other- "wise the Board's decision—i. e., its assessment—stands

"affirmed; and no notice is afforded the taxpayer before "the making of the Board's assessment, nor any oppor- "tunity to be heard concerning it save that before the "arbitrators. Held, that an assessment so made by the "Board of County Tax Assessors, increasing the valua- "tion returned by a property owner, without notice or "hearing, was without due process of law, where his rem- "edy by arbitration proved abortive because the arbitra- "tors, though agreeing that the assessment was excessive, "could no two of them unite on a new assessment before "the ten day limitation expired."

We contend that an examination of the decisions of this Court pertinent to this case discloses that the following principles of law have been laid down:

First: That "due process of law" requires that at some stage of the proceedings the taxpayer must have an opportunity to appear and be heard *both as to the validity of the tax and as to its amount.*

Second: That the state legislature possesses the authority, by direct legislative enactment, to establish taxing districts and to fix the boundaries thereof without notice to the property owners included within such district.

Third: That where, by direct legislative enactment, certain territory has been formed into a taxing district the taxing authorities of such district may impose special assessments upon the property situated within the taxing district, pursuant to powers conferred by the legislature upon the taxing authorities, without first giving the property owner an opportunity to be heard as to the necessity for the making of the improvement, but in such cases the taxpayer must be given an opportunity to be heard as to the amount of the tax which he is to be compelled to pay.

Fourth: That in cases in which a taxing area or district is not formed by direct act of the legislature but is formed for the making of some public improvement by special assessments upon the property contained in the area or district, by local officers through authority delegated to them by the legislature to act upon petition of property owners, it is *absolutely essential to the validity of the proceedings that notice be given to the property owners whose interests are affected before the taxing area or dis-*

trict can be formed, the work done, and a tax imposed. The notice is not necessarily a personal one and may be by publication *but a notice of some character is essential.*

Analyzing all of the cases upon the subject, there cannot be found a single case in which a law containing the provisions of the South Dakota drainage law has been sustained by the courts. In every instance in which a law has been held valid there was a positive requirement that notice should be given to the taxpayer of a hearing upon the question of the making of the proposed improvements. In every instance the property affected has been definitely determined before the hearing and the property owner has been advised in some manner that his property is included within the area upon which it is intended that a tax or asssesment be imposed.

Search the law reports through; there cannot be found a case in which a mere general notice directed to "all persons affected" has been held to be a sufficient notice to a property owner that his property is to be included within an assessment area.

The inequity of a law like that of South Dakota is well illustrated by the results of the proceedings of the Board of County Commissioners of Minnehaha county in the case at bar. Under a notice to "all persons affected" it is sought to assess for the construction of the works in Drainage Ditch No. 1 and 2 not only the area formerly assessed for the construction of Drainage Ditch No. 1 and for the construction of Drainage Ditch No. 2, but to assess also property situated several miles from any of the work done in Drainage Ditch No. 1 and 2 and miles away from any of the land in the area assessed for the original construction of Drainage Ditch No. 1 or of Drainage Ditch No. 2. Property, that could not by any possibility be drained by the work done in Drainage Ditch No. 1 and 2 and that could not even remotely be benefited by that work, was included in the assessment area, and under the notice there could have been included just as well any other property situate within the limits of the 800 square miles comprising Minnehaha county.

If the County Commissioners of Minnehaha county had been required by the South Dakota drainage law to obtain, in the first instance, a survey and plat of the pro-

posed drainage area, and then to notify, either personally or by mail, publication, or posting, the property owners interested in that area, their proceedings might have had a semblance of legality, but under the South Dakota statute no such procedure is required. The County Commissioners have before them the names of the property owners through whose lands the drainage ditch passes but neither the Board of County Commissioners nor any one else has the slightest idea of what lands will be assessed for the cost of the construction of the drainage ditch. The only notice that is given to anyone is the general notice to "all persons affected." After the drainage works are completed, then for the first time a survey is made for the purpose of ascertaining what lands are "affected" and shall be assessed. The County Commissioners fix the proportion of benefits and publish the notice which, for the first time, informs the property owner that his land is liable for the assessment. It is then too late to lock the barn door. The horse has already been stolen. The drainage project has been constructed, the cost incurred, and all that is left for the property owner to do is to pay his assessment and "look pleasant." We reiterate, that never has a law of this character been sustained by this Court. All decisions of this Court, cited in support of the constitutionality of the South Dakota statute, can be easily distinguished as they are all of them based upon facts and principles of law which are not found in this case.

The bill in this case attacked directly the constitutionality of the South Dakota Drainage Statute. In the District Court the District judge upheld the constitutionality of the statute but granted an injunction upon other grounds (*Chicago, Rock Island & Pacific Railway Co. vs Risty*, 282 Fed. 364). In the Circuit Court of Appeals JUDGE KENYON, in delivering the opinion of the Court, expressly avoided passing upon the constitutional questions involved and while he expressly admitted that these questions were very grave ones, he held that their determination was not necessary to the decision of the case in that court and affirmed on other grounds the decision of the District Court.

Upon this appeal in this court, the constitutionality of the South Dakota Drainage Statute is again brought

before the court by the averments of the bill and answers and by the evidence introduced upon the trial in the District Court and preserved in the record in this Court. The position taken by the Plaintiff and Appellant is, that the South Dakota Drainage Law is in violation of the provisions of the Fourteenth Amendment to the Constitution and while, as will be discussed in a later portion of our argument, we contend that the proceedings taken by the Board of County Commissioners of Minnehaha County were so irregular as to render them invalid even if the statute were constitutional, we now submit, that on account of the unconstitutional provisions of the South Dakota Drainage Law the Board of County Commissioners of Minnehaha County possessed no authority to make assessments against the property of Appellee for the purpose of defraying the costs of the construction of Drainage Ditch No. 1 and 2.

In concluding our discussion upon this branch of this case we submit that the South Dakota drainage statute is unconstitutional in that no notice to property owners is required before a drainage assessment area is established or the work constructed and consequently the statute is unconstitutional as authorizing the taking of property without due process of law, contrary to the fourteenth amendment to the federal constitution.

II.

THE SOUTH DAKOTA DRAINAGE LAW IS IN VIOLATION OF SECTIONS 2 AND 13 OF ARTICLE VI OF THE SOUTH DAKOTA STATE CONSTITUTION AND IS THEREFORE UNCONSTITUTIONAL.

We now come to the question of the constitutionality of the South Dakota drainage law under the provisions of the South Dakota State Constitution. Section 2 of Article VI of the South Dakota Constitution provides as follows:

"§ 2. No person shall be deprived of life, liberty or "property without due process of law."

Section 13 of Article VI of the South Dakota Constitution provides as follows:

"§ 13. Private property shall not be taken for public "use, or damaged without compensation * * * * *"

It will thus be seen that the South Dakota state constitution contains not only the due process of law clause contained in the fourteenth amendment to the federal constitution but also the just compensation clause contained in the fifth amendment to the federal constitution, thus making the provisions applicable to the state which by the fifth amendment are made applicable to the federal government.

The South Dakota drainage statute has a number of times been before the South Dakota supreme court for construction in various of its phases but the question as to the constitutionality of the statute, by reason of its failure to provide a notice to property owners before the assessment area is determined, has never been presented to the South Dakota supreme court or passed upon by that court. Shortly prior to the institution of the case at bar, a suit was commenced in the circuit court of Minnehaha county, South Dakota, by one Oluf O. Gilseth against the Board of County Commissioners of Minnehaha county and other persons, to restrain certain acts with relation to the making of an apportionment of benefits for the construction of the drainage works in controversy in the case at bar. Gilseth, the plaintiff in that case, was a property owner residing upon the flats north of the city of Sioux Falls upon whose land the County Commissioners were attempting to make an assessment. The South Dakota supreme court held that Gilseth was estopped by his actions with respect to the construction of the drainage works from objecting to an assessment to pay for their cost of construction, and the decision appears as *Gilseth vs Risty*, 46 S. D. 374. In the opinion of the majority of the Court, the Court says: "We do not understand that "appellant questions the constitutionality of the law un- "der which the said project was carried out." The Court thereupon proceeds to determine the case under the assumption that the law is constitutional and that the plaintiff, Gilseth, makes no attack upon it. In the dissenting opinion filed by one of the Judges of the Supreme Court of South Dakota in *Gilseth vs Risty*, the question of the constitutionality of the statute is discussed but the opinion

of the majority of the Court decides the case under the express reservation that the question of constitutionality is not involved.

The Supreme Court of South Dakota, in the case of *Evans vs Fall River County*, 9 S. D. 130, stated the law in that jurisdiction in the following language:

"Notice to the taxpayer is a jurisdictional matter, "and his right to be heard in opposition to an assessment, "or to the amount thereof, is vitally essential to the valid- "ity of every assessment. *Black, Tax Titles*, 488; 2 "*Blackw. Tax Titles*, 953; *Cooley, Tax'n*, 227; *County of* "*Santa Clara vs Southern Pac. R. Co.*, 18 Fed. 385; *Pow-* "*ers vs. Larrabee (N. D.)*, 49 N. W. 724; *Bank vs. Maher*, "9 Fed. 884."

From the foregoing citation it will be seen that the Supreme Court of South Dakota recognizes the doctrine laid down by the Supreme Court of the United States to the effect that in a special assessment proceeding the taxpayer must have the right, at some time or other, and in some manner or other, to be heard both as to the validity and as to the amount of the assessment.

The same argument which we have made relating to the unconstitutionality of the South Dakota drainage statute under the fourteenth amendment to the federal constitution applies with equal force to the statute considered in the light of the provisions of the South Dakota constitution.

We therefore contend that the South Dakota drainage law is unconstitutional under the constitution of that State for the reason that no notice is given the property owner of the proceedings precedent to the determination of the boundaries of the assessment area.

Counsel for Appellants argue that the proceedings had in the case at bar are valid for the reason that, as a matter of fact, the drainage notice did contain a description of the property sufficient to give notice to each property owner whose lands were affected. We do not by any means concede that the notice given was sufficient to apprise property owners that their lands were to be subject to assessment for the payment of the cost of the construction of the drainage project, but even if the Board of County Commissioners of Minnehaha county had pub-

lished a notice sufficient for that purpose it would not have helped the situation. The statute does not require any such notice to be published and is consequently unconstitutional. Validity cannot be injected into an unconstitutional and void statute by taking under it the proceedings which would have to be taken under a constitutional and valid status. The law being unconstitutional, all proceedings under it are invalid *ab initio*.

III.

THE LEGISLATURE OF SOUTH DAKOTA HAS NEVER EXERCISED THE AUTHORITY GRANTED TO IT BY SECTION 6 OF ARTICLE XXI OF THE SOUTH DAKOTA CONSTITUTION PROVIDING FOR THE ORGANIZATION OF DRAINAGE DISTRICTS.

To the proper determination of this case, there is necessary a consideration of just what of the powers granted to it by the South Dakota constitution the legislature of that state has attempted to exercise by the enactment of the South Dakota drainage statute. This involves an analysis of the exact phraseology of the constitutional provision under which the legislature obtained its power to act. Section 6 of Article XXI of the constitution constitutes that authority and is as follows:

"§ 6. The drainage of agricultural lands is hereby "declared to be a public purpose and the legislature may "provide therefor, and may provide for the organization "of drainage districts for the drainage of lands for any "public use, and may vest the corporate authorities there-"of, and the corporate authorities of counties, townships "and municipalities, with power to construct levees, drains "and ditches, and to keep in repair all drains, ditches and "levees heretofore constructed under the laws of this "state, by special assessments upon the property bene-"fited thereby, according to benefits received."

The first clause of the foregoing section declares that the drainage of agricultural lands is a public purpose, and gives the legislature power to "provide therefor." This clause is complete in itself and to determine its meaning and intent requires no aid from the remainder of the section.

The section then goes further and gives the legislature authority to "provide for the organization of drain-"age districts for the drainage of lands for any public "use." This is a power conferred upon the legislature distinct and in addition to that contained in the first clause of the section. It gives the legislature authority to establish drainage districts for the purpose, not only of carrying into effect the power to drain agricultural lands, but for the purpose of carrying on any drainage project for "any public use."

As the section stands, when the first and second clauses are considered together, it appears that three things are provided for: (a) the drainage of agricultural lands is made a public purpose, (b) the legislature is given power to provide for the drainage of agricultural lands, and (c) the legislature is given power to provide for the organization of drainage districts for the drainage of land for any public use.

The constitutional section then continues giving to the legislature authority, (a) to vest the corporate authorities of drainage districts with power to construct levees, drains and ditches and keep in repair all drains, ditches and levees theretofore constructed under the laws of the state, by special assessments upon property benefited thereby, according to benefits received, and (b) to vest the corporate authorities of counties, townships, and municipalities with power to construct levees, drains and ditches and keep in repair all drains, ditches, and levees theretofore constructed under the laws of the state, by special assessments upon the property benefited thereby, according to the benefits received.

Throughout the entire section there appears a clear intent to authorize the legislature to proceed in matters respecting drainage of lands in either of two ways, (a) by the organization of drainage districts with corporate authorities, and (b) by empowering the corporate authorities of counties, townships and municipalities with power to enter upon and carry out drainage projects. It is not made obligatory upon the legislature to follow either system for the construction of drainage. The constitution gives the legislature the option to carry on drainage work by drainage districts organized as separate en-

tities, or to carry on the work through the regularly constituted authorities of counties, townships, and municipalities. The legislature of South Dakota, acting under the constitutional option given it by Section 6 of Article XXI of the constitution, has declined to provide for the organization of drainage districts as separate corporate entities, and has provided for the doing of all drainage work through the corporate authorities of the various counties, to-wit, the Board of County Commissioners, county auditor, county treasurer, and other county officers.

It follows that in the case at bar there was not and could not under the law have been formed any drainage districts. The drainage projects, known as Drainage Ditch No. 1, and Drainage Ditch No. 2, and Drainage Ditch No. 1 and 2, were all conceived and carried out by the county authorities of Minnehaha county under the constitutional provision giving the legislature the power to vest in the county authorities the power to construct levees, drains, ditches, etc. The legislature never attempted to exercise the power given it by the constitution to organize drainage districts, and the application of the term "district" to the assessment area of Drainage Ditch No. 1, Drainage Ditch No. 2, or Drainage Ditch No. 1 and 2 is a misnomer. That term is reserved by the South Dakota constitution for an entirely different sort of organization and should not be used in connection with a drainage project carried on by the Board of County Commissioners under the South Dakota statute.

The situation with respect to this matter was pointed out by Judge Elliott in his opinion upon the trial of this case in the District Court. *Chicago, Rock Island & Pacific Railway Company vs Risty,* 282 Fed. 364. In this opinion, Judge Elliott says, (p. 368): "Pursuant to this "provision of the constitution, the legislature of the state "has provided for the drainage of agricultural lands: "*but nowhere is there any statutory enactment under "which drainage districts may be formed for the drain-"age of lands 'for any public use.'*"

A further examination of the particular wording of Section 6 of Article XXI of the South Dakota constitution discloses the important bearing which the failure of

the legislature to exercise the authority of establishing drainage districts has upon the decision of the case at bar. The wording of the constitutional provision is that the legislature "may provide for the organization of drain-"age districts for the drainage of lands for any public use," and may vest "the corporate authorities thereof," etc. Eliminate the quoted words (which are the only ones in the section referring to drainage districts) from the section and the result would be that the section would read, "The drainage of agricultural lands is hereby de-"clared to be a public purpose and the legislature may "provide therefor, and may vest the corporate authori-"ties of counties, townships and municipalities with pow-"er to construct levees, drains, and ditches, etc."

In other words, the South Dakota legislature is given authority to carry on drainage projects either through the formation of drainage districts as corporate entities, or through the municipal authorities of the counties, townships, and municipalities, but while drainage "for "any public use" may be constructed through corporate drainage districts, drainage of lands for agricultural purposes only may also be carried on by the county, townships and other municipal authorities. The constitution nowhere gives the legislature power to provide that drainage for "any public use" other than the drainage of agricultural lands may be constructed by the county, township, or other municipal authorities. Drainage for any other public purpose must be constructed by districts specially organized therefor.

It consequently follows that the legislature of South Dakota cannot, under the provisions of the state constitution, authorize drainage projects, for other than agricultural lands, to be conducted by the county, township, or other municipal authorities. Such authorities may construct drainage projects for the drainage of agricultural lands, but for any other public purposes the works must be constructed by the corporate authorities of drainage districts established for that purpose.

While the legislature of South Dakota had the right, under the state constitution, to enact a law authorizing the Board of County Commissioners of Minnehaha county to construct a drainage project for the drainage of agri-

cultural lands, it could not, under the constitution, authorize the Board of County Commissioners to carry on any drainage project for any public use other than the drainage of agricultural lands.

It follows, therefore, that if Drainage Ditch No. 1 and 2 was initiated by the Board of County Commissioners of Minnehaha county for a purpose other than the drainage of agricultural lands, the Board exceeded their powers in constructing the dams, ditches, spillway, and other works in Drainage Ditch No. 1 and 2, for which Appellee is now asked to pay a proportionate part. The question whether Drainage Ditch No. 1 and 2 was a project for the drainage of agricultural lands or for some other purpose we will discuss in a separate section of this brief.

IV.

DRAINAGE DITCH NO. 1 AND 2 WAS NOT A PROJECT FOR THE DRAINAGE OF AGRICULTURAL LANDS, AND THE ACTION OF THE BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY IN ENTERING UPON THE PROJECT AND IN CARRYING IT ON WAS *ULTRA VIRES*.

We now come to the consideration of the question as to whether Drainage Ditch No. 1 and 2 was a project for the drainage of agricultural lands or for the carrying out of some other purpose. There are at this time before this court pending appeals in six cases involving Drainage Ditch No. 1 and 2, and there is a divergence of views of the Appellees in various of the six cases as to the status of the drainage proposition. In some of the cases, the Appellees contend that Drainage Ditch No. 1 and 2 was simply a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and that the work was initiated and carried on by the Board of County Commissioners of Minnehaha county as a project for the repairing of Drainage Ditch No. 1 and of Drainage Ditch No. 2. In the case at bar, the position which we take is that Drainage Ditch No. 1 and 2 must be considered as an independent project entered upon by the Board of County Commissioners and that it is not a mere project for the re-

pair of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and is not in any manner controlled by the original proceedings for the construction of the old ditches. We contend that Drainage Ditch No. 1 and 2 must be considered as if it were an entirely new proposition entered upon after the spillway at the outlet of Drainage Ditch No. 1 had been washed out in the spring of 1916.

In the bill in this suit, it is alleged that the Board of County Commissioners of Minnehaha county has spent a sum in excess of $255,000 in the construction of a spillway, dams, and retaining gates, "designed not for the "purpose of drainage of agricultural lands, but solely "for the purpose of controlling and retarding the flow "of water, through the outlet of said Drainage Ditches "No. 1 and No. 2 into the Big Sioux river for the pur-"pose of preventing a change in the channel of said river "and of preventing the drainage of the gravel bed through "which the said city of Sioux Falls obtains its water "supply." It is further alleged that less than five per cent of such money has been expended for any purpose legitimately connected with the construction and maintenance of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The bill further sets up the alleged proceedings for the organization of Drainage Ditch No. 1 and 2.

The answer sets up the organization of Drainage Ditch No. 1 and 2 as a separate organization from Drainage Ditch No. 1 and Drainage Ditch No. 2, and the theory of Appellants is that Drainage Ditch No. 1 and 2 was a separate and independent organization and not a mere continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2, and that its formation was compelled for the purpose of saving the water supply of the city of Sioux Falls, and preventing the change of the channel of the Big Sioux river, and the imperiling of the interests of various property owners.

The position of Appellants throughout this case has been that Drainage Ditch No. 1 and 2 was a new and separate organization. They have so pleaded, and with their allegations in this regard we have no contention to make. The Appellee in this case is satisfied to rest this proposition upon the allegations of the answer and to concede that Drainage Ditch No. 1 and 2 was a new or-

ganization and was entirely independent of the original ditches. As we have said, in others of the six cases tried at the same time and upon the same record as this case, the plaintiffs (Appellees in this court) contested the claim of the defendants and intervenors (Appellants in this court) that Drainage Ditch No. 1 and 2 was a new and independent proposition and contended that all of the work done by the Board of County Commissioners was done merely as a continuation of the work upon the original ditches, Drainage Ditch No. 1 and Drainage Ditch No. 2. JUDGE ELLIOTT, in his opinion filed in the District Court, arrived at the conclusion that Drainage Ditch No. 1 and 2 was not a new and independent organization but was simply a continuation of the old original ditches. *Chicago, Rock Island & Pacific Railway vs Risty*, 282 Fed. 364 (p. 374 *et seq*).

With due respect to the opinion of the learned District Judge (who evidently felt inclined to hold so as not to preclude the holders of the drainage ditch warrants from a right to recover the amount of their investments from the property owners within the original assessment area of the Drainage Ditch No. 1 and of Drainage Ditch No. 2), we respectfully submit, that under the allegations of the bill and answer in this case, and under the evidence contained in the record, Drainage Ditch No. 1 and 2 must be deemed to be a new and independent organization and must stand or fall as such. If it possesses no life of its own, life cannot be injected into it by treating it as a continuation of the old original ditch organizations.

It appears from the evidence in this case that after the outlet of Drainage Ditch No. 1 had been washed out in the spring of 1916, various plans were proposed for the controlling of the water so as to prevent the formation of a new river channel and the draining of the gravel bed, from which the city of Sioux Falls obtained its water supply. No changes in Drainage Ditch No. 1 and Drainage Ditch No. 2 were required for the purpose of draining agricultural lands in the flats north of the city of Sioux Falls. The two ditches were working beautifully, so far as that purpose was concerned. They formed a perfect, complete and satisfactory system for the drainage of the flats. The property owners in the

flats could not have asked for any drainage system more complete. The trouble was, that instead of draining too little, the ditches drained too much, and were too efficient in their operation. No change in them was required for any purpose connected with the drainage of agricultural lands. The only people interested were those who objected to the formation of a new channel for the Big Sioux river and who were interested in maintaining a water supply for the city of Sioux Falls. The change in the course of the river, if made, would have operated to destroy various industries dependent upon the water power at the dams south of the falls. It would also have prevented the flow of the water through the city limits, and would have forced the city of Sioux Falls to seek some other municipal water supply.

The Board of County Commissioners, after various plans had been considered and for one reason after another abandoned, finally formed a new organization under the name of Drainage Ditch No. 1 and 2, and went ahead and expended upwards of $250,000 in the construction of a spillway, retaining walls, retaining dams, ditches, etc. The greater part of the money was invested in a spillway, dam and retaining walls which were purposely intended to retard, rather than to accelerate the flow of the surface water which collected upon the flats north of the city of Sioux Falls, and which consequently were intended to hinder rather than to facilitate the drainage of the flats.

After $255,000 and over had been expended upon the spillway and other water retaining works, the Board of County Commissioners proceeded to make an apportionment of benefits upon the lands "affected" by the improvement. In the assessment area, the Board of County Commissioners included not only the territory which had been included in the assessment area of the original ditches, Drainage Ditch No. 1 and Drainage Ditch No. 2, but also included all of the lands and lots within a considerable distance on either side of the Big Sioux river between the south boundary of the property in the assessment areas of the original ditches, along the channel of the Big Sioux river for a distance of some nine miles, along where the river runs west and south of

the city of Sioux Falls and through the city, and up to a point a short distance north of Sioux Falls. The ostensible reason for the inclusion of all this additional territory was the alleged fact that the property along the river was subject to floods at the time of freshets which would be relieved by the construction of the spillway and other water retaining works. Upon the trial, it was shown that with the exception of a small tract of territory immediately south of the original ditch assessment areas, the remainder of the lands, for a space of eight or nine miles along the channel of the Big Sioux river, had never suffered from flood waters, excepting in the spring of 1881, and that the occasion for the flood in that year was not the collection of water upon the flats north of the city of Sioux Falls, but the forming of an ice gorge at a point in the river in the southeast portion of the city. There was consequently a total lack of any proof in the record that the territory, along the channel of the river and through the city of Sioux Falls attempted to be included in the assessemnt area, was in any manner affected, beneficially or otherwise, by the construction of the spillway and other water retaining works.

In addition, the Board of County Commissioners attempted to proportion "benefits" to the City of Sioux Falls, the Northern States Power Company (owners of the waterpower on the Big Sioux river above the falls), and upon four railroad companies (one of which was Appellee) having railroad tracks and station grounds situated within the attempted assessment area. In the case of Appellee, and of one of the other railroad companies sought to be assessed, the railroad owned right of way and trackage both in the assessment areas of the original ditches and in the additional territory attempted to be included within the assessment area of Drainage Ditch No. 1 and 2. The other two railroads owned trackage and property only in the new territory and had no mileage or station grounds in the original assessment areas. In the decrees entered in the various railroad cases, the District Court enjoined the assessment of the railroad properties not included in the original assessment areas but reserved, without prejudice, the deter-

mination of the question whether Appellee and the other railroad companies having land both in the original assessment areas and in the new assessment area should be held liable for an assessment upon its property in the original assessment area.

The question therefore arises whether, under the record in this case, the Board of County Commissioners of Minnehaha county possesses authority to make any apportionment of benefits whatsoever, or any assessment upon any property whatsoever, for the cost of the construction of the works in Drainage Ditch No. 1 and 2. Our contention in this regard is as follows:

It is alleged by the defendants and Appellants in their answer, and Appellee admits it to be a fact, that Drainage Ditch No. 1 and 2 was a new and independent proposition and not a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and cannot be considered as a proposition for the repair of the original ditches. It is a project which must stand or fall upon its own footing.

Under the evidence in this case, Drainage Ditch No. 1 and 2 was not a project for the drainage of agricultural lands but was a project for another "public use," to-wit, the preservation of the water flowage in the channel of the Big Sioux river and of the supply of water in the gravel bed from which the city of Sioux Falls obtains its water supply. Neither of these propositions involves the drainage of agricultural lands. Drainage Ditch No. 1 and Drainage Ditch No. 2 had completely accomplished the object of draining the flats north of the city of Sioux Falls. If those drainage works were damaging other property interests, the remedy for the persons interested was to have the ditches abated as nuisances. Instead of pursuing this course, the Board of County Commissioners of Minnehaha county entered upon the construction of an elaborate system of water retaining works by which the water, which was collected from the flats into Drainage Ditch No. 1 and Drainage Ditch No. 2, could be retained until it could be passed off gradually into the Big Sioux river. To have abated Drainage Ditch No. 1 and Drainage Ditch No. 2 as nuisances, would have been to permit

the water, accumlating upon the flats, to remain there until it could flow off through its natural channel around the bends in the Big Sioux river, the same as it did before Drainage Ditch No. 1 and Drainage Ditch No. 2 were constructed. Instead, however, of doing this, the Board of County Commissioners proceeded to construct a new water retaining system by which the water could be retained upon the flats until it could gradually be drawn off, partly through the natural channel of the river and partly through a restricted passageway formed by the spillway and its attendant retaining walls and dams. In other words, the Board of County Commissioners proceeded to spend $250,000 and over for the purpose of accomplishing the same object that could have been accomplished by damming up the original ditches and leaving the flats in the same condition that they were before the original ditches were constructed. While some evidence was introduced, tending to show that a portion of the water collecting upon the flats passed off through the spillway, it remained in the evidence almost uncontradicted that the situation in the flats above the city of Sioux Falls is as bad as it was before any drainage ditches were constructed.

From all of the evidence in the record in this case, it would appear that the construction of the spillway and other works, under the organization of Drainage Ditch No. 1 and 2, was not for the purpose of draining agricultural lands but was for an entirely different purpose. This is the conclusion to which JUDGE ELLIOTT came in his opinion in the District Court, and upon this subject JUDGE ELLIOTT says, *Chicago, Rock Island and Pacific Railway Company vs. Risty,* 282 Fed. 364 (p. 378):

"There is another and further suggestion: I am of "the opinion that this reconstruction of the old spillway "without change of location, the repair of the break from "the river into the ditch, the cleaning of the ditch, the "change of the headgates where the flood waters are "taken from the river, everything that was done under "this pretended establishment of a new ditch, could not "have been viewed in the same light or as serving the "same purpose as the construction of the original ditches,

"because the thing that caused the board of commis-
"sioners to take any action with reference to the condi-
"tion that then existed was the danger that existed be-
"cause of the conduct of the water down through these
"two drainage ditches to and through this spillway. The
"danger that was threatened was not that the agricultural
"lands would not be drained, but that immense damage
"was threatened, that the course of the river was to be
"diverted to this cut-off, that great areas of land were
"threatened to be cut away by this river 100 feet deep,
"and that the water supply of the city was threatened
"to be taken away because of this drainage ditch and
"this imperfect spillway, because the water was to be
"taken from the river and all of the benefits of the river
"for several miles, through and around the city of Sioux
"Falls, would be destroyed. The power of the Northern
"States Power Company would be destroyed, by taking
"the water from the river. If it had not been for those
"conditions, for these threatened dangers, no action would
"have been taken; the ditches would have continued to
"function as they had functioned before. If the spill-
"way had been properly constructed originally, and if it
"had not proven inadequate, there would have been no
"cause for any action by the board in the year 1916.
"Every consideration that impelled action by the board
"was some phase of the threatened danger by reason
"of the inadequate and imperfect construction of these
"two ditches. Neither of these considerations that in-
"fluenced the action of the board *had anything to do with*
"draining agricultural lands."

As has been shown, the legislature of South Dakota has never passed an act, putting into effect the authority vested by the constitution in the legislature to create drainage districts. As has also been shown, while drainage of agricultural lands can be carried on by county, township, and other municipal authorities, drainage for other "public uses" can only be constructed by drainage districts through their corporate authorities. It appearing from the record in this case that the work done under the organization of Drainage Ditch No. 1 and 2 was not for the purpose of agricultural lands but for other "public uses," it follows that the Board of County

Commissioners of Minnehaha county exceeded its authority in attempting to organize Drainage Ditch No. 1 and 2 and to construct the spillway and attendant works. Upon this proposition, JUDGE ELLIOTT, in his opinion, says:

"It may be said that to remedy these wrongs consti-
"tuted a public use, as referred to in the constitution of
"the state of South Dakota. Admitting that that is true,
"we are confronted with the proposition that there has
"been no legislation, conforming with the provisions of
"the constitution, authorizing the legislature to provide
"for the establishment of drainage districts and in the
"naming of officers with the powers therein referred to.
"If, therefore, any claim were made that the commis-
"sioners were acting under this authority, independent
"of the provision of law with reference to the drainage
"of agricultural lands, the answer is that the provision
"of the constitution is not selfexecuting, and that no leg-
"islation has been provided carrying this provision of
"the constitution into effect."

We therefore submit, that as the construction of the spillway and other attendant works was not a project for the drainage of agricultural lands, and as drainage for public uses other than the drainage of agricultural lands can, in South Dakota, only be carried on by the corporate authorities of drainage districts, and as the legislature of South Dakota has never authorized the organization of drainage districts with corporate authorities, all of the acts of the Board of County Commissioners of Minnehaha county, in attempting to organize Drainage Ditch No. 1 and 2, and in constructing the spillway and attendant works under such organization, were *ultra vires*, and that no apportionment of benefits or assessment for the cost of such construction can be made upon the property of Appellee.

V.

THE SOUTH DAKOTA DRAINAGE LAW IS UNCONSTITUTIONAL, SO FAR AS RESPECTS ASSESSMENTS OF RAILROAD PROPERTY, IN THAT IT PROVIDES FOR THE GIVING OF NO NOTICE WHATEVER OF THE APPORTIONMENT AND

EQUALIZATION OF BENEFITS TO RAILROAD COMPANIES.

In the preceding discussion of the South Dakota drainage law, we have considered the subject of the notice required by the statute to be given to property owners in general. We now desire to call the attention of the court to the provisions (or want of provisions) in the statute, relating to the notice to be given to railroad companies.

So far as concerns the statutory provisions relating to the notice to be given before a drainage project is entered upon by the Board of County Commissioners under the South Dakota drainage law, there is no difference as respects railroads and other property owners. The only notice, as has been seen, is a general notice to all persons "affected" by the proposed drainage project.

When we come to the matter of the notice given for the equalization of benefits, a singular situation is presented by the provisions of the statute in, that while the law provides for the publication of a notice to the owners of land, there is no provision whatever for the publication of any notice to railroad companies.

The provisions respecting the notice to be given of the equalization of proportion of benefits is found in Section 8463, South Dakota Revised Code, 1919. This section was evidently originally drafted for the purpose of providing a method for the equalization of assessments upon agricultural lands. The method, provided by the statute, for arriving at the assessment and equalization of benefits, is to take some "particular tract as a unit" and then with this tract as a measuring stick to determine, in number of units, the benefits received by the remaining tracts of land. This system is one which is in its nature applicable to agricultural lands, but which cannot well be applied to other classes of property, such as railroads and the property of municipalities. In the case of railroads, the taking of a particular tract of land as the unit, or measuring stick cannot be made to work out successfully unless the taxing authorities are content to assess railroads merely by virtue of the railroad ownership of the tracts of land comprised in the right of way within the assessment area. In other words, the

only way in which the proportion of benefits to railroad property could be determined, under the system provided by the statute, would be to consider merely the area of the right of way and proportion benefits to it the same as to the other agricultural land within the assessment area.

Evidently the legislature, in enacting the South Dakota drainage law, was not satisfied to have railroad companies and municipal organizations pay assessments for the construction of drainage works upon the same basis as the owners of agricultural lands, and in enacting Section 8463, South Dakota Revised Code, 1919, after providing the method for the assessment of the proportion of benefits upon lands by selecting some particular tract as a unit, there was added to the Section (something in the nature of an afterthought) the clause, "the pro- "portion of benefits which any county, city, town or "township may obtain by the construction of such drain- "age to highways or otherwise, and *the benefits which "any railroad company may obtain for its property by "such construction,* shall be fixed and equalized together "with the proportion of benefits to tracts of land." No method of arriving at the assessment and equalization is provided by the statute. The "particular tract as a unit" system is selfevidently inapplicable in such cases but the legislature has provided nothing to take its place. The law gives the Board of County Commissioners the naked power to fix and equalize the proportion of benefits to counties, cities, towns, townships, and railroad companies, but provides no method upon which the assessment and equalization can be based.

The notice of equalization of proportion of benefits, provided by Section 8463, "shall state the route and "width of the drainage established, a description of each "tract of land affected by the proposed drainage and the "names of the owners of the several tracts of land as "appears from the records of the office of the Register of "Deeds, at the date of the filing of the petition, and the "proportion of benefits fixed for each tract of property, "taking any particular tract as a unit, and shall notify "all such owners to show cause why the proportion of "benefits shall not be fixed as stated." This is a notice

directed solely to the owners of tracts of land within the assessment area. It does not purport to be a notice to a county, city, town, township, or railroad company respecting the assessment or the equalization of proportion of benefits upon the property belonging to any of such organizations. The statute authorizes the Board of County Commissioners to assess the "proportion of benefits" which any county, city, town or township may obtain by the construction of drainage to highways or otherwise, but does not provide for the giving of any notice to the municipality affected. With respect to railroad companies, the statute authorizes the Board of County Commissioners to "fix and equalize" the "benefits", but seems to make a distinction between railroad property and other classes of property by using the words "proportion of benefits" with respect to other property, but the term "benefits" with respect to railroad property. This would seem to indicate that it was not the intent of the legislature that railroad companies should be assessed in the same proportionate manner as are agricultural lands, or as are counties, cities, towns or townships.

The fact, however, remains that the legislature of South Dakota has made no provision whatever for the giving of notice to railroad companies, cities, towns, or townships, of the assessment or equalization of benefits supposed to be derived from the construction of the drainage works. It consequently follows that as far as railroad companies, counties, cities, towns, and townships are concerned, the statute provides for no notice whatever, at any stage of the proceeding, of the assessment or of the tax. Even if the South Dakota drainage statute should be held valid as far as respect the matter of notice to the owners of agricultural lands, it is clearly unconstitutional as to railroads and municipalities by reason of its failure to provide for any notice whatever at any stage of the proceedings. It clearly comes within the inhibition of the Fourteenth Amendment and within the doctrine laid down by the Supreme Court in numerous cases.

Central of Georgia Railway Company vs Wright, 207 U. S. 127,

Londoner vs Denver, 210 U. S. 373,
Soliah vs Heskin, 222 U. S. 522,
Turner vs Wade, 254 U. S. 64

The South Dakota drainage statute having failed to provide for the giving of any notice, at any stage of the proceedings prior to the time the tax becomes absolute, to railroad companies or municipalities, any assessment or tax imposed upon each corporation or municipality under the statute is without due process of law and void.

VI.

THE ATTEMPTED ASSESSMENT UPON THE PROPERTY OF APPELLEE WAS ARBITRARY, UNJUST, AND ILLEGAL, AND CONSTITUTES A DISCRIMINATION SO PALPABLE AND ARBITRARY AS TO AMOUNT TO A DENIAL OF THE EQUAL PROTECTION OF THE LAW.

Under the proposed assessment of benefits, out of a total of 32,549.62 units there were assessed against Appellee 1681 units, upon which the assessment of Appellee would be in excess of $15,000. The methods used by the Board of County Commissioners in arriving at these figures is disclosed by the testimony of H. Rettinghouse, a civil engineer employed by the Board of County Commissioners to make a survey of the assessment area, and who made the computations contained in the assessment of benefits adopted by the Board. Mr. Rettinghouse was called by Appellants as a witness and upon the trial testified (Record pp. 350-3951), as follows:

"We used this unit selected as one and compared "the other real estate with it. It was decided by the "Board that the acre in question was worth one hundred "dollars prior to the improvements and that it was "worth one hundred twenty-five dollars subsequent to the "improvements. Therefore the actual value of benefit "to the unit selected was twenty-five dollars. All the "agricultural land was assessed in relation to this unit. "Many of the lands were only 30 or 40 per cent depend-"ing upon the amount of benefit derived, as compared "with this unit, being one hundred per cent. There were "other lands that were as high as three hundred and fifty

"per cent of this unit. I am familiar with the cost of "construction and upkeep of highways. In arriving at "the benefit to the highways within this drainage area "we estimated the benefit in this way. There is a certain "amount of annual maintenance necessary for any road, "and there is more than that amount under flood con- "ditions. That is to say, a road that is periodically "flooded as against a road that never is flooded. The "difference in the estimated cost of maintenance was "capitalized, or represented the interest on a certain "sum of money, and we consider the capitalized portion "as a real benefit. We then, after obtaining that re- "sult after making a great many calculations, taking "into consideration the various locations, some of them "benefitted more than others.

"We divided the amount arrived at by the value of "the unit of $25, thereby obtaining the number of units "as a proportional benefit for these roads. The sum "we divided by the unit represented the capitalized value "to that part of the highway; we applied the same "method to the streets and highways of the City of "Sioux Falls. We did not apply the acreage basis to "the city property, excepting possibly the grounds where "the waterworks are located. In applying the benefit "to the unit and what the Board took into consideration "as elements of benefit to the Milwaukee Railway Com- "pany, we took into consideration the fact that in the "first place there were practically three elements. First "was the right-of-way on the acreage basis, which was "estimated in proportion to the adjacent lands. Second, "that it was possible to shorten or abandon certain "bridges. In order to determine the benefits derived "therefrom is simply a mathematical proposition. It "costs a certain amount of money each year in order "to maintain a bridge, whether it is a pile bridge or a "steel bridge. We know how long these structures will "last. We figure the cost of a bridge and divide it by "the number of years in order to get the amount that "is necessary to be expended each year for replace- "ment. Taking the amount in dollars and cents multi- "plied by the length of the bridge and divide that and "capitalize that at 7 per cent, which is the usual rate

"of interest, and that determines the amount of benefit. "This is the second element. The third element is "the fact that by reason of the flooding of the territory "in which railroads are located, washouts often occur. "We obtained data and from my personal knowledge and "experience I have a very good idea what it costs to re- "pair washouts periodically appearing and we estimated "as close as possible how much it would amount to every "year and capitalized that amount again.

"Again as an additional element, a road-bed is solid- "ified or made stronger by not being subject to floods. "A road-bed that is constantly or for great lengths of "time subjected to submersion is certainly weakened, "and again, so far as humanly possible, we figured the "amount of benefits in dollars and cents and after get- "ting all of these results or capitalized amounts, we di "vided that by twenty-five as our measure and determined "the number of units of benefit. That system and general "method and plan was used to determine the amount "of benefits that each railroad received from these "separate elements."

The statement of Mr. Rettinghouse, the engineer who made the assessment of benefits for the Board of County Commissioners of Minnehaha county, is upon its face sufficient to demonstrate the fact that in arriving at the proportion of benefits to be assessed against Appellee, the other railroad companies, and the city of Sioux Falls, the Board used as a basis for arriving at the assessment a method so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. The assessment was clearly upon a fanciful view of benefits to be derived by the railroad companies from the drainage project. The basis used was not authorized by any provision of the South Dakota drainage law but was evolved from the inner consciousness of the County Commissioners of Minnehaha county and of the civil engineer employed by them. The basis was so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. It constituted a dis-

crimination so palpable and arbitrary as to amount to a denial of the equal protection of the law.

We do not deem it necessary to discuss this proposition at further length. In the recent case of *Kansas City Southern Railway Company vs Road Improvement District No. 6*, 256 U. S. 658, this Court has emphatically condemned similar methods of assessment.

We respectfully submit, that even if the South Dakota drainage were constitutional and there were no other valid objections to the proceedings of the Board of County Commissioners of Minnehaha County in the organization of Drainage Ditch No. 1 and 2, and in the construction work done thereunder, the assessment made upon Appellee cannot be sustained for the reason that it is so arbitrary and unjust and so confessedly founded upon a fanciful basis as to deprive Appellee of the equal protection of the law.

VII.

THE DECREE MUST BE SUSTAINED REGARDLESS OF WHETHER THE DRAINAGE DITCH NO. 1 AND 2 BE REGARDED AS AN ORIGINAL DITCH PROCEEDING OR AS A MAINTENANCE AND REPAIR PROPOSITION.

Section 2, ch. 134, Laws of 1907; Section 8459 R. S. 1919, provides for the initiation of the proceedings by filing a petition. Section 4, ch. 134, Laws of 1907, Section 2, ch. 102, Laws of 1919; Section 8461 R. S. 1919, provides for notice of hearing thereof given to property owners, and is the only notice given prior to the establishment of the ditch. This notice is, therefore, jurisdictional. We have already contended that this statute, not requiring a description of the property claimed to be affected, does not satisfy the constitutional requirements of due process of law. All parties affected have a right to be heard upon the question of the establishment of the proposed drainage. They must have notice that such property will be claimed to be affected, otherwise the major step in the proceeding for which they are ultimately bound to pay, has been taken without jurisdiction of the person or property.

If the said Section R. S. 8461 requires a description of the property to be affected, then the notice itself is insufficient. Upon this theory, perhaps, the decision of the trial court was based. The notice of the hearing upon the petition for the establishment of the ditch 1 and 2 refers generally to the lands affected thereby. There is nothing to indicate that the new ditch would extend beyond or occupy a position different, from the old ditches 1 and 2. The evidence shows that there was no change or extension. The lands therefore presumed to be affected by the new ditch, if held to be a new ditch, or by the improvement of the old ditches, could not, in the absence of the description in the notice, be deemed or expected to include other lands than those included within the drainage area of the old ditches 1 and 2. There was no such description and nothing upon which it could have been apprehended that the area was intended to be extended. There was, therefore, want of notice in fact to the owners of property not included within the original drainage area. The undisputed evidence is that a considerable property of the Appellee not included in the original area, is attempted to be assessed under the guise of a new drainage ditch and this without any notice that the old drainage area was to be extended. There was, therefore, a failure to give notice, jurisdiction was not acquired of the proposed added area affected by the injunction and decree of the trial court. The reference made in the Appellants' brief to the Gilseth case may be disposed of by this situation; the lands involved in the Gilseth case were in the original drainage area, while the assessments sought here to be enjoined by the court affect areas not included within such area. The court by its decree in this case excepted from the effect of the decree the right to make an assessment upon the railroad property within the original drainage area.

The court was, therefore, justified in finding that the proposed assessment upon property not included within the original drainage area was an afterthought for the purpose of raising money. It matters not whether such determination be upon the theory that this was an attempted establishment of the new ditch or whether such proceedings for the new ditch was a mere subterfuge for

raising money to repair and improve the old ditch. The decision of the court equally sustains either theory.

As the court properly determined, no attempt was made to take the statutory steps for the repair, improvement or continuation of the old ditch, but an attempt was made to follow statutory requirements to establish a new ditch—hence it matters not whether this was a mere subterfuge to raise money or any ineffectual attempt to establish a new ditch.

Appellants challenge the record on account of the insufficiency of the facts to support the findings and conclusions of the trial court affirmed by the court of appeals. The proposition as to the amount in controversy, that the proceedings and proposed assessments are arbitrarily determined without notice of hearing in advance of a determination of benefits upon a hearing, as well as the amount in controversy, is fully presented and made to appear from Exhibit B attached to bill of complaint, from which it appears that before any notice of equalization or the apportionment of benefits, it had already been arbitrarily determined by the Board that the different classes of property as different in character and as differently affected, if at all, as the agricultural lands from either by the so-called drainage should be assessed a certain percentage of the cost. There was no rule of comparisons prescribed by statute, or adopted by the Board, but it had already been determined that 14.5% should be assessed against the railroads, 33.4% against farm lands, 1% on city lots, 9.7% on city of Sioux Falls and 16.5% on the Northern States Power Company. This was a percentage of the $309,221.40 to be raised. It was then proposed that by Exhibit C attached to the bill of complaint that the various railroads should be assessed upon certain property in specific amounts. Upon this a hearing was proposed to be had. This situation is fairly conceded by argument of Appellants on page 80, paragraph III wherein Appellants say: "But passing that, it is "plain on this record so far as the present appeal is "concerned there is more than $1,000.00 in controversy "* * *. It is admitted that no assessment has yet been "made and not a dollar of tax yet collected. There has "been an expenditure of over $250,000; drainage warrants

"for that amount are outstanding, and they must be "paid if at all by collecting the assessment that this in- "junction stopped. The tentative apportionment against "the Appellees is roundly, $112,000. (Page 13 in N., P., "R., S., O. and M.) But on the point under discussion "little attention need be paid that fact. There is at this "time more than $1,000.00 in dispute no matter how this "$112,000.00 is treated." In other words, Appellants concede that by the apportionment already made, the sum of $112,000.00 must be raised upon the property of the Appellees and that by no course of reasoning can it be determined that less than $1,000.00 is involved in each of the appeals.

By the same course of reasoning, not only had the amount been determined, but also a division of the expenses as between different classes of property. The amount to be raised upon railroads had already been determined as 14.5% of the entire expense, regardless of benefits. However that be apportioned, neither could be less than $1,000.00. The testimony shows the dissimilarity of the property and the theory of the arbitrary assessment so that it clearly appears from the pleadings and the proof that not only more than $3,000.00 is involved but that the amount to be borne by the railroads had already been determined in advance and the apportionment, according to Appellants' concession, is to be made among the railroads of the 14.5%. Consequently these Appellees have been deprived of their right to be heard upon the controlling and important question, that is, as to the amount and basis of the assessment against railroads.

VIII.

THE DISTRICT COURT POSSESSED JURISDICTION TO ENTERTAIN AND DETERMINE THIS SUIT.

Counsel for Appellants have filled a great portion of their brief with arguments upon objections to the jurisdiction of the District Court in this suit. We do not deem it necessary to take up these various objections and discuss them *seriatum*. The questions at issue, involving as they do the constitutionality of the Federal

Constitution, together with the amount involved and the diversity of citizenship, are amply sufficient to sustain the jurisdiction of the court.

Counsel for Appellants strenuously contend that Appellee should have waited until after the Board of County Commissioners of Minnehaha county had finished the equalization of benefits before instituting this suit. This case is, however, not one in which any such delay of proceedings was necessary. The law, under which the Board of County Commissioners was proceeding, was unconstitutional. The Board was a trespasser from the very commencement of the assessment proceedings. After the Board of County Commissioners had committed one illegal act, in making the assessment of benefits, it was certainly not incumbent upon Appellee to wait before instituting legal proceedings until after the Board had committed further illegal acts. Jurisdiction to maintain a suit to restrain the commission of a tort becomes fixed as soon as the first tortuous step has been taken by the tort feasor. It is not necessary for the person injured to wait until after the threatened damage has been completed. The Board of County Commissioners of Minnehaha county invaded the rights of Appellee when it made the assessment of benefits, and the right of action then became complete.

In our view of the issues involved in this case, the points which we have raised in the foregoing discussions in this brief are a sufficient answer to all questions concerning the jurisdiction of the court.

IX.

APPELLEE IS NOT ESTOPPED BY ITS ACTS FROM MAINTAINING THIS SUIT.

In their brief, counsel for Appellants make a somewhat elaborate attempt to show that Appellee is estopped from maintaining this suit. It was in evidence that the railroad tracks of the Appellee extend through the flats north of the city of Sioux Falls, and are in some places not far distant from the drainage ditch. It also appeared in the evidence that Appellee is the owner of a spur track to the South Dakota penitentiary, which is situated not

far from the place where the spillway is constructed, and that freight used in the construction of the spillway was delivered to the workmen building the spillway at the terminus of this spur track at the penitentiary. It further appears that one of the contractors, employed by the Board of County Commissioners to do dredging upon the ditch, shipped his dredging machines over the lines of railroad of the Appellee from the city of Sioux Falls to Renner, a station about five miles north of Sioux Falls. It further appears that upon one occasion, Appellee transported, as a common carrier, a gang of workmen, employed by the contractors engaged upon the construction of the drainage works, to the point where the flat was flooded north of Sioux Falls, and stopped the passenger train to let the gang off at the place where they were to do work, and stopped again in the evening to take the gang on board, and bring them back to Sioux Falls. The foregoing are all of the facts upon which counsel seek to base their theory of estoppel.

All the evidence of estoppel contained in the records amounts to is, first, that Appellee operates a railroad through the flats upon which the ditches were constructed, and, second, that Appellee, as a common carrier, transported men and materials used in the construction of the works. There is not a scintilla of evidence that Appellee or any of its officers ever consented to the drainage construction or approved it in any manner whatsoever. It is, therefore, a sufficient answer to the estoppel proposition, that there is no evidence of any facts which would create an estoppel.

A further answer to the estoppel plea is this: Under the South Dakota drainage law, no notice was required to be given Appellee until the assessment of benefits had been made. Up to that time, Appellee had no knowledge that its property, situated outside of the original assessment areas of Drainage Ditch No. 1 and of Drainage Ditch No. 2, was "affected" by the drainage construction, or would be assessed for the cost thereof (it will be remembered that in the decree in this case, an injunction was issued in favor of Appellee only as to its property outside of the original assessment areas, and that as to the property within such areas the decree is

without prejudice to the rights of Appellee. In this proceeding, therefore, only the property outside of the original assessment areas is to be taken into consideration). We do not concede that, under the South Dakota statute, any notice was ever given to Appellee that an assessment had been made upon its property for the statute, as has been seen, does not provide for the giving of any notice whatever to railroad companies. If, however, it should be conceded, for the sake of argument, that the notice published by the Board of County Commissioners, after the assessment had been made, was a notice to Appellee, it was the first notice that Appellee had ever received. All of the acts under which an estoppel is claimed by Appellants were done during the time of the construction work and long prior to the making of the assessment of benefits and to the publishing of the equalization notice.

We respectfully submit that even if the acts set forth in the record were sufficient to constitute an estoppel upon the part of Appellee that such acts could not constitute an estoppel for the reason that, at the time they were done, Appellee had received no notice that its property within the new territory sought to be assessed was within the assessment area of Drainage Ditch No. 1 and 2, and had no knowledge that an assessment was in contemplation. We deem it unnecessary to discuss the estoppel proposition at further length.

X.

IN CONCLUSION

In the record of this case there is ample evidence of the greatest ignorance, ineffeciency, and extravagance upon the part of the Board of County Commissioners of Minnehaha county in the construction of the spillway, retaining walls, dams, and other works under the organization known as Drainage Ditch No. 1 and 2. Plans for the work were adopted and then the adoption rescinded. Plans and specifications for the construction of a spillway were obtained and bids advertised for and received for the construction in accordance with the plans. The bids were rejected upon the ground that they were too high, the plans were then thrown into the waste basket and contractors were employed to construct a spillway upon

the cost-plus plan, the contractors to receive compensation for the material and labor used and, in addition, a profit of nine per cent. The construction of the spillway was entered upon without any plans therefor being made, and the plans were drawn after the spillway had been completed, or practically completed. The cost of the spillway so constructed was approximately $150,000, or more than three hundred per cent of the amount of the bids which were rejected by the Board as being too high. The spillway and other works, when completed, have failed to accomplish successfully the drainage of the flats north of the city of Sioux Falls. The property owners in the flats are in practically the same, or possibly in a worse condition, than they were prior to the original construction of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The works constructed, under the organization of Drainage Ditch No. 1 and 2, simply operate to retain the surface water upon the flats and not to drain it off. They are successful in preventing the diversion of the channel of the Big Sioux river and in preventing the draining of the gravel bed from which the city of Sioux Falls obtains its water supply. Those two objects have successfully been accomplished but the same results could have been attained by placing, at a trifling expense, earthwork dams in proper places along the course of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The spillway and other works, as completed in Drainage Ditch No. 1 and 2, have operated to destroy the efficiency of the original ditches as drainage propositions, but have accomplished nothing that could not have been accomplished at a trifling expense by simply abandoning the old ditches and preventing the flow of water through the bluff and into the Big Sioux river below the falls.

The Board of County Commissioners of Minnehaha county, in the work done by them on Drainage Ditch No. 1 and 2, seem to have acted at haphazard and without any well defined plan of procedure. The one thing which they have accomplished successfully has been to expend upwards of $250,000 upon works which are useless as a drainage proposition, and, with interest, the entire indebtedness which has now accumulated is in excess of $300,000. The intervening Appellants, who hold

the drainage ditch warrants issued by the Board of County Commissioners of Minnehaha county upon Drainage Ditch No. 1 and 2, are certainly in an unfortunate position. That they are in a fair way to lose their investment is, however, no reason why Appellee, an "innocent bystander," should be "made the goat" and forced to pay for the errors, mistakes, and wild extravagances of the Board of County Commissioners of Minnehaha county. It was not through any fault of Appellee that Drainage Ditch No. 1 and 2 was organized and the spillway and other works constructed. It is in no manner responsible for the acts of the Board of County Commissioners or for the mistakes of judgment of the intervening Appellants, in investing in the warrants.

In conclusion, we submit, that for the reasons which we have hereinbefore set forth, the South Dakota drainage law is unconstitutional under both the federal and the state constitutions; that the proceedings under which Drainage Ditch No. 1 and 2 was organized were illegal and void; that the work done under such organization was without authority of law; that the attempted assessment upon the property of Appellee is founded upon a fanciful, arbitrary, and illegal basis; that the District Court possessed jurisdiction to hear and determine this suit; and that, for these and the other reasons hereinbefore set forth, the decree of the District Court and the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

PROVISIONS OF SOUTH DAKOTA CONSTITUTION

SECTION 2 OF ARTICLE VI.

§ 2. No person shall be deprived of life, liberty or property without due process of law.

SECTION 13 OF ARTICLE VI

§ 13. Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained, and before possession is taken. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.

SECTION 6 OF ARTICLE XXI

§ 6. The drainage of agricultural lands is hereby declared to be a public purpose and the legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest the corporate authorities thereof, and the corporate authorities of counties, townships and municipalities, with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby, according to benefits received.

APPENDIX B

SOUTH DAKOTA DRAINAGE STATUTES

(NOTE: The section numbers at the beginning of each paragraph are those of the South Dakota Revised Code of 1919. The references at the end of each paragraph are to the Session Laws of the various years. The paragraphs as printed constitute the law as it stood at the time of the transactions involved in this suit.)

§ 8458. POWER OF COUNTY COMMISSIONERS. The Board of County Commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural land. (§ 1, ch. 98, 1905; § 1, ch. 134, 1907).

§ 8459. PETITION. Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in whole or in part, and a general statement of the territory likely to be affected thereby. The petition shall be accompanied by a bond with sufficient sureties to be approved by the county auditor, conditioned to pay all expenses incurred in case the board does not grant the petition or the same is denied on appeal. Such petition may be presented at any regular or special meeting of the board, and, if sufficient in form, shall be ordered filed with the county auditor. (§ 2, ch. 98, 1905; § 2, ch. 134, 1907).

§ 8460. INSPECTION OF PROPOSED ROUTE. It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together with the board of county commissioners shall as soon as practicable, inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such survey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage, but may be a complete survey such as will be required for the construction of the proposed drainage and

assessment of its cost, or as much less as the board may require. Such survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. For the purpose of inspection or surveys, the county commissioners, surveyors or their employes may enter upon any lands traversed by the proposed drainage or in their judgment likely to be affected thereby. The county auditor shall promptly furnish the state engineer with a copy of the surveyor's report mentioned in the succeeding section and of all maps and plans filed by such surveyor and also with a copy of such further files as the state engineer may ask for. In case the drainage is established the preparation of plans and specifications upon which the contract of construction is to be awarded and also the work of construction, shall be under the supervision of the state engineer. It shall be the duty of the state engineer to render such assistance and advice to the board of county commissioners in regard to such drainage as the duties of his office will permit and he shall be reimbursed by such board for his expenses incident thereto; provided, that in case of minor ditches the state engineer shall not be required to attend with the board of county commissioners at the first inspection, nor to perform subsequent services if in his judgment it shall not be necessary for him so to do. (§ 3, ch. 98, 1905; § 3, ch. 134, 1907; § 1, ch. 102, 1909).

§ 8461. SURVEYOR'S REPORT — NOTICE OF HEARING. The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall determine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route

of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceedings for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing. (§ 4, ch. 98, 1905; § 4, ch. 134, 1907; § 2, ch. 102, 1909).

§ 8462. HEARING ON PETITION. At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. After full hearing the drainage may be established along the line set forth in the petition or in the finding of the board prior to the hearing, or the board may vary the route thereof, or its width, as deemed practicable or necessary. If the board deems it best to vary the route, or to materially change the initial or terminal points of such proposed drainage so that it will pass through other lands than those described in the notice of hearing, or to increase the width of lands to be taken for the proposed drainage, the board shall adjourn the hearing and give the owners of such lands notice as in case of the original hearing. No open ditch shall be constructed within the limits of any public highway except where the topography of the country makes such construction advisable and in such case the ditch shall be located at a sufficient distance from the center of such highway to permit a roadway of standard width being constructed. If the proposed drainage does not give sufficient fall to drain the lands sought to be drained or will not properly take care of the waters collected by

such drainage, the same shall be extended so as to secure the drainage or properly dispose of the water. The hearing in any such case shall be adjourned and notice given to all parties newly affected as in case of the original hearing. When the board of county commissioners shall have fully heard and considered such petition, and all matters in opposition to or in support of the same, it shall, if it finds the proposed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition, the petitioners to be jointly and severally liable for the costs of the proceeding, the same to be recovered in a civil action. If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property through which the same shall pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimants right to have the same assessed by the jury. Such drain shall be given a name and the proceeding thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office. (§ 5, ch. 98, 1905; § 5, ch. 134, 1907; § 3, ch. 102, 1908; § 1, ch. 205, 1917).

§ 8463. EQUALIZATION OF BENEFITS. After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the

board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds at the date of the filing of the petition and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed. (§ 6, ch. 98, 1905; § 6, ch. 134, 1907; § 4, ch. 102, 1909).

§ 8464. ASSESSMENTS. After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. The cost of establishment shall include the costs of the service of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all other expenses incurred or to be incurred that in any way contributed or will contribute to the establishment or construction of the drainage. At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same

will be so filed, by publication at least once each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due and payable and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the state and the United States and, if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest from the date of the order of the assessment at a rate not to exceed eight per cent per annum payable annually. Such assessment shall be paid to and received by the county treasurer and paid over to the holders of the assessment certificates or upon the order of the board of county commissioners. The board of county commissioners may issue separate assessment certificates against each tract assessed for the amount of the assessment thereon, and may sell the same at not less than par value with all accrued interest, or may contract to pay for the construction of such drainage with such assessment certificates or with warrants. Such assessment certificates shall refer to the record in the office of the county auditor of the order of assessment and of the filing of a copy thereof in the county treasurer's office, shall transfer to the holder all interest, claim, or right in or to such assessment, bear the same rate of interest, carry the lien of such assessment and be enforcible as provided by law. Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale, provided that no such assessment or installment thereof shall be included in the sale of any

given year unless the same shall have been delinquent on or before August first of each year. The provisions of Chapters 7, 8, 9, Part 9 of this title shall apply to the enforcement of the lien or drainage assessments so far as such provisions are applicable, except that a treasurer's deed issued upon a delinquent drainage assessment shall recite the fact that the title conveyed is subject to all the claims which the state or any political subdivision thereof may have thereon for annual taxes.

Whenever an assessmnet for drainage or an installment thereof has been made against any county, city, town or township, as provided in this chapter, the officers of such county, city, town or township, whose duty it is under the law to make the levy of taxes, shall at the time of the next annual tax levy after the making of such assessment make a levy for drainage purposes of such an amount as shall be necessary to pay such assessment, and return the same to the proper officers as provided by for the other taxes, and such levy and tax shall be enforced and collected in all respects as provided by law for other taxes; provided, that any surplus remaining in any fund at the close of any year may be used by any township to pay and apply on any drainage assessment, as provided herein; provided, further, that in unorganized townships the county commissioners shall be authorized to pay for drainage as provided herein out of any money belonging to such unorganized township, and each succeeding year a like levy shall be made by such authorities until the whole of such assessment for drainage is paid. Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at a rate not to exceed eight per cent per annum payable annually, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any damages allowed and cost of establishment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage. (§ 7, ch. 98, 1905; § 7, ch. 134, 1907; § 5, ch. 102, 1909;

ch. 130, 1911, and as amended by § 1, ch. 46, Laws of Second Special Session of the Sixteenth Session of the Legislature of South Dakota 1920).

§ 8465. BIDS—SPECIFICATIONS—CONTRACTS. Whenever sufficient money shall have been collected the damages occasioned by the construction of such drainage and fixed as herein provided shall be paid and thereupon the board of county commissioners shall proceed to construct such drainage and shall let contracts for the construction of the same. Such contracts may require the contractors to take their pay in assessment certificates or in warrants to be thereafter issued. The contract may be for the construction of the entire drainage or for any portion thereof, and shall be let upon competitive bids, the board reserving the right to reject any and all bids. The lowest responsible and capable bidder shall be accepted but if any landowner affected be an equally low, capable and responsible bidder with a nonowner of the lands affected the former shall be preferred. When any contract shall be let the contractor shall give a bond in such sum as shall be approved by the board of county commissioners, conditioned for the faithful performance of his work and full completion of his contract to the satisfaction of such board. For the information of the contractors in bidding upon the proposed drainage, full plans and specifications shall be filed in the office of the county auditor. If in the judgment of the board of county commissioners the entire drainage or any part thereof can be constructed for less money than the amount of any bid submitted therefor, the board may cause such drainage to be constructed, hire the necessary labor and purchase all necessary material for such construction, without letting contracts therefor. Contracts for building bridges or culverts rendered necessary by the construction of such drainage may be let separately and after the drainage is completed. The cost of constructing such bridges or culverts shall be charged in the first instance as part of the cost of drainage and thereafter such bridges and culverts shall be maintained as part of the highway; provided, that the cost of removing, repairing, enlarging or replacing bridges and culverts already existing across the line of a proposed drainage ditch shall

not be charged as a part of the drainage. (§ 8, ch. 98, 1905; § 8, ch. 134, 1907; § 6, ch. 102, 1909; ch. 206, 1917).

§ 8466. BOARD MAY EXTEND TIME FOR COMPLETION OF CONTRACT. The board of county commissioners shall have power to grant a reasonable extension of time for the completion of any contract. When any contract shall not be finished within the time specified or to which it may be extended, such board may in its discretion at any time thereafter relet such unfinished portion of any part thereof after not less than five days' notice thereof to the lowest responsible bidder and shall take security as for the original contract. The cost of completing such parts, over and above the original contract price and the expense of notices and reletting, shall be collected by the board from the first contractor; provided, that in no case shall the board forfeit and annul a contract without five days' notice to the contractor, if found, and if not found then by written notice left at his last known place of residence in the county. (§ 9, ch. 98, 1905; § 9, ch. 134, 1907).

§ 8467. ASSESSMENTS FOR FURTHER COSTS. At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction, including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessments and certificates. The board of county commissioners may sell such assessment certificates at not

less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants only one assessment need be made. In any case, in the discretion of the board, several assessments may be made as the work progresses. Assessments shall be paid to the county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners for the purpose of the particular drainage. (§ 10, ch. 98, 1905; § 10, ch. 134, 1907; § 7, ch. 102, 1909).

§ 8468. ACCEPTANCE OF DRAINAGE BY BOARD. After the work of construction shall have been fully completed and approved by the state engineer, the drainage may be accepted by the board of county commissioners, by order duly made, and payment shall be made therefor unless in the discretion of the board of county commissioners agreement be made for the partial payments; provided, that final payment shall not be made until the expiration of thirty days after the acceptance of the work and in case an appeal has been taken from the order accepting such work final payment shall not be made until the determination of such appeal; provided, further, that no payment shall be made to any engineer whose employment has not been approved by the state engineer, and no payment shall be made upon any contract for the construction of any such drainage project, unless the same shall have been constructed under the supervision of the state engineer; and provided further, that nothing in this section shall apply to minor drainage projects. All claims for compensation or expenses for publishing legal notices or supervising the construction of any such drainage project including the per diem and the mileage of the county commissioners, shall be paid from the general fund of the county, and for all such payments the county treasurer shall reimburse the general fund from the assessments herein provided for. (§ 11, ch. 98, 1905; § 11, ch. 134, 1907; § 8, ch. 102, 1909; ch. 207, 1917).

§ 8469. APPEALS. An appeal shall lie for any final order or determination of the board of county com-

missioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage to the circuit court of the county in which such drainage is located by any one deeming himself aggrieved by any such order or determination. Written notice of such appeal shall be served upon the board of county commissioners and a bond conditioned to pay all the costs of such appeal, in case the contention of appellant be not sustained in some respect, shall be filed in the office of the clerk of courts, to be approved by him in such amount and with such sureties as he deems necessary. Upon the service of such notice and the filing of such bond, the county auditor shall transmit to the clerk of courts the petition and all other papers and records in the matter or certified copies thereof, when the convenience of the auditor's office would be seriously impaired by the transmission of the original records, and such matter shall be heard as an original action in the circuit court. No appeal shall operate as a stay of proceedings by the board of county commissioners, but the court may upon the taking of an appeal, for good cause shown issue an order staying the further proceedings by the board of county commissioners until the hearing and determination of such appeal. Before granting such stay, the court shall require an undertaking in sufficient amount and with sufficient surety to the effect that if the order appealed from be sustained the person upon whose motion the stay is granted shall pay all damages caused by the issuance of such order of stay. Any number of persons interested may join in the same appeal. Appeals shall be in all cases taken within thirty days from the making of the order or determination appealed from. If, on the trial of such action, it be determined that the drainage as petitioned for and established by order of the board is not conducive to the public health, convenience or welfare or is not necessary or practicable for the purpose of draining agricultural lands, the petitioners shall be jointly and severally liable for all the costs thus far incurred. If the contention of the appellant as to the amount of damages or proportion of benefits, the acceptance of the drain-

age, of the practicability of the drainage when the route thereof is varied by the county commissioners over the protest and objection of the petitioners, be sustained in whole or in part, the costs of such trial shall be part of the cost of the drainage. Upon an appeal from an assessment of benefits, the court of jury shall consider not only the relative benefits, to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not; if benefited, to what extent. (§ 12, ch. 98, 1905; § 12, ch. 134, 1907; § 9, ch. 102, 1909).

§ 8470. ASSESSMENTS FOR MAINTENANCE. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportion determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance or may be collected directly by the board of county commissioners. (§ 13, ch. 98, 1905; § 13, ch. 134, 1907).

§ 8471. ASSESSMENTS PAID IN INSTALLMENTS. The owner of any tract of land against which an assessment for drainage is made, who shall, within thirty days after the making of such assessment, file with the county auditor an agreement in writing that in consideration of the right to pay his assessment in installments he will not make any objections to the illegality or irregularity of his assessment, if any there be, and will pay the same with interest as fixed by the board of county commissioners, shall have the privilege of paying such assessment in ten annual installments, interest payable annually. Assessment certificates shall not issue until after the expiration of the period of filing such agree-

ments with the county auditor, and when issued for assessments to be payable in installments may be issued in coupon form. The first installment shall be payable within ten days after a certified copy of the assessment has been filed, in the office of the county treasurer, and subsequent installments shall be payable one, two, three, four, five, six, seven, eight and nine years from the date of such assessment, respectively, with interest on the whole sum unpaid payable annually at maturity of the several installments. Such subsequent installments shall become delinquent after the expiration of thirty days from the time the same are payable and thereupon a penalty of five per cent shall attach thereto. Provided, that where bonds shall have been issued for the construction of such drainage, as provided in Section 8472, such assessments shall be made payable in installments sufficient to meet the payment on the bonds, as the same shall become due. Payments of assessments may at any time be received and full discharge thereof given by the county treasurer to any property holder, but after issue of bonds, such payment of assessments can be received only according to the terms of such bonds. (§ 14, ch. 98, 1905; § 14, ch. 134, 1907; § 10, ch. 102, 1909).

§ 8472. BOARD MAY ISSUE BONDS. The board of county commissioners, whenever it has ordered the establishment of any drainage, shall have authority by resolution to be spread upon its records, to provide for the issuance of bonds in such sums as may be necessary for the purpose of defraying the expenses incurred or to be incurred in obtaining the right of way or in locating or constructing any such drainage. Such word "expenses" shall be construed to mean and cover every item of cost of such drainage from its inception to its completion, such bonds to be payable only out of the funds to be derived from special assessments upon the lands benefited thereby. Such bonds shall bear interest at a rate not exceeding 7% per annum, payable annually and be payable not exceeding twenty years from issue. Such bonds shall be signed by the chairman of the board of county commissioners and countersigned by the auditor, who shall keep a record of all such bonds. Such bonds shall be issued for the benefit of the particular drainage,

numbered, recorded and indexed in the office of the county auditor, and shall in no case be issued for a sum exceeding the benefits to the lands affected by such drainage. The board of county commissioners shall have the power to negotiate such bonds at not less than par value, as it may deem best for the interest of all persons affected by such drainage, any premium received on such bonds to be credited to the fund of the particular drainage. Such bonds shall contain a recital that the same are issued pursuant to the authority of this article and that they are to be paid out of the funds to be obtained as herein provided. Assessments shall be made upon all of the lands benefited by such drainage for the payment of the principal and interest of such bonds when the same shall become due. Such assessments may be made by separate assessments for installments of interest and principal or in one proceeding with but one set of notices. When the assessments are finally fixed the same shall be certified to the county treasurer by the county auditor, and the money paid in thereon shall be received by the county treasurer and paid over to the holders of such bonds. Separate funds shall be kept by the treasurer for each drainage project, and no funds for one drainage project shall be applied to any other drainage. No county shall be liable for the payment of any bonds issued under this article, but such bonds shall be paid only out of the funds derived from the special assessments herein provided for. Such bonds may be made payable at such times as the board of county commissioners shall find for the best interests of the persons benefited by the drainage, and may be issued for all or any portion of the expenses of such drainage. (§ 15, ch. 98, 1905; § 15, ch. 134, 1907).

§ 8474. FURTHER POWERS OF BOARD. Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as in all

lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly. (§ 17, ch. 98, 1905; § 17, ch. 134, 1907).

§ 8475. DITCH OR DRAIN MAY BE DECLARED NUISANCE. Any ditch, drain or watercourse, which is now or may hereafter be constructed so as to prevent the sufrace and overflow water from adjacent lands from entering the same is hereby declared a nuisance and may be abated as such. (§ 18, ch. 98, 1905; § 18, ch. 134, 1907).

§ 8476. POWERS DEFINED. The powers conferred by this article for establishing and constructing drains shall also extend to and include the deepening and widening of any drains which have heretofore been or may hereafter be constructed, also to straightening, cleaning out and deepening the channels of creeks and streams and constructing, maintaining, remodeling and repairing levees, dykes and barriers for the purpose of drainage; and the board of county commissioners may relocate or extend the line of any drain if the same is necessary to provide a suitable outlet, and shall cause a survey thereof to be made, but no proceedings affecting the rights of persons or property shall be had under this section except upon notice and the other procedure prescribed herein for the construction of drains. (§ 19, ch. 98, 1905; § 19, ch. 134, 1907).

§ 8477. DRAINS UNDER CHARGE OF COUNTY COMMISSIONERS. All drains that have been constructed under any law of this state, or that may be constructed under the provisions of this article, shall, except as otherwise specifically provided, be under the charge of the board of county commissioners and be by it kept open and in repair. In all cases when any completed drain is or may be situated in more than one county, the care of the portion thereof lying within any county is assigned to the board of county commissioners of such county to be

kept open and in repair. The cost of such repairs shall in all cases be assessed, levied and collected in the same manner as provided in this article for the construction of drains originally and in all cases when no assessments of benefits shall have been made, the board of county commissioners having charge of such drain shall make such assessments. (§ 20, ch. 98, 1905; § 20, ch. 134, 1907).

§ 8478. BOARD MAY MAKE RULES AND REGULATIONS. The board of county commissioners may make such rules and regulations on the subject of drainage as it may deem proper, not inconsistent with the provisions of this article, and especially with regard to clearing out and keeping clear the channels of streams and the construction and maintenance of dams thereupon, with reference to their capacity for drainage. (§ 21, ch. 98, 1905; § 21, ch. 134, 1907).

§ 8482. DRAINS FOR TOWNS AND CITIES. The board of county commissioners shall have authority to establish drainage for or including the whole or any part of any city or incorporated town, including cities acting under special charter, as provided in this article, and it shall have the same authority with respect to the assessment of damages and benefits within such city or town as in other cases provided for in this article, and like notices to such city or town with respect to the establishment of such drainage and the apportionment and assessment of damages and benefits shall be given as is required by this article to be given to the owner of property damaged or benefited by the establishment or construction of such improvement. (§ 24, ch. 98, 1905; § 24, ch. 134, 1907).

§ 8485. COMPENSATION OF COUNTY COMMISSIONERS. The county commissioners shall receive for their services four dollars per day for the time actually spent by them in the performance of the duties of their offices under this chapter, publishers of newspapers shall receive for publishing legal notices the same fees as are allowed by law for publishing proceedings of the county commissioners; but the proceedings of the board of county commissioners when acting in any drainage matter under this article shall not be published as a part of its regular proceedings or at all. The county auditor shall charge a reasonable amount, to be fixed by the

board, for services, to be paid into the general fund of the county. Each county commissioner shall have power to administer any oath required in any drainage proceeding. (§ 27, ch. 98, 1905; § 27, ch. 134, 1907; § 11, ch. 102, 1909).

§ 8486. NOTICES, HOW SERVED. Notice by personal service, as of a summons in a civil action, may be given instead of by publication and posting in all cases where notice is provided for in this article. In any case where notice is required under the provisions of this article and any person affected by the drainage has not been notified, either by publication or personally, and a hearing has been had or determination made, such person may be notified personally or by publication and posting, to show cause at a time and place to be fixed by the board of county commissioners, and to make return or claim damages as in case of the original hearing. Any such omitted person may be brought in on such due notice at any stage of the proceeding, or after it has been otherwise concluded. The enforcement of any assessment shall not be enjoined for want of the notice provided for in this article, except pending an application to the board of county commissioners for the determination of such matters as to which any person deems himself not bound because of want of notice. (§ 28, ch. 134, 1907).

§ 8488. DEFECTS IN PROCEEDINGS DISREGARDED. Any defect or irregularity not affecting the substantial rights of parties interested, occurring in any drainage proceeding, shall be disregarded in any action seeking to avoid an assessment or cancel, annul or declare void any such proceeding. And in case the defect is substantial the court shall of its own motion determine the rights of the parties, validate the proceedings and assess the costs as justice may require, if the court shall find cause for such validation or such action should have been taken in the first instance and all parties interested are before the court. (§ 29, ch. 98, 1905; § 30, ch. 134, 1907).

§ 8489. INVALID OR ABANDONED PROCEEDINGS. If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned,

or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate thereform, but the board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by the board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons. (§ 33, ch. 134, 1907).

IN THE

Supreme Court of the United States

October Term 1925

No. 97.

A. G. RISTY *et al*, as County Commissioners, etc., *et al.*,
Appellants,

vs

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY
Appellee

BRIEF AND ARGUMENT FOR APPELLEE

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Brief and Argument for Appellee

Supreme Court of the United States
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vs

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY
Appellee

APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE

The Chicago, St. Paul, Minneapolis & Omaha Railway Company, Plaintiff and Appellee, filed its bill in the District Court of the District of South Dakota praying for an injunction. From a decree granting an injunction the Defendants and Appellants appealed to the Circuit Court of Appeals of the Eighth Circuit, in which latter court the decree of the District Court was affirmed. From the decision of the Circuit Court of Appeals the defendants appeal to this Court.

This suit involves the constitutionality of the Drainage Ditch Statute of the state of South Dakota under both the federal and state constitutions and also involves the regularity and validity of proceedings taken under that statute. The facts out of which this suit arises, are, as follows:

STATEMENT OF FACTS

At the election in November, 1906, there was adopted an amendment to the constitution of South Dakota which is known as Section 6 of Article XXI of that constitution and which is as follows:

"§ 6. The drainage of agricultural lands is hereby "declared to be a public purpose and the legislature may "provide therefor, and may provide for the organization "of drainage districts for the drainage of lands for any "public use, and may vest the corporate authorities there-"of, and the corporate authorities of counties, townships "and municipalities, with power to construct levees, drains "and ditches, and to keep in repair all drains, ditches and "levees heretofore constructed under the laws of this "state, by special assessments upon the property bene-"fited thereby, according to benefits received."

The legislature of South Dakota has never enacted any law to carry into effect the powers, conferred upon it by the foregoing constitutional amendment providing for the organization of drainage districts, but has enacted, or attempted to enact various laws vesting the corporate authorities of the several counties of the state with power to construct levees, drains, and ditches and to keep the same in repair by special assessments upon the property benefited thereby.

The first drainage ditch enactment was Chapter 98 of the Session Laws of South Dakota, 1905, which was passed prior to the adoption of Section 6 of Article XXI of the South Dakota constitution. After the adoption of that section a new law was passed which is known as Chapter 134 of the Session Laws of South Dakota, 1907. The 1907 law was amended by Chapter 102 of the Session Laws of South Dakota, 1909. The 1907 law was further amended by Chapters 207 and 208 of the Session Laws of South Dakota, 1917. In 1919 the entire drainage law was recompiled and re-enacted as Sections 8458 to 8507, South Dakota Revised Code of 1919. Further amendments were enacted in 1919 which appear as Chapter 46 of the Session Laws of the First Special Session of the Sixteenth Legislature of South Dakota and by Chapters 193, 194, 195, 196, 197 and 198 of the Session Laws of South Dakota, 1921.

For the convenience of the court we are printing as Appendix A of this brief the portions of the South Dakota constitution, and as Appendix B the portions of the South Dakota laws which bear upon the questions at issue in this suit.

The Big Sioux river has its origin in a lake in the northeastern part of South Dakota and runs thence in a generally southerly direction, and in the eastern part of South Dakota, (of which state it is in places the boundary line) for about 100 miles and empties into the Missouri river at a point a short distance north of Sioux City, Iowa. In its course the Big Sioux river passes through the center of the city of Sioux Falls. It strikes Minnehaha county, in which Sioux Falls is situated, at its north line and flows in a generally southerly direction, but with many bends and curves, for a distance, in a straight line, of twenty-four miles, running in its course two and one-half miles west of the business center of the city of Sioux Falls and south to a point three miles south of the business center. It then flows in an easterly direction for about three miles and then turns north, running through the business center of the city of Sioux Falls and northerly to a point two miles from the business center. It then runs in an easterly direction for several miles when it again resumes its southerly course towards its junction with the Missouri river. The consequence is that at the city of Sioux Falls the river runs like an inverted letter "S," upon the bar of which Sioux Falls is situated.

From a point about five miles south of where the Big Sioux enters Minnehaha county it runs through a valley or flat from two to four miles in width until it reaches a point about three miles southwest of the business center of the city of Sioux Falls. From there on until it reaches the northeastern portion of the city the river is confined by high banks on either side and with no valley interposing between them.

There is comparatively little fall between the point where the Big Sioux river enters the flat about fifteen miles north of the city of Sioux Falls and the northeastern section of the city where the river passes over a series of falls of an aggregate height of more than one hundred feet. The result is that the level of the river bed, as it

passes over the falls in the northeastern portion of the city of Sioux Falls, is over one hundred feet below the level of the river at a point, four miles to the westward, where it passes to the west of the city of Sioux Falls.

About 1878, a dam was constructed for water power purposes across the Big Sioux river within the limits of the city of Sioux Falls a short distance above the falls and, between that dam and the falls, other dams were subsequently constructed, all of which were in existence long prior to any of the transactions out of which this suit arises. These dams for many years have been utilized, without complaint from any source, by the Northern States Power Company and its predecessors, as a source of water power, and upon the dams and power works several hundreds of thousands of dollars have been expended with the consent, express or implied, of the public authorities of Minnehaha county and of the city of Sioux Falls and of the property owners along the Big Sioux river.

The city of Sioux Falls, something over twenty years ago, located its municipal waterworks upon the flat north of the city, between the Big Sioux river where it flows in a southerly direction to the westward of the city and where it flows to the northward after it passes over the falls in the northeastern portion of the city. The flat where the waterworks are situated is a few feet higher than the level of the river bed to the westward of the waterworks plant and more than one hundred feet higher than the level of the river bed to the eastward. Between the two channels of the river (at this point about 3½ miles apart) there is an extensive gravel bed underlying the surface of the ground, which gravel bed is filled with water and is the source from which the city of Sioux Falls obtains its municipal water supply.

For many years, and from in fact shortly after the settlement of Minnehaha county in the late sixties and early seventies, complaints arose in regard to the flooding of the land in the valley of the Big Sioux river north of the city of Sioux Falls. The topography of the country along this valley being level and there being but little fall in the river bed for a distance of nearly thirty miles, between the north end of the flats and the falls of the Big

Sioux river, the surface waters, in times of freshets, would accumulate upon the flats and remain there for several days, and sometimes for weeks, before they gradually flowed off through the narrow river channel south of the city of Sioux Falls and through the city until they reached the falls. This situation was made still worse by the construction of the dam upon the river above the falls in 1878 which hindered still further the passage of the water along the river bed before it reached the falls. As the state of South Dakota became more and more densely settled in the counties along the Big Sioux river north of Minnehaha county, numerous drainage ditches were established, the effect of which was still further to accelerate the flow of surface water during freshets and to cause a still greater volume of water to accumulate upon the flats north of the city of Sioux Falls.

In December, 1907, the Board of County Commissioners of Minnehaha county, purporting to act under the authority of Chapter 134 Session Laws of South Dakota, 1907, established a drainage ditch known as Drainage Ditch No. 1. This ditch was some three miles in length and extended, from a point on the Big Sioux river below the falls, northward to a point on the flat north of the city of Sioux Falls. In 1910, the Board of County Commissioners, again purporting to be acting under the authority of Chapter 134 of the Session Laws of South Dakota, 1907, as amended by Chapter 102, Session Laws of South Dakota, 1909, established a second ditch, known as Drainage Ditch No. 2, which commenced at the north end of Drainage Ditch No. 1 and extended in a northerly direction for about twelve miles.

At the point Drainage Ditch No. 1 empties into the Big Sioux river below the falls it passed over a hill in a descent of about one hundred feet. The bottom of the ditch was covered along this descent with concrete, making a spillway through which the water accumulating upon the flats could run to reach the channel of the Big Sioux river below the falls.

Drainage Ditch No. 1 and Drainage Ditch No. 2 operated more or less successfully in draining the flats until the spring of 1916 at which time, during a somewhat heavy rainfall, the concrete bottom of Drainage Ditch No.

1, (or its spillway) washed out and the water began cutting a channel through the hill.

The fact that the concrete spillway had washed out did not in any manner decrease the efficiency of Drainage Ditch No. 1 and Drainage Ditch No. 2 as drainage propositions. In fact, the washout of the spillway made them still more efficient for draining purposes, and if they had been left alone they would very speedily have settled the question of drainage for the lands upon the flats. The effect of the washout was to open a passage for all of the water which accumulated upon the flats into the channel of the Big Sioux river below the falls and this channel was amply sufficient to have taken care of all of the water which ever accumulated upon the flats. In fact, it was a perfect success as a drainage proposition.

Unfortunately, while Drainage Ditch No. 1, after its spillway was washed out, succeeded in doing all in the way of drainage that the owners of the lands upon the flats desired to have done, it seriously affected other interests. If the water had been allowed to go without hindrance through the new channel it would, within a very short time, have diverted the entire course of the water in the Big Sioux river and would have formed a new channel for the river across the flats north of the city of Sioux Falls, in which channel all of the water coming down the river could have flowed into the channel below the falls without passing around and through the city of Sioux Falls and over the falls, thus cutting off about twelve miles of the river channel. The further effect would have been to destroy the waterpower formed by the dams across the Big Sioux river in the city of Sioux Falls above the falls, as the only water which would have flowed in the Big Sioux river channel through the city of Sioux Falls and over the falls would have been the water from Skunk creek, a tributary of the Big Sioux river, emptying into that stream south of the city of Sioux Falls. Another effect of allowing the river to run through its new channel would have been to destroy the municipal water plant of the city of Sioux Falls by draining the water from the gravel bed from which the city obtained its water supply.

After the spillway at the outlet of Drainage Ditch No. 1 had washed out in March, 1916, various plans were

proposed looking toward the control of the water which flowed through the ditch. Many conferences were had between the Board of County Commissioners and the representatives of the various interests affected. The Appellee was not represented at any of these conferences and never took any part in any manner in them or in the subsequent proceedings.

In October, 1916, the Board of County Commissioners took proceedings by which they attempted to establish a new ditch project which they named "Drainage Ditch No. 1 and 2." Thereafter, all proceedings with respect to Drainage Ditch No. 1 and with respect to Drainage Ditch No. 2 were abandoned and all subsequent work was done by the Board of County Commissioners upon the new project, "Drainage Ditch No. 1 and 2."

The Board of County Commissioners, after attempting to organize Drainage Ditch No. 1 and 2, proceeded to construct additional ditches, cut-offs, and dams in the flats above the city of Sioux Falls, and at the former outlet of Drainage Ditch No. 1, to construct a spillway, and other water retaining works for the purpose of controlling the flow of the water through the ditches. This work was done by the Board of County Commissioners without any regard to the requirements of the South Dakota drainage statutes and without having first had plans therefore prepared and approved by the state engineer. The most of the work was done by the board without letting a contract therefor and upon the cost-plus plan. The result was, that at the end of the construction period, the cost of the work done by the Board of County Commissioners upon Drainage Ditch No. 1 and 2 had amounted to a sum in excess of $250,000, of which upwards of $150,000 was expended upon the spillway and other water retaining works at the outlet of the ditch. For the amount expended, the Board of County Commissioners issued warrants upon the Drainage Ditch No. 1 and 2. These warrants were taken by the laborers and material men employed upon the construction work and were in most instances discounted to the local banks in Minnehaha county.

After a number of abortive attempts to levy an assessment for the purpose of raising the money to pay the warrants issued for the work done upon Drainage Ditch No.

1 and 2, the Board of County Commissioners, in June, 1921, adopted a notice of time and place for equalizing the proportion of benefits for the construction of the work on Drainage Ditch No. 1 and 2, in which notice the proportion of benefits assessed against Appellee was 839.45 units out of a proposed total of 32549.62 units, upon the basis of which proportion the assessment against Appellee and its property would be in excess of $7,500.

The plaintiff and Appellee brought this suit to enjoin the making of any assessment upon its property for the work done upon Drainage Ditch No. 1 and 2. A temporary injunction was granted *pendente lite*. The defendants named in the bill were the Board of County Commissioners of Minnehaha County, the Auditor, and the Treasurer of that county. Subsequently, the various banks and other persons holding drainage ditch warrants filed a petition for leave to intervene in the suit. This petition was granted and answers were filed both by the defendants and by the intervenors. Upon the hearing of the suit upon its merits, a final decree was entered enjoining the Board of County Commissioners from making any assessment for the expense of the work done under the proceedings establishing Drainage Ditch No. 1 and 2. The decree by its terms was without prejudice to the right of Appellee to contest any assessment upon the property owned by it which had formerly been assessed for Drainage Ditch No. 1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company vs Risty*, 282 Fed. 364.)

In its bill Appellee set up the facts concerning the construction of Drainage Ditches No. 1 and No. 2 and the subsequent construction of a spillway and attacked the constitutionality of the South Dakota Drainage Statute in the following allegations:

"That said purported statute of the state of South "Dakota 'Exhibit A' hereto, is unconstitutional and void, "in that the same is in violation of Section 2 of Article "VI, of the Constitution of the State of South Dakota, "and in that the same is in violation of the Fourteenth "Amendment of the Constitution of the United States; "that said Statute, 'Exhibit A', is further void and un- "constitutional in that the same provides no fixed and

"determinable method or rule for the apportionment of "benefits upon the property and property owners situat- "ed within the drainage area, and especially in that said "purported statute furnishes no fixed or determinable "basis for the apportionment of benefits upon the prop- "erty of railroad companies and other corporations, and "upon the property of municipal and quasi-municipal cor- "porations, and upon platted property in cities and vil- "lages. Said purported law, 'Exhibit A', is further un- "constitutional and void in that the same provides for an "assessment against property without the right of the "property owner to be heard thereon and without notice "of any character to the property owner; that if said ap- "portionment of benefits be made as threatened by the "said Board of County Commissioners of said Minnehaha "County, and as is provided in said notice, 'Exhibit C', "the same will constitute the taking of the property of "plaintiff and of the other property owner affected by "said notice without due process of law; that a cloud will "be placed upon the title of the plaintiff to its real prop- "erty situated within said drainage area affected by "said notice, 'Exhibit C' and that there will result a mul- "tiplicity of suits and that plaintiff and other property "owners affected will suffer irreparable injury." (Rec- ord, p. 15).

The bill also attacked the acts of the Board of County Commissioners of Minnehaha County in its proceedings relative to the construction of the spillway and other drainage works as being without jurisdiction on account of the unconstitutionality of the South Dakota Drainage Statute and also on account of such proceedings not being had in accordance with the provisions of the Statute. (Record, pp. 14-15). The apportionment of benefits made against the property of Appellee was further attacked as exorbitant, disproportionate to the assessment of other property and made upon an arbitrary and discriminatory basis. (Record, pp. 72-73).

In their answer, Appellants took issue upon the unconstitutionality of the South Dakota Drainage law and specifically set up the establishment by the Board of County Commissioners of a new ditch project under the title of "Drainage Ditch No. 1 and 2."

Upon the trial in the district court the issues involved were, under the pleadings:

1. The constitutionality of the South Dakota Drainage Ditch Statute.

2. The regularity of the proceedings of the Board of County Commissioners of Minnehaha county under the Statute.

3. The proper construction to be given to the provisions of the South Dakota Drainage Statute.

There was practically no dispute as to the facts out of which this suit arises. It was admitted by all parties to the controversy that originally the Board of County Commissioners of Minnehaha county had established two drainage ditches known respectively as Drainage Ditch No. 1 and Drainage Ditch No. 2. It was also conceded that after the spillway, at the outlet of Drainage Ditch No. 1, had been washed out, the Board of County Commissioners established a new ditch project known as Drainage Ditch No. 1 and 2.

This suit was one of six cases involving this same ditch project, but the positions taken by the plaintiffs in the various cases differed upon the proposition as to whether Drainage Ditch No. 1 and 2 was a new and independent proposition or whether it was merely a project for the maintenance and repair of Drainage Ditch No. 1 and Drainage Ditch No. 2 and consequently a continuation of those two propositions. In all of the six cases the contention of counsel for Appellants was that Drainage Ditch No. 1 and 2 was a new and independent proposition. This position was contested by plaintiffs in some of the cases who took the position that it was merely a maintenance and repair project. In the case at bar, the plaintiff (Appellee in this court) was content to coincide with the position taken by the defendants (Appellants in this court) and to base its right to an injunction upon a state of facts in which it conceded that Drainage Ditch No. 1 and 2 was a new and independent ditch proposition and not a continuation of the old Drainage Ditch No. 1 and Drainage Ditch No. 2.

In the District Court injunctions were granted to the plaintiffs in all the six cases, but in his opinion filed in the District Court, the District Judge took the position that

Drainage Ditch No. 1 and 2 was merely a maintenance and repair project and a continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company vs Risty*, 282 Fed. 364).

While we contend in this court, as we did in the Circuit Court of Appeals, that the decree of the District Court was properly entered and should be affirmed, we do not act as the defenders of the decree upon the grounds upon which it was based by the District Judge. The decree was, in our view of the controversy, properly entered, but the same decree should have been entered had the court been of the opinion that Drainage Ditch No. 1 and 2 was an independent and original ditch proposition and not a continuation and repair project of Drainage Ditch No. 1 and Drainage Ditch No. 2. In this position we do not coincide with the views expressed by counsel for the Appellees in other of the six cases now before this court. We accept the position of counsel for the Appellants that Drainage Ditch No. 1 and 2 was an original and independent ditch proposition and upon that basis shall proceed with our argument in support of the decree of the District Court and the decision of the Circuit Court of Appeals.

An appeal was taken by the defendants and by the intervenors to the Circuit Court of Appeals for the Eighth Circuit, in which court the decree of the District Court was affirmed. *Risty vs Chicago, Rock Island & Pacific Railway Company*, 297 Fed 710. The defendants and intervenors then filed a petition in this Court for a writ of certiorari and, at the same time, took this appeal. The application for a certiorari was denied. *Risty vs Chicago, St. Paul, Minneapolis & Omaha*, 266 U. S. 622. The case is now before this court upon the appeal.

The foregoing being the facts in this suit, we submit on behalf of the Appellee, the Chicago, Milwaukee & St. Paul Railway Company, the following:

BRIEF AND ARGUMENT

I.

THE SOUTH DAKOTA DRAINAGE LAW IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND IS THEREFORE UNCONSTITUTIONAL.

The first proposition which we desire to present for the consideration of the Court is that the entire South Dakota drainage law is unconstitutional, our contention being that it is in violation of the "due process of law" clause of the fourteenth amendment to the federal constitution. The consideration of this question involves an analysis of the provisions of the South Dakota drainage statute as it existed at the time the Board of County Commissioners of Minnehaha county attempted to establish Drainage Ditch No. 1 and 2 and did the work thereunder.

The first statutory step in the establishment of a drainage ditch is the filing of a petition. (§2, ch. 134, Laws of 1907; §8459, R. S. 1919). This petition must "set forth "the necessity for the drainage, a description of the pro-"posed route by its initial and terminal points and its "general course, or by its exact course in whole or in part, "and a *general statement of the territory likely to be "affected thereby"*. It will be noticed that in the petition, which is the initial and jurisdictional step in the formation of a drainage ditch, it is not necessary to include a description of the property which will be affected and upon which assessments will be levied to pay the costs of the construction of the ditch. All that is required is a "general statement of the territory likely to be affected "thereby." The next step in the proceeding is for the County Auditor to transmit a copy of the petition to the State Engineer, who, together with the Board of County Commissioners is required to inspect the proposed route and "if in the opinion of the Board and the State Engi-"neer it is necessary," the Board of County Commissioners causes a survey of the proposed drainage to be made by a competent engineer, selected by the Board, but under the general supervision of the State Engineer. This survey is primarily for the purpose of aiding the Board in determining the necessity for the proposed drainage but

it may be a complete survey such as will be required for the construction of the drainage and the assessment of its cost. All this is within the jurisdiction of the Board of County Commissioners. The survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. (§ 3, ch. 134, Laws of 1907; § 1, ch. 102, Laws of 1909; §8460, R. S., 1919). While the survey may, at the option of the Board of County Commissioners, be a complete survey for the purpose of ascertaining all facts required for the construction of the proposed drainage and the assessment of its cost, such complete survey is not rendered obligatory by the statute and the Board of County Commissioners may have made only so much of the survey as may be necessary to determine the necessity for the proposed drainage.

After receiving the report of the surveyor, the Board of County Commissioners is required to determine the "exact line and width of the ditch, if the same shall not "be fixed in the petition, and shall file its determination "with the petition." The Board then fixes the time and place for the hearing of the petition and gives notice by publication in a newspaper for two weeks and by posting copies of the notice in three public places near the route of the proposed drainage. The notice "shall describe the "route of the proposed drainage and the tract of country "likely to be affected thereby in general terms, the sep-"arate tracts of land through which the proposed drain-"age will pass and give the names of the owners thereof "as appears from the records of the office of the Register "of Deeds on the date of the filing of the petition, and "shall refer to the files in the proceeding for further par-"ticulars." The notice shall also "summon *all persons* "*affected* by the proposed drainage to appear at such "hearing and show cause why the proposed drainage shall "not be established and constructed." (§ 4, ch. 134, Laws of 1907; § 2, ch. 102, Laws of 1909; § 8461, R. S. 1919). This notice is the only notice given to property owners prior to the establishment of a drainage ditch and is the only notice under which the Board can acquire jurisdic-

tion to make an assessment. The owners are named of the separate tracts of land through which the proposed drainage will pass but no description is given of the property *affected by the proposed drainage ditch or which will be assessed for the cost of the construction thereof.* The notice merely describes the route of the proposed drainage and the "tract of country likely to be affected thereby *"in general terms"* and then summons *"all persons af-"fected by the proposed drainage"* to appear at the hearing. A notice designating as the tract of country "likely "to be affected thereby in general terms" would be sufficient, if it named as such "tract of country" the entire county in which the drainage ditch is to be constructed. Nothing whatever is required in the notice by which any property owner, other than one owning land through which the ditch is to be constructed, is appraised that he is affected or that his land will be assessed for the construction of the proposed drainage ditch. In fact, all that the South Dakota law requires is for the Board of County Commissioners of a South Dakota county to publish and post a general notice summoning "all persons affected" to appear at the hearing, in order to support an assessment, for the construction of the ditch, upon all of the real property situated within the county limits. There is absolutely nothing in the statutory notice to inform any property owner that he will be called upon to pay an assessment. After the ditch is constructed, the Board of County Commissioners is at liberty, under the South Dakota statute, to extend the assessment to all property in every direction up to the county boundary lines. If this be sufficient notice, then after it is given, the Board of County Commissioners has the power to assess for the cost of the construction of any ditch every acre of property within the county limits.

At the hearing upon the petition, the South Dakota statute kindly permits "any person interested" to appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the Board as to the width and route of the proposed ditch. After the hearing, the County Board may establish the drainage ditch. (§ 5, ch. 134, Laws of 1907; § 3, ch. 102, Laws of 1909; § 8462, R. S. 1919).

After the establishment of the drainage ditch, the Board of County Commissioners "shall fix the proportion of benefits of the proposed drainage among the lands affected and shall appoint a time and place for equalizing the same." (§6, ch. 134, Laws of 1907; § 4, ch. 102, Laws of 1909; § 8463, R. S. 1919). There is no statutory requirement as to how soon after the establishment of the drainage ditch this shall be done and it is not necessary that it be done before the drainage project has been completed. It must be done before an assessment is made for the purpose of paying the cost of the establishment of the drainage project but the assessment, when made, includes all costs already incurred, or thereafter to be incurred. (§ 7, ch. 134, Laws of 1907; § 5, ch. 102, Laws of 1909; ch. 130, Laws of 1911; § 8464, R. S. 1919.)

The notice of equalization of proportion of benefits is given by publication once in each week for two consecutive weeks in a newspaper of the county and by posting copies of the notice in three public places near the route of the proposed drainage. The law requires that the "notice "shall state the route and the width of the drainage estab- "lished, a description of each tract of land affected by "the proposed drainage and the names of the owners of "the several tracts of land as appears from the records "of the office of the Register of Deeds, at the date of filing "of the petition, and the proportion of benefits fixed by "each tract of property, taking any particular tract as a "unit, and shall notify all such owners to show cause why "the proportion of benefits shall not be fixed as stated." (§ 6, ch. 134, Laws of 1907; § 4, ch. 102, Laws of 1909; § 8463, R. S. 1919). Here for the first time there is published a description of each tract of land "affected" by the proposed drainage and the names of the owners of such tracts. As in the case at bar, the work may have been completed and an expense of over a quarter of a million dollars incurred before the Board of County Commissioners determines what particular lands are "affected" by the proposed drainage and gives notice to the owners of such lands. A property owner for the first time notified that his land is "affected" by the proposed drainage has no right to object in any manner to the establishment of the drainage project. He has nothing to say in re-

gard to its manner or cost of construction; he has no voice in the selection of the particular tract of land taken as a unit; and all concerning which he can be heard is as to whether the proportion of benefits "shall not be fixed "as stated."

It is now too late for the property owner to escape. He is like a rat in a trap. All that he can do is to appear before the Board of County Commissioners and object to the proportion of benefits which has been assessed against him and ask to have that proportion reduced by raising the proportion of some other property owner. He is precluded from raising any question whatsoever as to the right to include his property within the drainage area. He has nothing to say as to the necessity for the drainage project or as to its manner of construction or its cost. Without any notice, either personal or constructive, his property has been included in the drainage area under the general proclamation of the Board of County Commissioners and he has no redress.

Theirs not to make reply,
Theirs not to reason why,
Theirs but to do and die,

even though

Someone had blundered.

The property owner cannot question the validity of the proceedings. All that is left for him to do is to pay.

Our contention is that the South Dakota drainage statute is in violation of the due process of law clause of the fourteenth amendment to the federal constitution for the reason that no opportunity is given a property owner, whose property is "affected" by the proposed drainage project, to appear prior to the doing of the work and the making of the assessment for the construction cost.

In support of the constitutionality of the South Dakota drainage statute, counsel for appellants have cited *Spencer vs. Merchant*, 125 U. S. 345. That case was decided by a divided court. The legislature of the state of New York had, by express enactment, determined that certain lands should be included within an assessment district in which the cost of the improvement was to be proportioned. The majority of the court held "that the deter-"mination of the territorial district which should be taxed

"for local improvement is within the province of legisla-
"tive discretion." The courts in this and a line of suc
ceeding cases have made a clear distinction between cases in which a taxing district has been established by an act of the legislature and cases in which special assessments are to be made by some taxing body upon the property "beneficially affected" but not included within any taxing district established by legislative enactment. In the cases of taxing districts established by act of the legislature no notice need be given to the property owners of the inclusion of their property within the district, but a different rule applies in cases in which the taxing district is determined by the area of the land "beneficially affected."

Fallbrook Irrigation District vs Bradley, 164 U. S. 112, also cited by counsel in support of the constitutionality of the South Dakota drainage law, is, when carefully read, a strong authority against the constitutionality of the South Dakota statute. In the very elaborate opinion in this case the Court (p. 167) says:

"The legislature not having itself described the dis-
"trict, has not decided that any particular land would or
"could possibly be benefited as described, and, therefore,
"it would be necessary to give a hearing at some time to
"those interested upon the question of fact whether or
"not the land of any owner which was intended to be in-
"cluded would be benefited by the irrigation proposed. If
"such a hearing were provided for by the act, the de-
"cision of the tribunal thereby created would be sufficient.
"Whether it is provided for will be discussed when we
"come to the question of the proper construction of the
"act itself."

Later on in the opinion the court discusses the question whether the statute does provide for a hearing prior to the formation of the district and holds that under the provision of the statute under consideration and under the construction given it by the supreme court of California, by which state it was enacted, the right of hearing is given the property owner prior to the formation of the district. The court discusses the statute (pp. 170-172):

"We come now to the question of the true construc-
"tion of the act. Does it provide for a hearing as to
"whether the petitioners are of the class mentioned and

"described in the act and as to their compliance with the "conditions of the act in regard to the proceedings prior "to the presentation of the petition for the formation of "the district? Is there any opportunity provided for a "hearing upon notice to the land owners interested in the "question whether their lands will be benefited by the "proposed irrigation? We think the right to a hearing "in regard to all these facts is given by the act and that it "has been practically so construed by the Supreme Court "of California in some of the cases, above cited from the "reports of that court and in the case cited in the briefs "of counsel. We should come to the same conclusion from "a perusal of the act. The first two sections provide for "the petition and a hearing. The petition is to be signed "by a majority of the holders of title to lands susceptible "of one mode of irrigation, etc. This petition is to be pre-"sented to the board of supervisors at a regular meeting, "and notice of intended presentation must be published "two weeks before the time at which it is to be presented. "The board shall hear the same, shall establish and de-"fine the boundaries, although it cannot modify those de-"scribed in the petition, so as to except from the district "lands susceptible of irrigation by the same system of "works applicable to the other lands in the proposed dis-"trict, and the board cannot include in the district, even "though included in the description in the petition, lands "which shall not, in the judgment of the board, be bene-"fited by irrigation by said system.

"If the board is to hear the petition upon notice, and "is not to include land which will not, in its judgment, be "benefited by irrigation by the system, we think it fol-"lows as a necessary and a fair implication that the per-"sons interested in or who may be affected by the pro-"posed improvement have the right under the notice to "appear before the board and contest the facts upon which "the petition is based, and also the fact of benefit to any "particular land included in the description of that pro-"posed district.

"It is not an accurate construction of the statute to "say that no opportunity is afforded the landowner to test "the sufficiency of the petition in regard to the signers "thereof and in regard to the other conditions named in

"the act; nor is it correct to say that the power of the "board of supervisors is, in terms, limited to making such "changes in the boundaries proposed by the petitioners "as it may deem proper, subject to the conditions named "in the act.

"When the act speaks of a hearing of the petition, "what is meant by it? Certainly it must extend to a "hearing of the facts stated in the petition, and whether "those who sign it are sufficient in number and are among "the class of persons mentioned in the act as alone having "the right to sign the same. The obvious purpose of the "publication of the notice of the intended presentation of "the petition is to give those who are in any way interest-"ed in the proceeding an opportunity to appear before "the board and be heard upon all the questions of fact, "including the question of benefits to lands described in "the petition. As there is to be a hearing before the "board, and the board is not to include any lands which "in its judgment will not be benefited, the plain construc-"tion of the act is that the hearing before the board in-"cludes the question as to the benefits of the lands, be-"cause that is one of the conditions upon which the final "determination of the board is based, and the act cannot "in reason be so construed as to provide that while the "board is to give a hearing on the petition it must never-"theless decide in favor of the petitioners, and must estab-"lish and define the boundaries of the district, although "the signers may not be fifty, or a majority of the hold-"ers of title, as provided by the act, and notwithstanding "some other defect may become apparent upon the hear-"ing."

It will be seen in *Fallbrook Irrigation District vs Bradley* that the California statute differs from the South Dakota statute in that the petition must "particularly de-"scribe the proposed boundaries of such districts" and the petition itself must be published. After the petition is published and has been passed upon by the Board of Supervisors the question of the formation of the irriga-tion district is submitted to an election of the electors of the district who are also freeholders. (*Fallbrook Irriga-tion District vs Bradley*, 164 U. S. 112, pp. 116-117). These facts differentiate the statute passed upon in *Fall-*

brook Irrigation District vs Bradley from the South Dakota statute under consideration. Under the California statute the boundaries of the proposed district are fixed in the first instance and after they have been determined then the question of the formation of the district is put to a vote of the freeholder electors. We submit therefore, that the decision in *Fallbrook Irrigation District vs Bradley* is a distinct authority in favor of our position that the South Dakota drainage statute is unconstitutional. The court expressly determines in that case that notice must be given to the property owner of the formation of the district before his property can be included in it, and one of the requisites of notice is that the property owner be advised in some manner, either actually or constructively, that his land will be included within the limits of the proposed project.

Embree vs Kansas City Road District, 240 U. S. 242, is another case relied upon by counsel in support of the constitutionality of the South Dakota law. Here, again, is a case which we submit directly sustains our contention as to the invalidity of the South Dakota statute. The Court in the opinion (pp. 246-248) says:

"The district was not established or defined by the "legislature, but by an order of the county court made "under a general law. Whether there was need for the "district and, if so, what lands should be included and "what excluded was committed to the judgment and dis-"cretion of that court subject to these qualifications: "First, that the district should contain at least 640 acres "of contiguous land and be wholly within the county; sec-"ond, that the court's action should be invoked by a peti-"tion signed by the owners of a majority of the acres in "the proposed district, and, third, that public notice—con-"ceded to be adequate—should be given, by the clerk of "the court, of the presentation of the petition and the "date when it would be considered, and that owners of "land within the proposed district should be accorded an "opportunity to appear, either collectively or separately, "and oppose its formation. In this connection the statute "says: 'The court shall hear such petition and remon-" 'strance, and shall make such change in the boundaries " 'of such proposed district as the public good may re-

"'quire and make necessary, and if after such changes "'are made it shall appear to the court that such petition "'is signed or in writing consented to by the owners of "'a majority of all the acres of land within the district "'as so changed, the court shall make a preliminary order "'establishing such public road district, and such order "'shall set out the boundaries of such district as estab- "'lished . . . but the boundaries of no district shall be "'so changed as to embrace any land not included in the "'notice made by the clerk unless the owner thereof shall "'in writing consent thereto, or shall appear at the hear- "'ing and is notified in open court of such fact and given "'an opportunity to file or join in a remonstrance.' The "order actually made shows that four of the present plain- "tiffs, with three others, appeared in opposition to the "petition, recites that 'the court, after hearing and con- "'sidering said petition and said protests and remon "'strances and all evidence offered in support thereof, "'finds that the public good requires and makes necessary "'the organization, formation and creation of such pro- "'posed public road district . . . with boundaries as stated "'in said petition,' and sets out the boundaries of the "district as established.

"The sole purpose in creating the district, as the "statute shows, was to accomplish the improvement of "public roads therein—the particular roads to be desig- "nated by the district commissioners and an approving "vote of the land owners.

"As the district was not established by the legisla- "ture but by an exercise of delegated authority, there was "no legislative decision that its location, boundaries and "needs were such that the lands therein would be benefit "ed by its creation and what it was intended to accom- "plish, and, this being so, it was essential to due process "of law that the land owners be accorded an opportunity "to be heard upon the question whether their lands would "be thus benefited. If the statute provided for such a "hearing, the decision of the designated tribunal would be "sufficient, unless made fraudulently or in bad faith. "*Fallbrook Irrigation District vs Bradley,* 164 U. S. 112, "174-175.

"Did the statute contemplate such a hearing? We

"have seen that it required that adequate public notice "be given of the presentation of the petition for the crea- "tion of the district and the time when it would be con- "sidered, made provision for the presentation of remon- "strances by owners of lands within the proposed district, "and directed that the petition and remonstrances be "heard by the county court, that the court make such "change in the boundaries 'as the public good may re- "'quire' and that the boundaries be not enlarged unless "the owners of the lands not before included consent in "writing or appear at the hearing and be given an oppor- "tunity to present objections. That a hearing of some "kind was contemplated is obvious, and conceded."

The case of *Soliah vs Heskin*, 222 U. S. 522, is strongly relied upon by counsel. That is a case arising under the North Dakota drainage law. The opinion at first glance would seem to support the contention of counsel for Appellants but an examination of the North Dakota statute, upon which the case arose, discloses the fact that the North Dakota law was not subject to the same objections which are urged against the South Dakota enactment. Under the North Dakota statute, a petition for the construction of the drain is filed with the board of drain commissioners. This petition designates the starting point and terminus and general course of the proposed drain. The board of drain commissioners then employs surveyors who prepare profiles, plans, and specifications of the proposed drain, an estimate of the cost thereof, and a map or plat of the lands to be drained in duplicate, showing the regular subdivisions thereof, one copy of which is filed in the office of the county auditor in the county in which the drain is proposed to be constructed and the other with the board of drain commissioners, subject to inspection. Upon the filing of the surveyor's report, the board of drain commissioners fixes a date and public place for hearing objections to the petitions and gives notice of such hearing. The notices must contain a copy of the petition and a statement of the date of filing of the surveyor's report and the date when the board will act upon the petition, must be signed by a majority of the members of the drainage board and "shall be sent by "registered mail to the last known address of each and

"every *owner of land which may be affected* by the pro-"posed drain." The North Dakota statute therefore requires that the names of "each and every owner of land "which may be affected" be determined and actual notice given these at the very inception of the project and this notice must be given by sending to each owner a copy of the petition and of a statement of the date of filing the surveyor's report and the date upon which the board will act upon the petition. That is a very different proposition from merely publishing notice "to all persons whose "property is affected" without first determining who are affected, as required by the South Dakota statute. The opinion in the case of *Soliah vs Heskin* must consequently be read in the light of the North Dakota statute which provides for the giving of notice at two stages of the proceedings to the property owner, first, a notice before the drainage district is formed, and, second, a notice when the assessment of benefits is made. The North Dakota statute provides exactly the thing for the want of which the South Dakota statute is unconstitutional.

Counsel for Appellants place great reliance upon the recent case of *Milheim vs Moffat Tunnel District*, 262 U. S. 710. That case is clearly to be distinguished from the case at bar. It is a case arising upon an assessment made in a taxing district, the limits of which had been fixed by act of the legislature of the state of Colorado. The supreme court held, following *Spencer vs Merchant*, 125 U. S. 345, and other similar cases, that the legislative authority of a state extends to the formation of taxing districts and that a state legislature can enact a law fixing the boundaries of a taxing district without giving notice to the owners of property included therein. That is an entirely different proposition from the one arising under the South Dakota drainage law and the decision of the supreme court in *Milheim vs. Moffat Tunnel District* is not an authority in support of the South Dakota statute which on its face does not attempt to form a taxing district by legislative enactment.

The case of *Voight vs Detroit City*, 184 U. S. 115, was cited by JUDGE ELLIOTT in his opinion deciding this case in the District Court. This case is one of a line of cases involving the making of special assessments in cities

for various municipal purposes. See also *St. Louis Land Company vs Kansas City,* 241 U. S. 419. In this line of cases the courts hold that cities organized under general laws or special acts of the legislature may impose special assessments under general statutes authorizing the levying of assessments in proportion to benefits. In all such cases, it is held by the courts, some opportunity must be given the taxpayer to be heard as to the proportion of the benefits to be assessed against his property but the property owner is not entitled to a hearing upon the question of the determination whether the improvements shall be made for which the special assessment is levied.

In the case of *Central of Georgia Railway Company vs Wright,* 207 U. S. 127, the Supreme Court held (quoting from the syllabus): "Due process of law requires "that opportunity to be heard as to the validity of the tax "and the amount of the assessment be given to a taxpay- "er, who, without fraudulent intent and in the honest be- "lief that it is not taxable, withholds property from tax "returns, and this requirement is not satisfied where the "taxpayer is allowed to attack the assessment only for "fraud and corruption."

In *Londoner vs Denver,* 210 U. S. 373, the Court, passing upon a Colorado statute, says:

"In the assessment, apportionment and collection of "taxes upon property within their jurisdiction the Con- "stitution of the United States imposes few restrictions "upon the States. In the enforcement of such restric- "tion as the Constitution does impose this court has re- "garded substance and not form. But where the legis- "lature of a State, instead of fixing the tax itself, com- "mits to some subordinate body the duty of determin- "ing whether, in what amount, and upon whom it shall "be levied, and of making its assessment and apportion- "ment, due process of law requires that at some stage "of the proceedings before the tax becomes irrevocably "fixed, the taxpayer shall have an opportunity to be "heard, of which he must have notice, either personal, by "publication, or by a law fixing the time and place of the "hearing. *Hager vs Reclamation District,* 111 U. S. 701; "*Kentucky Railroad Tax Cases,* 115 U. S. 321; *Winona &* "*St. Peter Land Co. vs Minnesota,* 159 U. S. 526, 537;

"*Lent vs Tillson,* 140 U. S. 316; *Glidden vs Harrington,*
"189 U. S. 255; *Hibben vs Smith,* 191 U. S. 310; *Security*
"*Trust Co. vs. Lexington,* 203 U. S. 323; *Central of*
"*Georgia vs Wright,* 207 U. S. 127. It must be remem-
"bered that the law of Colorado denies the landowner
"the right to object in the courts to the assessment, upon
"the ground that the objections are cognizable only by
"the boards of equalization.

"If it is enough that, under such circumstances, an op-
"portunity is given to submit in writing all objections to
"and complaints of the tax to the board, then there was a
"hearing afforded in the case at bar. But we think that
"something more than that, even in proceedings for tax-
"ation, is required by due process of law. Many require-
"ments essential in strictly judicial proceedings may be
"dispensed with in proceedings of this nature. But even
"here a hearing in its very essence demands that he who
"is entitled to it shall have the right to support his alle-
"gations by argument however brief, and, if need be, by
"proof, however informal. *Pittsburg &c Railway Co. vs*
"*Backus,* 154 U. S. 421, 426; *Fallbrook Irrigation District*
"*vs Bradley,* 164 U. S. 112, 171, *et seq.* It is apparent
"that such a hearing was denied to the plaintiffs in error.
"The denial was by the city council, which, while acting
"as a board of equalization, represents the state. *Ray-*
"*mond vs Chicago Traction Co.,* 207 U. S. 20. The as-
"sessment was therefore void, and the plaintiffs in error
"were entitled to a decree discharging their lands from
"a lien on account of it."

In *Turner vs Wade,* 254 U. S. 64, the Court held (quoting from the syllabus) as follows:

"The Georgia Tax Equalization Act (Laws, 1913, p.
"123 §§ 6-7), empowers the Board of County Tax Assess-
"ors to assess property for taxation and requires it to
"notify the taxpayer of changes made in his returns; it
"gives him, if dissatisfied, the right to demand an arbitra-
"tion, and provides that a majority of three arbitrators,
"one appointed by him, one by the Board and the third by
"the two so selected, shall fix the assessment; but the
"arbitrators must render their decision within ten days
"from the naming of the arbitrator by the board, other-
"wise the Board's decision—i. e., its assessment—stands

"affirmed; and no notice is afforded the taxpayer before "the making of the Board's assessment, nor any oppor- "tunity to be heard concerning it save that before the "arbitrators. Held, that an assessment so made by the "Board of County Tax Assessors, increasing the valua- "tion returned by a property owner, without notice or "hearing, was without due process of law, where his rem- "edy by arbitration proved abortive because the arbitra- "tors, though agreeing that the assessment was excessive, "could no two of them unite on a new assessment before "the ten day limitation expired."

We contend that an examination of the decisions of this Court pertinent to this case discloses that the following principles of law have been laid down:

First: That "due process of law" requires that at some stage of the proceedings the taxpayer must have an opportunity to appear and be heard *both as to the validity of the tax and as to its amount.*

Second: That the state legislature possesses the authority, by direct legislative enactment, to establish taxing districts and to fix the boundaries thereof without notice to the property owners included within such district.

Third: That where, by direct legislative enactment, certain territory has been formed into a taxing district the taxing authorities of such district may impose special assessments upon the property situated within the taxing district, pursuant to powers conferred by the legislature upon the taxing authorities, without first giving the property owner an opportunity to be heard as to the necessity for the making of the improvement, but in such cases the taxpayer must be given an opportunity to be heard as to the amount of the tax which he is to be compelled to pay.

Fourth: That in cases in which a taxing area or district is not formed by direct act of the legislature but is formed for the making of some public improvement by special assessments upon the property contained in the area or district, by local officers through authority delegated to them by the legislature to act upon petition of property owners, it is *absolutely essential to the validity of the proceedings that notice be given to the property owners whose interests are affected before the taxing area or dis-*

trict can be formed, the work done, and a tax imposed. The notice is not necessarily a personal one and may be by publication *but a notice of some character is essential.*

Analyzing all of the cases upon the subject, there cannot be found a single case in which a law containing the provisions of the South Dakota drainage law has been sustained by the courts. In every instance in which a law has been held valid there was a positive requirement that notice should be given to the taxpayer of a hearing upon the question of the making of the proposed improvements. In every instance the property affected has been definitely determined before the hearing and the property owner has been advised in some manner that his property is included within the area upon which it is intended that a tax or asssesment be imposed.

Search the law reports through; there cannot be found a case in which a mere general notice directed to "all persons affected" has been held to be a sufficient notice to a property owner that his property is to be included within an assessment area.

The inequity of a law like that of South Dakota is well illustrated by the results of the proceedings of the Board of County Commissioners of Minnehaha county in the case at bar. Under a notice to "all persons affected" it is sought to assess for the construction of the works in Drainage Ditch No. 1 and 2 not only the area formerly assessed for the construction of Drainage Ditch No. 1 and for the construction of Drainage Ditch No. 2, but to assess also property situated several miles from any of the work done in Drainage Ditch No. 1 and 2 and miles away from any of the land in the area assessed for the original construction of Drainage Ditch No. 1 or of Drainage Ditch No. 2. Property, that could not by any possibility be drained by the work done in Drainage Ditch No. 1 and 2 and that could not even remotely be benefited by that work, was included in the assessment area, and under the notice there could have been included just as well any other property situate within the limits of the 800 square miles comprising Minnehaha county.

If the County Commissioners of Minnehaha county had been required by the South Dakota drainage law to obtain, in the first instance, a survey and plat of the pro-

posed drainage area, and then to notify, either personally or by mail, publication, or posting, the property owners interested in that area, their proceedings might have had a semblance of legality, but under the South Dakota statute no such procedure is required. The County Commissioners have before them the names of the property owners through whose lands the drainage ditch passes but neither the Board of County Commissioners nor any one else has the slightest idea of what lands will be assessed for the cost of the construction of the drainage ditch. The only notice that is given to anyone is the general notice to "all persons affected." After the drainage works are completed, then for the first time a survey is made for the purpose of ascertaining what lands are "affected" and shall be assessed. The County Commissioners fix the proportion of benefits and publish the notice which, for the first time, informs the property owner that his land is liable for the assessment. It is then too late to lock the barn door. The horse has already been stolen. The drainage project has been constructed, the cost incurred, and all that is left for the property owner to do is to pay his assessment and "look pleasant." We reiterate, that never has a law of this character been sustained by this Court. All decisions of this Court, cited in support of the constitutionality of the South Dakota statute, can be easily distinguished as they are all of them based upon facts and principles of law which are not found in this case.

The bill in this case attacked directly the constitutionality of the South Dakota Drainage Statute. In the District Court the District judge upheld the constitutionality of the statute but granted an injunction upon other grounds (*Chicago, Rock Island & Pacific Railway Co. vs Risty,* 282 Fed. 364). In the Circuit Court of Appeals JUDGE KENYON, in delivering the opinion of the Court, expressly avoided passing upon the constitutional questions involved and while he expressly admitted that these questions were very grave ones, he held that their determination was not necessary to the decision of the case in that court and affirmed on other grounds the decision of the District Court.

Upon this appeal in this court, the constitutionality of the South Dakota Drainage Statute is again brought

before the court by the averments of the bill and answers and by the evidence introduced upon the trial in the District Court and preserved in the record in this Court. The position taken by the Plaintiff and Appellant is, that the South Dakota Drainage Law is in violation of the provisions of the Fourteenth Amendment to the Constitution and while, as will be discussed in a later portion of our argument, we contend that the proceedings taken by the Board of County Commissioners of Minnehaha County were so irregular as to render them invalid even if the statute were constitutional, we now submit, that on account of the unconstitutional provisions of the South Dakota Drainage Law the Board of County Commissioners of Minnehaha County possessed no authority to make assessments against the property of Appellee for the purpose of defraying the costs of the construction of Drainage Ditch No. 1 and 2.

In concluding our discussion upon this branch of this case we submit that the South Dakota drainage statute is unconstitutional in that no notice to property owners is required before a drainage assessment area is established or the work constructed and consequently the statute is unconstitutional as authorizing the taking of property without due process of law, contrary to the fourteenth amendment to the federal constitution.

II.

THE SOUTH DAKOTA DRAINAGE LAW IS IN VIOLATION OF SECTIONS 2 AND 13 OF ARTICLE VI OF THE SOUTH DAKOTA STATE CONSTITUTION AND IS THEREFORE UNCONSTITUTIONAL.

We now come to the question of the constitutionality of the South Dakota drainage law under the provisions of the South Dakota State Constitution. Section 2 of Article VI of the South Dakota Constitution provides as follows:

"§ 2. No person shall be deprived of life, liberty or "property without due process of law."

Section 13 of Article VI of the South Dakota Constitution provides as follows:

"§ 13. Private property shall not be taken for public "use, or damaged without compensation * * * * *"

It will thus be seen that the South Dakota state constitution contains not only the due process of law clause contained in the fourteenth amendment to the federal constitution but also the just compensation clause contained in the fifth amendment to the federal constitution, thus making the provisions applicable to the state which by the fifth amendment are made applicable to the federal government.

The South Dakota drainage statute has a number of times been before the South Dakota supreme court for construction in various of its phases but the question as to the constitutionality of the statute, by reason of its failure to provide a notice to property owners before the assessment area is determined, has never been presented to the South Dakota supreme court or passed upon by that court. Shortly prior to the institution of the case at bar, a suit was commenced in the circuit court of Minnehaha county, South Dakota, by one Oluf O. Gilseth against the Board of County Commissioners of Minnehaha county and other persons, to restrain certain acts with relation to the making of an apportionment of benefits for the construction of the drainage works in controversy in the case at bar. Gilseth, the plaintiff in that case, was a property owner residing upon the flats north of the city of Sioux Falls upon whose land the County Commissioners were attempting to make an assessment. The South Dakota supreme court held that Gilseth was estopped by his actions with respect to the construction of the drainage works from objecting to an assessment to pay for their cost of construction, and the decision appears as *Gilseth vs Risty*, 46 S. D. 374. In the opinion of the majority of the Court, the Court says: "We do not understand that "appellant questions the constitutionality of the law un- "der which the said project was carried out." The Court thereupon proceeds to determine the case under the assumption that the law is constitutional and that the plaintiff, Gilseth, makes no attack upon it. In the dissenting opinion filed by one of the Judges of the Supreme Court of South Dakota in *Gilseth vs Risty*, the question of the constitutionality of the statute is discussed but the opinion

of the majority of the Court decides the case under the express reservation that the question of constitutionality is not involved.

The Supreme Court of South Dakota, in the case of *Evans vs Fall River County*, 9 S. D. 130, stated the law in that jurisdiction in the following language:

"Notice to the taxpayer is a jurisdictional matter, "and his right to be heard in opposition to an assessment, "or to the amount thereof, is vitally essential to the valid- "ity of every assessment. *Black, Tax Titles*, 488; 2 "*Blackw. Tax Titles*, 953; *Cooley, Tax'n*, 227; *County of* "*Santa Clara vs Southern Pac. R. Co.*, 18 Fed. 385; *Pow-* "*ers vs. Larrabee (N. D.)*, 49 N. W. 724; *Bank vs. Maher*, "9 Fed. 884."

From the foregoing citation it will be seen that the Supreme Court of South Dakota recognizes the doctrine laid down by the Supreme Court of the United States to the effect that in a special assessment proceeding the taxpayer must have the right, at some time or other, and in some manner or other, to be heard both as to the validity and as to the amount of the assessment.

The same argument which we have made relating to the unconstitutionality of the South Dakota drainage statute under the fourteenth amendment to the federal constitution applies with equal force to the statute considered in the light of the provisions of the South Dakota constitution.

We therefore contend that the South Dakota drainage law is unconstitutional under the constitution of that State for the reason that no notice is given the property owner of the proceedings precedent to the determination of the boundaries of the assessment area.

Counsel for Appellants argue that the proceedings had in the case at bar are valid for the reason that, as a matter of fact, the drainage notice did contain a description of the property sufficient to give notice to each property owner whose lands were affected. We do not by any means concede that the notice given was sufficient to apprise property owners that their lands were to be subject to assessment for the payment of the cost of the construction of the drainage project, but even if the Board of County Commissioners of Minnehaha county had pub-

lished a notice sufficient for that purpose it would not have helped the situation. The statute does not require any such notice to be published and is consequently unconstitutional. Validity cannot be injected into an unconstitutional and void statute by taking under it the proceedings which would have to be taken under a constitutional and valid status. The law being unconstitutional, all proceedings under it are invalid *ab initio*.

III.

THE LEGISLATURE OF SOUTH DAKOTA HAS NEVER EXERCISED THE AUTHORITY GRANTED TO IT BY SECTION 6 OF ARTICLE XXI OF THE SOUTH DAKOTA CONSTITUTION PROVIDING FOR THE ORGANIZATION OF DRAINAGE DISTRICTS.

To the proper determination of this case, there is necessary a consideration of just what of the powers granted to it by the South Dakota constitution the legislature of that state has attempted to exercise by the enactment of the South Dakota drainage statute. This involves an analysis of the exact phraseology of the constitutional provision under which the legislature obtained its power to act. Section 6 of Article XXI of the constitution constitutes that authority and is as follows:

"§ 6. The drainage of agricultural lands is hereby "declared to be a public purpose and the legislature may "provide therefor, and may provide for the organization "of drainage districts for the drainage of lands for any "public use, and may vest the corporate authorities there-"of, and the corporate authorities of counties, townships "and municipalities, with power to construct levees, drains "and ditches, and to keep in repair all drains, ditches and "levees heretofore constructed under the laws of this "state, by special assessments upon the property bene-"fited thereby, according to benefits received."

The first clause of the foregoing section declares that the drainage of agricultural lands is a public purpose, and gives the legislature power to "provide therefor." This clause is complete in itself and to determine its meaning and intent requires no aid from the remainder of the section.

The section then goes further and gives the legislature authority to "provide for the organization of drain-"age districts for the drainage of lands for any public "use." This is a power conferred upon the legislature distinct and in addition to that contained in the first clause of the section. It gives the legislature authority to establish drainage districts for the purpose, not only of carrying into effect the power to drain agricultural lands, but for the purpose of carrying on any drainage project for "any public use."

As the section stands, when the first and second clauses are considered together, it appears that three things are provided for: (a) the drainage of agricultural lands is made a public purpose, (b) the legislature is given power to provide for the drainage of agricultural lands, and (c) the legislature is given power to provide for the organization of drainage districts for the drainage of land for any public use.

The constitutional section then continues giving to the legislature authority, (a) to vest the corporate authorities of drainage districts with power to construct levees, drains and ditches and keep in repair all drains, ditches and levees theretofore constructed under the laws of the state, by special assessments upon property benefited thereby, according to benefits received, and (b) to vest the corporate authorities of counties, townships, and municipalities with power to construct levees, drains and ditches and keep in repair all drains, ditches, and levees theretofore constructed under the laws of the state, by special assessments upon the property benefited thereby, according to the benefits received.

Throughout the entire section there appears a clear intent to authorize the legislature to proceed in matters respecting drainage of lands in either of two ways, (a) by the organization of drainage districts with corporate authorities, and (b) by empowering the corporate authorities of counties, townships and municipalities with power to enter upon and carry out drainage projects. It is not made obligatory upon the legislature to follow either system for the construction of drainage. The constitution gives the legislature the option to carry on drainage work by drainage districts organized as separate en-

tities, or to carry on the work through the regularly constituted authorities of counties, townships, and municipalities. The legislature of South Dakota, acting under the constitutional option given it by Section 6 of Article XXI of the constitution, has declined to provide for the organization of drainage districts as separate corporate entities, and has provided for the doing of all drainage work through the corporate authorities of the various counties, to-wit, the Board of County Commissioners, county auditor, county treasurer, and other county officers.

It follows that in the case at bar there was not and could not under the law have been formed any drainage districts. The drainage projects, known as Drainage Ditch No. 1, and Drainage Ditch No. 2, and Drainage Ditch No. 1 and 2, were all conceived and carried out by the county authorities of Minnehaha county under the constitutional provision giving the legislature the power to vest in the county authorities the power to construct levees, drains, ditches, etc. The legislature never attempted to exercise the power given it by the constitution to organize drainage districts, and the application of the term "district" to the assessment area of Drainage Ditch No. 1, Drainage Ditch No. 2, or Drainage Ditch No. 1 and 2 is a misnomer. That term is reserved by the South Dakota constitution for an entirely different sort of organization and should not be used in connection with a drainage project carried on by the Board of County Commissioners under the South Dakota statute.

The situation with respect to this matter was pointed out by Judge Elliott in his opinion upon the trial of this case in the District Court. *Chicago, Rock Island & Pacific Railway Company vs Risty*, 282 Fed. 364. In this opinion, Judge Elliott says, (p. 368): "Pursuant to this "provision of the constitution, the legislature of the state "has provided for the drainage of agricultural lands: "*but nowhere is there any statutory enactment under "which drainage districts may be formed for the drain-"age of lands 'for any public use.'*"

A further examination of the particular wording of Section 6 of Article XXI of the South Dakota constitution discloses the important bearing which the failure of

the legislature to exercise the authority of establishing drainage districts has upon the decision of the case at bar. The wording of the constitutional provision is that the legislature "may provide for the organization of drain-"age districts for the drainage of lands for any public use," and may vest "the corporate authorities thereof," etc. Eliminate the quoted words (which are the only ones in the section referring to drainage districts) from the section and the result would be that the section would read, "The drainage of agricultural lands is hereby de-"clared to be a public purpose and the legislature may "provide therefor, and may vest the corporate authori-"ties of counties, townships and municipalities with pow-"er to construct levees, drains, and ditches, etc."

In other words, the South Dakota legislature is given authority to carry on drainage projects either through the formation of drainage districts as corporate entities, or through the municipal authorities of the counties, townships, and municipalities, but while drainage "for "any public use" may be constructed through corporate drainage districts, drainage of lands for agricultural purposes only may also be carried on by the county, townships and other municipal authorities. The constitution nowhere gives the legislature power to provide that drainage for "any public use" other than the drainage of agricultural lands may be constructed by the county, township, or other municipal authorities. Drainage for any other public purpose must be constructed by districts specially organized therefor.

It consequently follows that the legislature of South Dakota cannot, under the provisions of the state constitution, authorize drainage projects, for other than agricultural lands, to be conducted by the county, township, or other municipal authorities. Such authorities may construct drainage projects for the drainage of agricultural lands, but for any other public purposes the works must be constructed by the corporate authorities of drainage districts established for that purpose.

While the legislature of South Dakota had the right, under the state constitution, to enact a law authorizing the Board of County Commissioners of Minnehaha county to construct a drainage project for the drainage of agri-

cultural lands, it could not, under the constitution, authorize the Board of County Commissioners to carry on any drainage project for any public use other than the drainage of agricultural lands.

It follows, therefore, that if Drainage Ditch No. 1 and 2 was initiated by the Board of County Commissioners of Minnehaha county for a purpose other than the drainage of agricultural lands, the Board exceeded their powers in constructing the dams, ditches, spillway, and other works in Drainage Ditch No. 1 and 2, for which Appellee is now asked to pay a proportionate part. The question whether Drainage Ditch No. 1 and 2 was a project for the drainage of agricultural lands or for some other purpose we will discuss in a separate section of this brief.

IV.

DRAINAGE DITCH NO. 1 AND 2 WAS NOT A PROJECT FOR THE DRAINAGE OF AGRICULTURAL LANDS, AND THE ACTION OF THE BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY IN ENTERING UPON THE PROJECT AND IN CARRYING IT ON WAS *ULTRA VIRES*.

We now come to the consideration of the question as to whether Drainage Ditch No. 1 and 2 was a project for the drainage of agricultural lands or for the carrying out of some other purpose. There are at this time before this court pending appeals in six cases involving Drainage Ditch No. 1 and 2, and there is a divergence of views of the Appellees in various of the six cases as to the status of the drainage proposition. In some of the cases, the Appellees contend that Drainage Ditch No. 1 and 2 was simply a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and that the work was initiated and carried on by the Board of County Commissioners of Minnehaha county as a project for the repairing of Drainage Ditch No. 1 and of Drainage Ditch No. 2. In the case at bar, the position which we take is that Drainage Ditch No. 1 and 2 must be considered as an independent project entered upon by the Board of County Commissioners and that it is not a mere project for the re-

pair of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and is not in any manner controlled by the original proceedings for the construction of the old ditches. We contend that Drainage Ditch No. 1 and 2 must be considered as if it were an entirely new proposition entered upon after the spillway at the outlet of Drainage Ditch No. 1 had been washed out in the spring of 1916.

In the bill in this suit, it is alleged that the Board of County Commissioners of Minnehaha county has spent a sum in excess of $255,000 in the construction of a spillway, dams, and retaining gates, "designed not for the "purpose of drainage of agricultural lands, but solely "for the purpose of controlling and retarding the flow "of water, through the outlet of said Drainage Ditches "No. 1 and No. 2 into the Big Sioux river for the pur-"pose of preventing a change in the channel of said river "and of preventing the drainage of the gravel bed through "which the said city of Sioux Falls obtains its water "supply." It is further alleged that less than five per cent of such money has been expended for any purpose legitimately connected with the construction and maintenance of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The bill further sets up the alleged proceedings for the organization of Drainage Ditch No. 1 and 2.

The answer sets up the organization of Drainage Ditch No. 1 and 2 as a separate organization from Drainage Ditch No. 1 and Drainage Ditch No. 2, and the theory of Appellants is that Drainage Ditch No. 1 and 2 was a separate and independent organization and not a mere continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2, and that its formation was compelled for the purpose of saving the water supply of the city of Sioux Falls, and preventing the change of the channel of the Big Sioux river, and the imperiling of the interests of various property owners.

The position of Appellants throughout this case has been that Drainage Ditch No. 1 and 2 was a new and separate organization. They have so pleaded, and with their allegations in this regard we have no contention to make. The Appellee in this case is satisfied to rest this proposition upon the allegations of the answer and to concede that Drainage Ditch No. 1 and 2 was a new or-

ganization and was entirely independent of the original ditches. As we have said, in others of the six cases tried at the same time and upon the same record as this case, the plaintiffs (Appellees in this court) contested the claim of the defendants and intervenors (Appellants in this court) that Drainage Ditch No. 1 and 2 was a new and independent proposition and contended that all of the work done by the Board of County Commissioners was done merely as a continuation of the work upon the original ditches, Drainage Ditch No. 1 and Drainage Ditch No. 2. JUDGE ELLIOTT, in his opinion filed in the District Court, arrived at the conclusion that Drainage Ditch No. 1 and 2 was not a new and independent organization but was simply a continuation of the old original ditches. *Chicago, Rock Island & Pacific Railway vs Risty*, 282 Fed. 364 (p. 374 *et seq*).

With due respect to the opinion of the learned District Judge (who evidently felt inclined to hold so as not to preclude the holders of the drainage ditch warrants from a right to recover the amount of their investments from the property owners within the original assessment area of the Drainage Ditch No. 1 and of Drainage Ditch No. 2), we respectfully submit, that under the allegations of the bill and answer in this case, and under the evidence contained in the record, Drainage Ditch No. 1 and 2 must be deemed to be a new and independent organization and must stand or fall as such. If it possesses no life of its own, life cannot be injected into it by treating it as a continuation of the old original ditch organizations.

It appears from the evidence in this case that after the outlet of Drainage Ditch No. 1 had been washed out in the spring of 1916, various plans were proposed for the controlling of the water so as to prevent the formation of a new river channel and the draining of the gravel bed, from which the city of Sioux Falls obtained its water supply. No changes in Drainage Ditch No. 1 and Drainage Ditch No. 2 were required for the purpose of draining agricultural lands in the flats north of the city of Sioux Falls. The two ditches were working beautifully, so far as that purpose was concerned. They formed a perfect, complete and satisfactory system for the drainage of the flats. The property owners in the

flats could not have asked for any drainage system more complete. The trouble was, that instead of draining too little, the ditches drained too much, and were too efficient in their operation. No change in them was required for any purpose connected with the drainage of agricultural lands. The only people interested were those who objected to the formation of a new channel for the Big Sioux river and who were interested in maintaining a water supply for the city of Sioux Falls. The change in the course of the river, if made, would have operated to destroy various industries dependent upon the water power at the dams south of the falls. It would also have prevented the flow of the water through the city limits, and would have forced the city of Sioux Falls to seek some other municipal water supply.

The Board of County Commissioners, after various plans had been considered and for one reason after another abandoned, finally formed a new organization under the name of Drainage Ditch No. 1 and 2, and went ahead and expended upwards of $250,000 in the construction of a spillway, retaining walls, retaining dams, ditches, etc. The greater part of the money was invested in a spillway, dam and retaining walls which were purposely intended to retard, rather than to accelerate the flow of the surface water which collected upon the flats north of the city of Sioux Falls, and which consequently were intended to hinder rather than to facilitate the drainage of the flats.

After $255,000 and over had been expended upon the spillway and other water retaining works, the Board of County Commissioners proceeded to make an apportionment of benefits upon the lands "affected" by the improvement. In the assessment area, the Board of County Commissioners included not only the territory which had been included in the assessment area of the original ditches, Drainage Ditch No. 1 and Drainage Ditch No. 2, but also included all of the lands and lots within a considerable distance on either side of the Big Sioux river between the south boundary of the property in the assessment areas of the original ditches, along the channel of the Big Sioux river for a distance of some nine miles, along where the river runs west and south of

the city of Sioux Falls and through the city, and up to a point a short distance north of Sioux Falls. The ostensible reason for the inclusion of all this additional territory was the alleged fact that the property along the river was subject to floods at the time of freshets which would be relieved by the construction of the spillway and other water retaining works. Upon the trial, it was shown that with the exception of a small tract of territory immediately south of the original ditch assessment areas, the remainder of the lands, for a space of eight or nine miles along the channel of the Big Sioux river, had never suffered from flood waters, excepting in the spring of 1881, and that the occasion for the flood in that year was not the collection of water upon the flats north of the city of Sioux Falls, but the forming of an ice gorge at a point in the river in the southeast portion of the city. There was consequently a total lack of any proof in the record that the territory, along the channel of the river and through the city of Sioux Falls attempted to be included in the assessemnt area, was in any manner affected, beneficially or otherwise, by the construction of the spillway and other water retaining works.

In addition, the Board of County Commissioners attempted to proportion "benefits" to the City of Sioux Falls, the Northern States Power Company (owners of the waterpower on the Big Sioux river above the falls), and upon four railroad companies (one of which was Appellee) having railroad tracks and station grounds situated within the attempted assessment area. In the case of Appellee, and of one of the other railroad companies sought to be assessed, the railroad owned right of way and trackage both in the assessment areas of the original ditches and in the additional territory attempted to be included within the assessment area of Drainage Ditch No. 1 and 2. The other two railroads owned trackage and property only in the new territory and had no mileage or station grounds in the original assessment areas. In the decrees entered in the various railroad cases, the District Court enjoined the assessment of the railroad properties not included in the original assessment areas but reserved, without prejudice, the deter-

mination of the question whether Appellee and the other railroad companies having land both in the original assessment areas and in the new assessment area should be held liable for an assessment upon its property in the original assessment area.

The question therefore arises whether, under the record in this case, the Board of County Commissioners of Minnehaha county possesses authority to make any apportionment of benefits whatsoever, or any assessment upon any property whatsoever, for the cost of the construction of the works in Drainage Ditch No. 1 and 2. Our contention in this regard is as follows:

It is alleged by the defendants and Appellants in their answer, and Appellee admits it to be a fact, that Drainage Ditch No. 1 and 2 was a new and independent proposition and not a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and cannot be considered as a proposition for the repair of the original ditches. It is a project which must stand or fall upon its own footing.

Under the evidence in this case, Drainage Ditch No. 1 and 2 was not a project for the drainage of agricultural lands but was a project for another "public use," to-wit, the preservation of the water flowage in the channel of the Big Sioux river and of the supply of water in the gravel bed from which the city of Sioux Falls obtains its water supply. Neither of these propositions involves the drainage of agricultural lands. Drainage Ditch No. 1 and Drainage Ditch No. 2 had completely accomplished the object of draining the flats north of the city of Sioux Falls. If those drainage works were damaging other property interests, the remedy for the persons interested was to have the ditches abated as nuisances. Instead of pursuing this course, the Board of County Commissioners of Minnehaha county entered upon the construction of an elaborate system of water retaining works by which the water, which was collected from the flats into Drainage Ditch No. 1 and Drainage Ditch No. 2, could be retained until it could be passed off gradually into the Big Sioux river. To have abated Drainage Ditch No. 1 and Drainage Ditch No. 2 as nuisances, would have been to permit

the water, accumlating upon the flats, to remain there until it could flow off through its natural channel around the bends in the Big Sioux river, the same as it did before Drainage Ditch No. 1 and Drainage Ditch No. 2 were constructed. Instead, however, of doing this, the Board of County Commissioners proceeded to construct a new water retaining system by which the water could be retained upon the flats until it could gradually be drawn off, partly through the natural channel of the river and partly through a restricted passageway formed by the spillway and its attendant retaining walls and dams. In other words, the Board of County Commissioners proceeded to spend $250,000 and over for the purpose of accomplishing the same object that could have been accomplished by damming up the original ditches and leaving the flats in the same condition that they were before the original ditches were constructed. While some evidence was introduced, tending to show that a portion of the water collecting upon the flats passed off through the spillway, it remained in the evidence almost uncontradicted that the situation in the flats above the city of Sioux Falls is as bad as it was before any drainage ditches were constructed.

From all of the evidence in the record in this case, it would appear that the construction of the spillway and other works, under the organization of Drainage Ditch No. 1 and 2, was not for the purpose of draining agricultural lands but was for an entirely different purpose. This is the conclusion to which JUDGE ELLIOTT came in his opinion in the District Court, and upon this subject JUDGE ELLIOTT says, *Chicago, Rock Island and Pacific Railway Company vs. Risty,* 282 Fed. 364 (p. 378):

"There is another and further suggestion: I am of "the opinion that this reconstruction of the old spillway "without change of location, the repair of the break from "the river into the ditch, the cleaning of the ditch, the "change of the headgates where the flood waters are "taken from the river, everything that was done under "this pretended establishment of a new ditch, could not "have been viewed in the same light or as serving the "same purpose as the construction of the original ditches,

"because the thing that caused the board of commis-
"sioners to take any action with reference to the condi-
"tion that then existed was the danger that existed be-
"cause of the conduct of the water down through these
"two drainage ditches to and through this spillway. The
"danger that was threatened was not that the agricultural
"lands would not be drained, but that immense damage
"was threatened, that the course of the river was to be
"diverted to this cut-off, that great areas of land were
"threatened to be cut away by this river 100 feet deep,
"and that the water supply of the city was threatened
"to be taken away because of this drainage ditch and
"this imperfect spillway, because the water was to be
"taken from the river and all of the benefits of the river
"for several miles, through and around the city of Sioux
"Falls, would be destroyed. The power of the Northern
"States Power Company would be destroyed, by taking
"the water from the river. If it had not been for those
"conditions, for these threatened dangers, no action would
"have been taken; the ditches would have continued to
"function as they had functioned before. If the spill-
"way had been properly constructed originally, and if it
"had not proven inadequate, there would have been no
"cause for any action by the board in the year 1916.
"Every consideration that impelled action by the board
"was some phase of the threatened danger by reason
"of the inadequate and imperfect construction of these
"two ditches. Neither of these considerations that in-
"fluenced the action of the board *had anything to do with*
"*draining agricultural lands.*"

As has been shown, the legislature of South Dakota has never passed an act, putting into effect the authority vested by the constitution in the legislature to create drainage districts. As has also been shown, while drainage of agricultural lands can be carried on by county, township, and other municipal authorities, drainage for other "public uses" can only be constructed by drainage districts through their corporate authorities. It appearing from the record in this case that the work done under the organization of Drainage Ditch No. 1 and 2 was not for the purpose of agricultural lands but for other "public uses," it follows that the Board of County

Commissioners of Minnehaha county exceeded its authority in attempting to organize Drainage Ditch No. 1 and 2 and to construct the spillway and attendant works. Upon this proposition, JUDGE ELLIOTT, in his opinion, says:

"It may be said that to remedy these wrongs consti-
"tuted a public use, as referred to in the constitution of
"the state of South Dakota. Admitting that that is true,
"we are confronted with the proposition that there has
"been no legislation, conforming with the provisions of
"the constitution, authorizing the legislature to provide
"for the establishment of drainage districts and in the
"naming of officers with the powers therein referred to.
"If, therefore, any claim were made that the commis-
"sioners were acting under this authority, independent
"of the provision of law with reference to the drainage
"of agricultural lands, the answer is that the provision
"of the constitution is not selfexecuting, and that no leg-
"islation has been provided carrying this provision of
"the constitution into effect."

We therefore submit, that as the construction of the spillway and other attendant works was not a project for the drainage of agricultural lands, and as drainage for public uses other than the drainage of agricultural lands can, in South Dakota, only be carried on by the corporate authorities of drainage districts, and as the legislature of South Dakota has never authorized the organization of drainage districts with corporate authorities, all of the acts of the Board of County Commissioners of Minnehaha county, in attempting to organize Drainage Ditch No. 1 and 2, and in constructing the spillway and attendant works under such organization, were *ultra vires*, and that no apportionment of benefits or assessment for the cost of such construction can be made upon the property of Appellee.

V.

THE SOUTH DAKOTA DRAINAGE LAW IS UNCONSTITUTIONAL, SO FAR AS RESPECTS ASSESSMENTS OF RAILROAD PROPERTY, IN THAT IT PROVIDES FOR THE GIVING OF NO NOTICE WHATEVER OF THE APPORTIONMENT AND

EQUALIZATION OF BENEFITS TO RAILROAD COMPANIES.

In the preceding discussion of the South Dakota drainage law, we have considered the subject of the notice required by the statute to be given to property owners in general. We now desire to call the attention of the court to the provisions (or want of provisions) in the statute, relating to the notice to be given to railroad companies.

So far as concerns the statutory provisions relating to the notice to be given before a drainage project is entered upon by the Board of County Commissioners under the South Dakota drainage law, there is no difference as respects railroads and other property owners. The only notice, as has been seen, is a general notice to all persons "affected" by the proposed drainage project.

When we come to the matter of the notice given for the equalization of benefits, a singular situation is presented by the provisions of the statute in, that while the law provides for the publication of a notice to the owners of land, there is no provision whatever for the publication of any notice to railroad companies.

The provisions respecting the notice to be given of the equalization of proportion of benefits is found in Section 8463, South Dakota Revised Code, 1919. This section was evidently originally drafted for the purpose of providing a method for the equalization of assessments upon agricultural lands. The method, provided by the statute, for arriving at the assessment and equalization of benefits, is to take some "particular tract as a unit" and then with this tract as a measuring stick to determine, in number of units, the benefits received by the remaining tracts of land. This system is one which is in its nature applicable to agricultural lands, but which cannot well be applied to other classes of property, such as railroads and the property of municipalities. In the case of railroads, the taking of a particular tract of land as the unit, or measuring stick cannot be made to work out successfully unless the taxing authorities are content to assess railroads merely by virtue of the railroad ownership of the tracts of land comprised in the right of way within the assessment area. In other words, the

only way in which the proportion of benefits to railroad property could be determined, under the system provided by the statute, would be to consider merely the area of the right of way and proportion benefits to it the same as to the other agricultural land within the assessment area.

Evidently the legislature, in enacting the South Dakota drainage law, was not satisfied to have railroad companies and municipal organizations pay assessments for the construction of drainage works upon the same basis as the owners of agricultural lands, and in enacting Section 8463, South Dakota Revised Code, 1919, after providing the method for the assessment of the proportion of benefits upon lands by selecting some particular tract as a unit, there was added to the Section (something in the nature of an afterthought) the clause, "the pro- "portion of benefits which any county, city, town or "township may obtain by the construction of such drain- "age to highways or otherwise, and *the benefits which "any railroad company may obtain for its property by "such construction,* shall be fixed and equalized together "with the proportion of benefits to tracts of land." No method of arriving at the assessment and equalization is provided by the statute. The "particular tract as a unit" system is selfevidently inapplicable in such cases but the legislature has provided nothing to take its place. The law gives the Board of County Commissioners the naked power to fix and equalize the proportion of benefits to counties, cities, towns, townships, and railroad companies, but provides no method upon which the assessment and equalization can be based.

The notice of equalization of proportion of benefits, provided by Section 8463, "shall state the route and "width of the drainage established, a description of each "tract of land affected by the proposed drainage and the "names of the owners of the several tracts of land as "appears from the records of the office of the Register of "Deeds, at the date of the filing of the petition, and the "proportion of benefits fixed for each tract of property, "taking any particular tract as a unit, and shall notify "all such owners to show cause why the proportion of "benefits shall not be fixed as stated." This is a notice

directed solely to the owners of tracts of land within the assessment area. It does not purport to be a notice to a county, city, town, township, or railroad company respecting the assessment or the equalization of proportion of benefits upon the property belonging to any of such organizations. The statute authorizes the Board of County Commissioners to assess the "proportion of benefits" which any county, city, town or township may obtain by the construction of drainage to highways or otherwise, but does not provide for the giving of any notice to the municipality affected. With respect to railroad companies, the statute authorizes the Board of County Commissioners to "fix and equalize" the "benefits", but seems to make a distinction between railroad property and other classes of property by using the words "proportion of benefits" with respect to other property, but the term "benefits" with respect to railroad property. This would seem to indicate that it was not the intent of the legislature that railroad companies should be assessed in the same proportionate manner as are agricultural lands, or as are counties, cities, towns or townships.

The fact, however, remains that the legislature of South Dakota has made no provision whatever for the giving of notice to railroad companies, cities, towns, or townships, of the assessment or equalization of benefits supposed to be derived from the construction of the drainage works. It consequently follows that as far as railroad companies, counties, cities, towns, and townships are concerned, the statute provides for no notice whatever, at any stage of the proceeding, of the assessment or of the tax. Even if the South Dakota drainage statute should be held valid as far as respect the matter of notice to the owners of agricultural lands, it is clearly unconstitutional as to railroads and municipalities by reason of its failure to provide for any notice whatever at any stage of the proceedings. It clearly comes within the inhibition of the Fourteenth Amendment and within the doctrine laid down by the Supreme Court in numerous cases.

Central of Georgia Railway Company vs Wright, 207 U. S. 127,

Londoner vs Denver, 210 U. S. 373,
Soliah vs Heskin, 222 U. S. 522,
Turner vs Wade, 254 U. S. 64

The South Dakota drainage statute having failed to provide for the giving of any notice, at any stage of the proceedings prior to the time the tax becomes absolute, to railroad companies or municipalities, any assessment or tax imposed upon each corporation or municipality under the statute is without due process of law and void.

VI.

THE ATTEMPTED ASSESSMENT UPON THE PROPERTY OF APPELLEE WAS ARBITRARY, UNJUST, AND ILLEGAL, AND CONSTITUTES A DISCRIMINATION SO PALPABLE AND ARBITRARY AS TO AMOUNT TO A DENIAL OF THE EQUAL PROTECTION OF THE LAW.

Under the proposed assessment of benefits, out of a total of 32,549.62 units there were assessed against Appellee 839.45 units, upon which the assessment of Appellee would be in excess of $7,500. The methods used by the Board of County Commissioners in arriving at these figures is disclosed by the testimony of H. Rettinghouse, a civil engineer employed by the Board of County Commissioners to make a survey of the assessment area, and who made the computations contained in the assessment of benefits adopted by the Board. Mr. Rettinghouse was called by Appellants as a witness and upon the trial testified (Record pp. 350-3951), as follows:

"We used this unit selected as one and compared "the other real estate with it. It was decided by the "Board that the acre in question was worth one hundred "dollars prior to the improvements and that it was "worth one hundred twenty-five dollars subsequent to the "improvements. Therefore the actual value of benefit "to the unit selected was twenty-five dollars. All the "agricultural land was assessed in relation to this unit. "Many of the lands were only 30 or 40 per cent depend- "ing upon the amount of benefit derived, as compared "with this unit, being one hundred per cent. There were "other lands that were as high as three hundred and fifty

"per cent of this unit. I am familiar with the cost of "construction and upkeep of highways. In arriving at "the benefit to the highways within this drainage area "we estimated the benefit in this way. There is a certain "amount of annual maintenance necessary for any road, "and there is more than that amount under flood con- "ditions. That is to say, a road that is periodically "flooded as against a road that never is flooded. The "difference in the estimated cost of maintenance was "capitalized, or represented the interest on a certain "sum of money, and we consider the capitalized portion "as a real benefit. We then, after obtaining that re- "sult after making a great many calculations, taking "into consideration the various locations, some of them "benefitted more than others.

"We divided the amount arrived at by the value of "the unit of $25, thereby obtaining the number of units "as a proportional benefit for these roads. The sum "we divided by the unit represented the capitalized value "to that part of the highway; we applied the same "method to the streets and highways of the City of "Sioux Falls. We did not apply the acreage basis to "the city property, excepting possibly the grounds where "the waterworks are located. In applying the benefit "to the unit and what the Board took into consideration "as elements of benefit to the Milwaukee Railway Com- "pany, we took into consideration the fact that in the "first place there were practically three elements. First "was the right-of-way on the acreage basis, which was "estimated in proportion to the adjacent lands. Second, "that it was possible to shorten or abandon certain "bridges. In order to determine the benefits derived "therefrom is simply a mathematical proposition. It "costs a certain amount of money each year in order "to maintain a bridge, whether it is a pile bridge or a "steel bridge. We know how long these structures will "last. We figure the cost of a bridge and divide it by "the number of years in order to get the amount that "is necessary to be expended each year for replace- "ment. Taking the amount in dollars and cents multi- "plied by the length of the bridge and divide that and "capitalize that at 7 per cent, which is the usual rate

"of interest, and that determines the amount of benefit. "This is the second element. The third element is "the fact that by reason of the flooding of the territory "in which railroads are located, washouts often occur. "We obtained data and from my personal knowledge and "experience I have a very good idea what it costs to re- "pair washouts periodically appearing and we estimated "as close as possible how much it would amount to every "year and capitalized that amount again.

"Again as an additional element, a road-bed is solid- "ified or made stronger by not being subject to floods. "A road-bed that is constantly or for great lengths of "time subjected to submersion is certainly weakened, "and again, so far as humanly possible, we figured the "amount of benefits in dollars and cents and after get- "ting all of these results or capitalized amounts, we di "vided that by twenty-five as our measure and determined "the number of units of benefit. That system and general "method and plan was used to determine the amount "of benefits that each railroad received from these "separate elements."

The statement of Mr. Rettinghouse, the engineer who made the assessment of benefits for the Board of County Commissioners of Minnehaha county, is upon its face sufficient to demonstrate the fact that in arriving at the proportion of benefits to be assessed against Appellee, the other railroad companies, and the city of Sioux Falls, the Board used as a basis for arriving at the assessment a method so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. The assessment was clearly upon a fanciful view of benefits to be derived by the railroad companies from the drainage project. The basis used was not authorized by any provision of the South Dakota drainage law but was evolved from the inner consciousness of the County Commissioners of Minnehaha county and of the civil engineer employed by them. The basis was so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. It constituted a dis-

crimination so palpable and arbitrary as to amount to a denial of the equal protection of the law.

We do not deem it necessary to discuss this proposition at further length. In the recent case of *Kansas City Southern Railway Company vs Road Improvement District No. 6*, 256 U. S. 658, this Court has emphatically condemned similar methods of assessment.

We respectfully submit, that even if the South Dakota drainage were constitutional and there were no other valid objections to the proceedings of the Board of County Commissioners of Minnehaha County in the organization of Drainage Ditch No. 1 and 2, and in the construction work done thereunder, the assessment made upon Appellee cannot be sustained for the reason that it is so arbitrary and unjust and so confessedly founded upon a fanciful basis as to deprive Appellee of the equal protection of the law.

VII.

THE DECREE MUST BE SUSTAINED REGARDLESS OF WHETHER THE DRAINAGE DITCH NO. 1 AND 2 BE REGARDED AS AN ORIGINAL DITCH PROCEEDING OR AS A MAINTENANCE AND REPAIR PROPOSITION.

Section 2, ch. 134, Laws of 1907; Section 8459 R. S. 1919, provides for the initiation of the proceedings by filing a petition. Section 4, ch. 134, Laws of 1907, Section 2, ch. 102, Laws of 1919; Section 8461 R. S. 1919, provides for notice of hearing thereof given to property owners, and is the only notice given prior to the establishment of the ditch. This notice is, therefore, jurisdictional. We have already contended that this statute, not requiring a description of the property claimed to be affected, does not satisfy the constitutional requirements of due process of law. All parties affected have a right to be heard upon the question of the establishment of the proposed drainage. They must have notice that such property will be claimed to be affected, otherwise the major step in the proceeding for which they are ultimately bound to pay, has been taken without jurisdiction of the person or property.

If the said Section R. S. 8461 requires a description of the property to be affected, then the notice itself is insufficient. Upon this theory, perhaps, the decision of the trial court was based. The notice of the hearing upon the petition for the establishment of the ditch 1 and 2 refers generally to the lands affected thereby. There is nothing to indicate that the new ditch would extend beyond or occupy a position different, from the old ditches 1 and 2. The evidence shows that there was no change or extension. The lands therefore presumed to be affected by the new ditch, if held to be a new ditch, or by the improvement of the old ditches, could not, in the absence of the description in the notice, be deemed or expected to include other lands than those included within the drainage area of the old ditches 1 and 2. There was no such description and nothing upon which it could have been apprehended that the area was intended to be extended. There was, therefore, want of notice in fact to the owners of property not included within the original drainage area. The undisputed evidence is that a considerable property of the Appellee not included in the original area, is attempted to be assessed under the guise of a new drainage ditch and this without any notice that the old drainage area was to be extended. There was, therefore, a failure to give notice, jurisdiction was not acquired of the proposed added area affected by the injunction and decree of the trial court. The reference made in the Appellants' brief to the Gilseth case may be disposed of by this situation; the lands involved in the Gilseth case were in the original drainage area, while the assessments sought here to be enjoined by the court affect areas not included within such area. The court by its decree in this case excepted from the effect of the decree the right to make an assessment upon the railroad property within the original drainage area.

The court was, therefore, justified in finding that the proposed assessment upon property not included within the original drainage area was an afterthought for the purpose of raising money. It matters not whether such determination be upon the theory that this was an attempted establishment of the new ditch or whether such proceedings for the new ditch was a mere subterfuge for

raising money to repair and improve the old ditch. The decision of the court equally sustains either theory.

As the court properly determined, no attempt was made to take the statutory steps for the repair, improvement or continuation of the old ditch, but an attempt was made to follow statutory requirements to establish a new ditch—hence it matters not whether this was a mere subterfuge to raise money or any ineffectual attempt to establish a new ditch.

Appellants challenge the record on account of the insufficiency of the facts to support the findings and conclusions of the trial court affirmed by the court of appeals. The proposition as to the amount in controversy, that the proceedings and proposed assessments are arbitrarily determined without notice of hearing in advance of a determination of benefits upon a hearing, as well as the amount in controversy, is fully presented and made to appear from Exhibit B attached to bill of complaint, from which it appears that before any notice of equalization or the apportionment of benefits, it had already been arbitrarily determined by the Board that the different classes of property as different in character and as differently affected, if at all, as the agricultural lands from either by the so-called drainage should be assessed a certain percentage of the cost. There was no rule of comparisons prescribed by statute, or adopted by the Board, but it had already been determined that 14.5% should be assessed against the railroads, 33.4% against farm lands, 1% on city lots, 9.7% on city of Sioux Falls and 16.5% on the Northern States Power Company. This was a percentage of the $309,221.40 to be raised. It was then proposed that by Exhibit C attached to the bill of complaint that the various railroads should be assessed upon certain property in specific amounts. Upon this a hearing was proposed to be had. This situation is fairly conceded by argument of Appellants on page 80, paragraph III wherein Appellants say: "But passing that, it is "plain on this record so far as the present appeal is "concerned there is more than $1,000.00 in controversy "* * *. It is admitted that no assessment has yet been "made and not a dollar of tax yet collected. There has "been an expenditure of over $250,000; drainage warrants

"for that amount are outstanding, and they must be "paid if at all by collecting the assessment that this in- "junction stopped. The tentative apportionment against "the Appellees is roundly, $112,000. (Page 13 in N., P., "R., S., O. and M.) But on the point under discussion "little attention need be paid that fact. There is at this "time more than $1,000.00 in dispute no matter how this "$112,000.00 is treated." In other words, Appellants concede that by the apportionment already made, the sum of $112,000.00 must be raised upon the property of the Appellees and that by no course of reasoning can it be determined that less than $1,000.00 is involved in each of the appeals.

By the same course of reasoning, not only had the amount been determined, but also a division of the expenses as between different classes of property. The amount to be raised upon railroads had already been determined as 14.5% of the entire expense, regardless of benefits. However that be apportioned, neither could be less than $1,000.00. The testimony shows the dissimilarity of the property and the theory of the arbitrary assessment so that it clearly appears from the pleadings and the proof that not only more than $3,000.00 is involved but that the amount to be borne by the railroads had already been determined in advance and the apportionment, according to Appellants' concession, is to be made among the railroads of the 14.5%. Consequently these Appellees have been deprived of their right to be heard upon the controlling and important question, that is, as to the amount and basis of the assessment against railroads.

VIII.

THE DISTRICT COURT POSSESSED JURISDICTION TO ENTERTAIN AND DETERMINE THIS SUIT.

Counsel for Appellants have filled a great portion of their brief with arguments upon objections to the jurisdiction of the District Court in this suit. We do not deem it necessary to take up these various objections and discuss them *seriatum*. The questions at issue, involving as they do the constitutionality of the Federal

Constitution, together with the amount involved and the diversity of citizenship, are amply sufficient to sustain the jurisdiction of the court.

Counsel for Appellants strenuously contend that Appellee should have waited until after the Board of County Commissioners of Minnehaha county had finished the equalization of benefits before instituting this suit. This case is, however, not one in which any such delay of proceedings was necessary. The law, under which the Board of County Commissioners was proceeding, was unconstitutional. The Board was a trespasser from the very commencement of the assessment proceedings. After the Board of County Commissioners had committed one illegal act, in making the assessment of benefits, it was certainly not incumbent upon Appellee to wait before instituting legal proceedings until after the Board had committed further illegal acts. Jurisdiction to maintain a suit to restrain the commission of a tort becomes fixed as soon as the first tortuous step has been taken by the tort feasor. It is not necessary for the person injured to wait until after the threatened damage has been completed. The Board of County Commissioners of Minnehaha county invaded the rights of Appellee when it made the assessment of benefits, and the right of action then became complete.

In our view of the issues involved in this case, the points which we have raised in the foregoing discussions in this brief are a sufficient answer to all questions concerning the jurisdiction of the court.

IX.

APPELLEE IS NOT ESTOPPED BY ITS ACTS FROM MAINTAINING THIS SUIT.

In their brief, counsel for Appellants make a somewhat elaborate attempt to show that Appellee is estopped from maintaining this suit. It was in evidence that the railroad tracks of the Appellee extend through the flats north of the city of Sioux Falls, and are in some places not far distant from the drainage ditch.

All the evidence of estoppel contained in the records amounts to is, that Appellee operates a railroad through

the flats upon which the ditches were constructed. There is not a scintilla of evidence that Appellee or any of its officers ever consented to the drainage construction or approved of it in any manner whatsoever. It is, therefore, a sufficient answer to the estoppel proposition, that there is no evidence of any facts which would create an estoppel.

A further answer to the estoppel plea is this: Under the South Dakota drainage law, no notice was required to be given Appellee until the assessment of benefits had been made. Up to that time, Appellee had no knowledge that its property, situated outside of the original assessment areas of Drainage Ditch No. 1 and of Drainage Ditch No. 2, was "affected" by the drainage construction, or would be assessed for the cost thereof (it will be remembered that in the decree in this case, an injunction was issued in favor of Appellee only as to its property outside of the original assessment areas, and that as to the property within such areas the decree is without prejudice to the rights of Appellee. In this proceeding, therefore, only the property outside of the original assessment areas is to be taken into consideration). We do not concede that, under the South Dakota statute, any notice was ever given to Appellee that an assessment had been made upon its property for the statute, as has been seen, does not provide for the giving of any notice whatever to railroad companies. If, however, it should be conceded, for the sake of argument, that the notice published by the Board of County Commissioners, after the assessment had been made, was a notice to Appellee, it was the first notice that Appellee had ever received. All of the acts under which an estoppel is claimed by Appellants were done during the time of the construction work and long prior to the making of the assessment of benefits and to the publishing of the equalization notice.

We respectfully submit that even if the acts set forth in the record were sufficient to constitute an estoppel upon the part of Appellee that such acts could not constitute an estoppel for the reason that, at the time they were done, Appellee had received no notice that its property within the new territory sought to be assessed was within the assessment area of Drainage Ditch No. 1 and 2, and

had no knowledge that an assessment was in contemplation. We deem it unnecessary to discuss the estoppel proposition at further length.

X.

IN CONCLUSION

In the record of this case there is ample evidence of the greatest ignorance, ineffeciency, and extravagance upon the part of the Board of County Commissioners of Minnehaha county in the construction of the spillway, retaining walls, dams, and other works under the organization known as Drainage Ditch No. 1 and 2. Plans for the work were adopted and then the adoption rescinded. Plans and specifications for the construction of a spillway were obtained and bids advertised for and received for the construction in accordance with the plans. The bids were rejected upon the ground that they were too high, the plans were then thrown into the waste basket and contractors were employed to construct a spillway upon the cost-plus plan, the contractors to receive compensation for the material and labor used and, in addition, a profit of nine per cent. The construction of the spillway was entered upon without any plans therefor being made, and the plans were drawn after the spillway had been completed, or practically completed. The cost of the spillway so constructed was approximately $150,000, or more than three hundred per cent of the amount of the bids which were rejected by the Board as being too high. The spillway and other works, when completed, have failed to accomplish successfully the drainage of the flats north of the city of Sioux Falls. The property owners in the flats are in practically the same, or possibly in a worse condition, than they were prior to the original construction of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The works constructed, under the organization of Drainage Ditch No. 1 and 2, simply operate to retain the surface water upon the flats and not to drain it off. They are successful in preventing the diversion of the channel of the Big Sioux river and in preventing the draining of the gravel bed from which the city of Sioux Falls obtains its water supply. Those two objects have successfully been accomplished but the same results could have

been attained by placing, at a trifling expense, earthwork dams in proper places along the course of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The spillway and other works, as completed in Drainage Ditch No. 1 and 2, have operated to destroy the efficiency of the original ditches as drainage propositions, but have accomplished nothing that could not have been accomplished at a trifling expense by simply abandoning the old ditches and preventing the flow of water through the bluff and into the Big Sioux river below the falls.

The Board of County Commissioners of Minnehaha county, in the work done by them on Drainage Ditch No. 1 and 2, seem to have acted at haphazard and without any well defined plan of procedure. The one thing which they have accomplished successfully has been to expend upwards of $250,000 upon works which are useless as a drainage proposition, and, with interest, the entire indebtedness which has now accumulated is in excess of $300,000. The intervening Appellants, who hold the drainage ditch warrants issued by the Board of County Commissioners of Minnehaha county upon Drainage Ditch No. 1 and 2, are certainly in an unfortunate position. That they are in a fair way to lose their investment is, however, no reason why Appellee, an "innocent bystander," should be "made the goat" and forced to pay for the errors, mistakes, and wild extravagances of the Board of County Commissioners of Minnehaha county. It was not through any fault of Appellee that Drainage Ditch No. 1 and 2 was organized and the spillway and other works constructed. It is in no manner responsible for the acts of the Board of County Commissioners or for the mistakes of judgment of the intervening Appellants, in investing in the warrants.

In conclusion, we submit, that for the reasons which we have hereinbefore set forth, the South Dakota drainage law is unconstitutional under both the federal and the state constitutions; that the proceedings under which Drainage Ditch No. 1 and 2 was organized were illegal and void; that the work done under such organization was without authority of law; that the attempted assessment upon the property of Appellee is founded upon a fanciful, arbitrary, and illegal basis; that the District Court pos-

sessed jurisdiction to hear and determine this suit; and that, for these and the other reasons hereinbefore set forth, the decree of the District Court and the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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T. M. BAILEY,
Solicitors for Appellee.

R. L. KENNEDY, *of Counsel.*

APPENDIX A

PROVISIONS OF SOUTH DAKOTA CONSTITUTION

SECTION 2 OF ARTICLE VI.

§ 2. No person shall be deprived of life, liberty or property without due process of law.

SECTION 13 OF ARTICLE VI

§ 13. Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained, and before possession is taken. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.

SECTION 6 OF ARTICLE XXI

§ 6. The drainage of agricultural lands is hereby declared to be a public purpose and the legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest the corporate authorities thereof, and the corporate authorities of counties, townships and municipalities, with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby, according to benefits received.

APPENDIX B

SOUTH DAKOTA DRAINAGE STATUTES

(NOTE: The section numbers at the beginning of each paragraph are those of the South Dakota Revised Code of 1919. The references at the end of each paragraph are to the Session Laws of the various years. The paragraphs as printed constitute the law as it stood at the time of the transactions involved in this suit.)

§ 8458. POWER OF COUNTY COMMISSIONERS. The Board of County Commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural land. (§ 1, ch. 98, 1905; § 1, ch. 134, 1907).

§ 8459. PETITION. Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in whole or in part, and a general statement of the territory likely to be affected thereby. The petition shall be accompanied by a bond with sufficient sureties to be approved by the county auditor, conditioned to pay all expenses incurred in case the board does not grant the petition or the same is denied on appeal. Such petition may be presented at any regular or special meeting of the board, and, if sufficient in form, shall be ordered filed with the county auditor. (§ 2, ch. 98, 1905; § 2, ch. 134, 1907).

§ 8460. INSPECTION OF PROPOSED ROUTE. It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together with the board of county commissioners shall as soon as practicable, inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such survey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage, but may be a complete survey such as will be required for the construction of the proposed drainage and

assessment of its cost, or as much less as the board may require. Such survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. For the purpose of inspection or surveys, the county commissioners, surveyors or their employes may enter upon any lands traversed by the proposed drainage or in their judgment likely to be affected thereby. The county auditor shall promptly furnish the state engineer with a copy of the surveyor's report mentioned in the succeeding section and of all maps and plans filed by such surveyor and also with a copy of such further files as the state engineer may ask for. In case the drainage is established the preparation of plans and specifications upon which the contract of construction is to be awarded and also the work of construction, shall be under the supervision of the state engineer. It shall be the duty of the state engineer to render such assistance and advice to the board of county commissioners in regard to such drainage as the duties of his office will permit and he shall be reimbursed by such board for his expenses incident thereto; provided, that in case of minor ditches the state engineer shall not be required to attend with the board of county commissioners at the first inspection, nor to perform subsequent services if in his judgment it shall not be necessary for him so to do. (§ 3, ch. 98, 1905; § 3, ch. 134, 1907; § 1, ch. 102, 1909).

§ 8461. SURVEYOR'S REPORT — NOTICE OF HEARING. The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall de termine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route

of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceedings for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing. (§ 4, ch. 98, 1905; § 4, ch. 134, 1907; § 2, ch. 102, 1909).

§ 8462. HEARING ON PETITION. At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. After full hearing the drainage may be established along the line set forth in the petition or in the finding of the board prior to the hearing, or the board may vary the route thereof, or its width, as deemed practicable or necessary. If the board deems it best to vary the route, or to materially change the initial or terminal points of such proposed drainage so that it will pass through other lands than those described in the notice of hearing, or to increase the width of lands to be taken for the proposed drainage, the board shall adjourn the hearing and give the owners of such lands notice as in case of the original hearing. No open ditch shall be constructed within the limits of any public highway except where the topography of the country makes such construction advisable and in such case the ditch shall be located at a sufficient distance from the center of such highway to permit a roadway of standard width being constructed. If the proposed drainage does not give sufficient fall to drain the lands sought to be drained or will not properly take care of the waters collected by

such drainage, the same shall be extended so as to secure the drainage or properly dispose of the water. The hearing in any such case shall be adjourned and notice given to all parties newly affected as in case of the original hearing. When the board of county commissioners shall have fully heard and considered such petition, and all matters in opposition to or in support of the same, it shall, if it finds the proposed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition, the petitioners to be jointly and severally liable for the costs of the proceeding, the same to be recovered in a civil action. If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property through which the same shall pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimants right to have the same assessed by the jury. Such drain shall be given a name and the proceeding thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office. (§ 5, ch. 98, 1905; § 5, ch. 134, 1907; § 3, ch. 102, 1908; § 1, ch. 205, 1917).

§ 8463. EQUALIZATION OF BENEFITS. After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the

board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds at the date of the filing of the petition and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed. (§ 6, ch. 98, 1905; § 6, ch. 134, 1907; § 4, ch. 102, 1909).

§ 8464. ASSESSMENTS. After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. The cost of establishment shall include the costs of the service of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all other expenses incurred or to be incurred that in any way contributed or will contribute to the establishment or construction of the drainage. At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same

will be so filed, by publication at least once each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due and payable and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the state and the United States and, if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest from the date of the order of the assessment at a rate not to exceed eight per cent per annum payable annually. Such assessment shall be paid to and received by the county treasurer and paid over to the holders of the assessment certificates or upon the order of the board of county commissioners. The board of county commissioners may issue separate assessment certificates against each tract assessed for the amount of the assessment thereon, and may sell the same at not less than par value with all accrued interest, or may contract to pay for the construction of such drainage with such assessment certificates or with warrants. Such assessment certificates shall refer to the record in the office of the county auditor of the order of assessment and of the filing of a copy thereof in the county treasurer's office, shall transfer to the holder all interest, claim, or right in or to such assessment, bear the same rate of interest, carry the lien of such assessment and be enforcible as provided by law. Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale, provided that no such assessment or installment thereof shall be included in the sale of any

given year unless the same shall have been delinquent on or before August first of each year. The provisions of Chapters 7, 8, 9, Part 9 of this title shall apply to the enforcement of the lien or drainage assessments so far as such provisions are applicable, except that a treasurer's deed issued upon a delinquent drainage assessment shall recite the fact that the title conveyed is subject to all the claims which the state or any political subdivision thereof may have thereon for annual taxes.

Whenever an assessmnet for drainage or an installment thereof has been made against any county, city, town or township, as provided in this chapter, the officers of such county, city, town or township, whose duty it is under the law to make the levy of taxes, shall at the time of the next annual tax levy after the making of such assessment make a levy for drainage purposes of such an amount as shall be necessary to pay such assessment, and return the same to the proper officers as provided by for the other taxes, and such levy and tax shall be enforced and collected in all respects as provided by law for other taxes; provided, that any surplus remaining in any fund at the close of any year may be used by any township to pay and apply on any drainage assessment, as provided herein; provided, further, that in unorganized townships the county commissioners shall be authorized to pay for drainage as provided herein out of any money belonging to such unorganized township, and each succeeding year a like levy shall be made by such authorities until the whole of such assessment for drainage is paid. Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at a rate not to exceed eight per cent per annum payable annually, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any damages allowed and cost of establishment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage. (§ 7, ch. 98, 1905; § 7, ch. 134, 1907; § 5, ch. 102, 1909;

ch. 130, 1911, and as amended by § 1, ch. 46, Laws of Second Special Session of the Sixteenth Session of the Legislature of South Dakota 1920).

§ 8465. BIDS—SPECIFICATIONS—CONTRACTS. Whenever sufficient money shall have been collected the damages occasioned by the construction of such drainage and fixed as herein provided shall be paid and thereupon the board of county commissioners shall proceed to construct such drainage and shall let contracts for the construction of the same. Such contracts may require the contractors to take their pay in assessment certificates or in warrants to be thereafter issued. The contract may be for the construction of the entire drainage or for any portion thereof, and shall be let upon competitive bids, the board reserving the right to reject any and all bids. The lowest responsible and capable bidder shall be accepted but if any landowner affected be an equally low, capable and responsible bidder with a nonowner of the lands affected the former shall be preferred. When any contract shall be let the contractor shall give a bond in such sum as shall be approved by the board of county commissioners, conditioned for the faithful performance of his work and full completion of his contract to the satisfaction of such board. For the information of the contractors in bidding upon the proposed drainage, full plans and specifications shall be filed in the office of the county auditor. If in the judgment of the board of county commissioners the entire drainage or any part thereof can be constructed for less money than the amount of any bid submitted therefor, the board may cause such drainage to be constructed, hire the necessary labor and purchase all necessary material for such construction, without letting contracts therefor. Contracts for building bridges or culverts rendered necessary by the construction of such drainage may be let separately and after the drainage is completed. The cost of constructing such bridges or culverts shall be charged in the first instance as part of the cost of drainage and thereafter such bridges and culverts shall be maintained as part of the highway; provided, that the cost of removing, repairing, enlarging or replacing bridges and culverts already existing across the line of a proposed drainage ditch shall

not be charged as a part of the drainage. (§ 8, ch. 98, 1905; § 8, ch. 134, 1907; § 6, ch. 102, 1909; ch. 206, 1917).

§ 8466. BOARD MAY EXTEND TIME FOR COMPLETION OF CONTRACT. The board of county commissioners shall have power to grant a reasonable extension of time for the completion of any contract. When any contract shall not be finished within the time specified or to which it may be extended, such board may in its discretion at any time thereafter relet such unfinished portion of any part thereof after not less than five days' notice thereof to the lowest responsible bidder and shall take security as for the original contract. The cost of completing such parts, over and above the original contract price and the expense of notices and reletting, shall be collected by the board from the first contractor; provided, that in no case shall the board forfeit and annul a contract without five days' notice to the contractor, if found, and if not found then by written notice left at his last known place of residence in the county. (§ 9, ch. 98, 1905; § 9, ch. 134, 1907).

§ 8467. ASSESSMENTS FOR FURTHER COSTS. At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction, including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessments and certificates. The board of county commissioners may sell such assessment certificates at not

less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants only one assessment need be made. In any case, in the discretion of the board, several assessments may be made as the work progresses. Assessments shall be paid to the county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners for the purpose of the particular drainage. (§ 10, ch. 98, 1905; § 10, ch. 134, 1907; § 7, ch. 102, 1909).

§ 8468. ACCEPTANCE OF DRAINAGE BY BOARD. After the work of construction shall have been fully completed and approved by the state engineer, the drainage may be accepted by the board of county commissioners, by order duly made, and payment shall be made therefor unless in the discretion of the board of county commissioners agreement be made for the partial payments; provided, that final payment shall not be made until the expiration of thirty days after the acceptance of the work and in case an appeal has been taken from the order accepting such work final payment shall not be made until the determination of such appeal; provided, further, that no payment shall be made to any engineer whose employment has not been approved by the state engineer, and no payment shall be made upon any contract for the construction of any such drainage project, unless the same shall have been constructed under the supervision of the state engineer; and provided further, that nothing in this section shall apply to minor drainage projects. All claims for compensation or expenses for publishing legal notices or supervising the construction of any such drainage project including the per diem and the mileage of the county commissioners, shall be paid from the general fund of the county, and for all such payments the county treasurer shall reimburse the general fund from the assessments herein provided for (§ 11, ch. 98, 1905; § 11, ch. 134, 1907; § 8, ch. 102, 1909; ch. 207, 1917).

§ 8469. APPEALS. An appeal shall lie for any final order or determination of the board of county com-

missioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage to the circuit court of the county in which such drainage is located by any one deeming himself aggrieved by any such order or determination. Written notice of such appeal shall be served upon the board of county commissioners and a bond conditioned to pay all the costs of such appeal, in case the contention of appellant be not sustained in some respect, shall be filed in the office of the clerk of courts, to be approved by him in such amount and with such sureties as he deems necessary. Upon the service of such notice and the filing of such bond, the county auditor shall transmit to the clerk of courts the petition and all other papers and records in the matter or certified copies thereof, when the convenience of the auditor's office would be seriously impaired by the transmission of the original records, and such matter shall be heard as an original action in the circuit court. No appeal shall operate as a stay of proceedings by the board of county commissioners, but the court may upon the taking of an appeal, for good cause shown issue an order staying the further proceedings by the board of county commissioners until the hearing and determination of such appeal. Before granting such stay, the court shall require an undertaking in sufficient amount and with sufficient surety to the effect that if the order appealed from be sustained the person upon whose motion the stay is granted shall pay all damages caused by the issuance of such order of stay. Any number of persons interested may join in the same appeal. Appeals shall be in all cases taken within thirty days from the making of the order or determination appealed from. If, on the trial of such action, it be determined that the drainage as petitioned for and established by order of the board is not conducive to the public health, convenience or welfare or is not necessary or practicable for the purpose of draining agricultural lands, the petitioners shall be jointly and severally liable for all the costs thus far incurred. If the contention of the appellant as to the amount of damages or proportion of benefits, the acceptance of the drain-

age, of the practicability of the drainage when the route thereof is varied by the county commissioners over the protest and objection of the petitioners, be sustained in whole or in part, the costs of such trial shall be part of the cost of the drainage. Upon an appeal from an assessment of benefits, the court of jury shall consider not only the relative benefits, to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not; if benefited, to what extent. (§ 12, ch. 98, 1905; § 12, ch. 134, 1907; § 9, ch. 102, 1909).

§ 8470. ASSESSMENTS FOR MAINTENANCE. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportion determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance or may be collected directly by the board of county commissioners. (§ 13, ch. 98, 1905; § 13, ch. 134, 1907).

§ 8471. ASSESSMENTS PAID IN INSTALLMENTS. The owner of any tract of land against which an assessment for drainage is made, who shall, within thirty days after the making of such assessment, file with the county auditor an agreement in writing that in consideration of the right to pay his assessment in installments he will not make any objections to the illegality or irregularity of his assessment, if any there be, and will pay the same with interest as fixed by the board of county commissioners, shall have the privilege of paying such assessment in ten annual installments, interest payable annually. Assessment certificates shall not issue until after the expiration of the period of filing such agree-

ments with the county auditor, and when issued for assessments to be payable in installments may be issued in coupon form. The first installment shall be payable within ten days after a certified copy of the assessment has been filed, in the office of the county treasurer, and subsequent installments shall be payable one, two, three, four, five, six, seven, eight and nine years from the date of such assessment, respectively, with interest on the whole sum unpaid payable annually at maturity of the several installments. Such subsequent installments shall become delinquent after the expiration of thirty days from the time the same are payable and thereupon a penalty of five per cent shall attach thereto. Provided, that where bonds shall have been issued for the construction of such drainage, as provided in Section 8472, such assessments shall be made payable in installments sufficient to meet the payment on the bonds, as the same shall become due. Payments of assessments may at any time be received and full discharge thereof given by the county treasurer to any property holder, but after issue of bonds, such payment of assessments can be received only according to the terms of such bonds. (§ 14, ch. 98, 1905; § 14, ch. 134, 1907; § 10, ch. 102, 1909).

§ 8472. BOARD MAY ISSUE BONDS. The board of county commissioners, whenever it has ordered the establishment of any drainage, shall have authority by resolution to be spread upon its records, to provide for the issuance of bonds in such sums as may be necessary for the purpose of defraying the expenses incurred or to be incurred in obtaining the right of way or in locating or constructing any such drainage. Such word "expenses" shall be construed to mean and cover every item of cost of such drainage from its inception to its completion, such bonds to be payable only out of the funds to be derived from special assessments upon the lands benefited thereby. Such bonds shall bear interest at a rate not exceeding 7% per annum, payable annually and be payable not exceeding twenty years from issue. Such bonds shall be signed by the chairman of the board of county commissioners and countersigned by the auditor, who shall keep a record of all such bonds. Such bonds shall be issued for the benefit of the particular drainage,

numbered, recorded and indexed in the office of the county auditor, and shall in no case be issued for a sum exceeding the benefits to the lands affected by such drainage. The board of county commissioners shall have the power to negotiate such bonds at not less than par value, as it may deem best for the interest of all persons affected by such drainage, any premium received on such bonds to be credited to the fund of the particular drainage. Such bonds shall contain a recital that the same are issued pursuant to the authority of this article and that they are to be paid out of the funds to be obtained as herein provided. Assessments shall be made upon all of the lands benefited by such drainage for the payment of the principal and interest of such bonds when the same shall become due. Such assessments may be made by separate assessments for installments of interest and principal or in one proceeding with but one set of notices. When the assessments are finally fixed the same shall be certified to the county treasurer by the county auditor, and the money paid in thereon shall be received by the county treasurer and paid over to the holders of such bonds. Separate funds shall be kept by the treasurer for each drainage project, and no funds for one drainage project shall be applied to any other drainage. No county shall be liable for the payment of any bonds issued under this article, but such bonds shall be paid only out of the funds derived from the special assessments herein provided for. Such bonds may be made payable at such times as the board of county commissioners shall find for the best interests of the persons benefited by the drainage, and may be issued for all or any portion of the expenses of such drainage. (§ 15, ch. 98, 1905; § 15, ch. 134, 1907).

§ 8474. FURTHER POWERS OF BOARD. Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as in all

lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly. (§ 17, ch. 98, 1905; § 17, ch. 134, 1907).

§ 8475. DITCH OR DRAIN MAY BE DECLARED NUISANCE. Any ditch, drain or watercourse, which is now or may hereafter be constructed so as to prevent the sufrace and overflow water from adjacent lands from entering the same is hereby declared a nuisance and may be abated as such. (§ 18, ch. 98, 1905; § 18, ch. 134, 1907).

§ 8476. POWERS DEFINED. The powers conferred by this article for establishing and constructing drains shall also extend to and include the deepening and widening of any drains which have heretofore been or may hereafter be constructed, also to straightening, cleaning out and deepening the channels of creeks and streams and constructing, maintaining, remodeling and repairing levees, dykes and barriers for the purpose of drainage; and the board of county commissioners may relocate or extend the line of any drain if the same is necessary to provide a suitable outlet, and shall cause a survey thereof to be made, but no proceedings affecting the rights of persons or property shall be had under this section except upon notice and the other procedure prescribed herein for the construction of drains. (§ 19, ch. 98, 1905; § 19, ch. 134, 1907).

§ 8477. DRAINS UNDER CHARGE OF COUNTY COMMISSIONERS. All drains that have been constructed under any law of this state, or that may be constructed under the provisions of this article, shall, except as otherwise specifically provided, be under the charge of the board of county commissioners and be by it kept open and in repair. In all cases when any completed drain is or may be situated in more than one county, the care of the portion thereof lying within any county is assigned to the board of county commissioners of such county to be

kept open and in repair. The cost of such repairs shall in all cases be assessed, levied and collected in the same manner as provided in this article for the construction of drains originally and in all cases when no assessments of benefits shall have been made, the board of county commissioners having charge of such drain shall make such assessments. (§ 20, ch. 98, 1905; § 20, ch. 134, 1907).

§ 8478. BOARD MAY MAKE RULES AND REGULATIONS. The board of county commissioners may make such rules and regulations on the subject of drainage as it may deem proper, not inconsistent with the provisions of this article, and especially with regard to clearing out and keeping clear the channels of streams and the construction and maintenance of dams thereupon, with reference to their capacity for drainage. (§ 21, ch. 98, 1905; § 21, ch. 134, 1907).

§ 8482. DRAINS FOR TOWNS AND CITIES. The board of county commissioners shall have authority to establish drainage for or including the whole or any part of any city or incorporated town, including cities acting under special charter, as provided in this article, and it shall have the same authority with respect to the assessment of damages and benefits within such city or town as in other cases provided for in this article, and like notices to such city or town with respect to the establishment of such drainage and the apportionment and assessment of damages and benefits shall be given as is required by this article to be given to the owner of property damaged or benefited by the establishment or construction of such improvement. (§ 24, ch. 98, 1905; § 24, ch. 134, 1907).

§ 8485. COMPENSATION OF COUNTY COMMISSIONERS. The county commissioners shall receive for their services four dollars per day for the time actually spent by them in the performance of the duties of their offices under this chapter, publishers of newspapers shall receive for publishing legal notices the same fees as are allowed by law for publishing proceedings of the county commissioners; but the proceedings of the board of county commissioners when acting in any drainage matter under this article shall not be published as a part of its regular proceedings or at all. The county auditor shall charge a reasonable amount, to be fixed by the

board, for services, to be paid into the general fund of the county. Each county commissioner shall have power to administer any oath required in any drainage proceeding. (§ 27, ch. 98, 1905; § 27, ch. 134, 1907; § 11, ch. 102, 1909).

§ 8486. NOTICES, HOW SERVED. Notice by personal service, as of a summons in a civil action, may be given instead of by publication and posting in all cases where notice is provided for in this article. In any case where notice is required under the provisions of this article and any person affected by the drainage has not been notified, either by publication or personally, and a hearing has been had or determination made, such person may be notified personally or by publication and posting, to show cause at a time and place to be fixed by the board of county commissioners, and to make return or claim damages as in case of the original hearing. Any such omitted person may be brought in on such due notice at any stage of the proceeding, or after it has been otherwise concluded. The enforcement of any assessment shall not be enjoined for want of the notice provided for in this article, except pending an application to the board of county commissioners for the determination of such matters as to which any person deems himself not bound because of want of notice. (§ 28, ch. 134, 1907).

§ 8488. DEFECTS IN PROCEEDINGS DISREGARDED. Any defect or irregularity not affecting the substantial rights of parties interested, occurring in any drainage proceeding, shall be disregarded in any action seeking to avoid an assessment or cancel, annul or declare void any such proceeding. And in case the defect is substantial the court shall of its own motion determine the rights of the parties, validate the proceedings and assess the costs as justice may require, if the court shall find cause for such validation or such action should have been taken in the first instance and all parties interested are before the court. (§ 29, ch. 98, 1905; § 30, ch. 134, 1907).

§ 8489. INVALID OR ABANDONED PROCEEDINGS. If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned,

or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in he invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate thereform, but the board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by the board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons. (§ 33, ch. 134, 1907).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 453

A. G. RISTY, ET AL, AS COUNTY COMMISSIONERS ETC. ET AL, PETITIONERS,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, RESPONDENT.

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

The Chicago, St. Paul, Minneapolis & Omaha Railway Company, plaintiff in the District Court and respondent in this Court, brought its bill in the District Court for the District of South Dakota against A. G. Risty and others, as County Commissioners of Minnehaha county, South Dakota, defendants, praying for an injunction restraining the making of an assessment upon the property of respondent for the cost of the construction of certain drainage works. The holders of warrants issued in payment of expenses incurred in the drainage project became interveners in the suit. A decree was entered in the District Court in favor of the plaintiff in that Court and respondent in this Court, (282 Fed. 364). From this decree the defendants and the interveners in the District Court appealed to the Circuit Court of Appeals for the Eighth Circuit in which Court the decree of the District Court was affirmed (297 Fed. 710). The defendants and interveners in the District Court, appellants in the Circuit Court of Appeals, have taken an appeal to this Court and have also, as petitioners, filed in this Court their petition for a writ of certiorari.

The main ground upon which petitioners ask that this Court grant a writ of certiorari is that a conflict has arisen between the decisions of the Circuit Court of Appeals for the Eighth Circuit and the decisions of the Supreme Court of the State of South Dakota in a matter relating to the construction of a statute of the state of South Dakota; and petitioners pray for the granting of a writ of certiorari upon the strength of *Forsyth vs Hammond*, 166 U. S. 506.

Our reply to the contention of petitioners is that no conflict exists between the decision of the Circuit Court of Appeals in this case and the decisions of the Supreme Court of South Dakota.

This case involves the construction of the drainage ditch statute of South Dakota. In the Circuit Court of Appeals this statute was attacked by respondent as unconstitutional. The Circuit Court of Appeals deemed it unnecessary to pass upon this contention but decided the case upon the ground that the proceedings, had under the statute in the instance of the particular drainage project under consideration, were irregular.

In *Gilseth vs Risty*, 46 S. D. 374, the Supreme Court of South Dakota rendered a decision in a case between other parties, but involving the same drainage project. The records in the two cases were entirely different and the Supreme Court of South Dakota held that the plaintiff in the case before it was estopped by his own laches from complaining of irregularities in the proceedings. There was in that case no conflict with the holding of the Circuit Court of Appeals in the present case.

In none of the other South Dakota cases cited by counsel for petitioners is there involved the drainage ditch project in controversy in the present case or any of the questions involved in the present case which were resolved by the Circuit Court of Appeals in favor of respondent.

For the foregoing reasons we submit that no showing is made whereby a writ of certiorari should be issued under *Forsyth vs Hammond*, 166 U. S. 506.

The remaining points raised by counsel for petitioners are, we believe, best answered by the opinion of JUDGE KENYON in the Circuit Court of Appeals. We, therefore, append a copy of this opinion to this brief as being the most apt reply which we can make to the contentions of counsel for petitioners.

Respectfully Submitted,

CHARLES O. BAILEY,
R. L. KENNEDY,
J. H. VOORHEES,
T. M. BAILEY,
Counsel for Respondent.

(297 FEDERAL REPORTER, 710)

A. G. RISTY, *et al*, as
County Commissioners, etc., *et al*,

vs.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY,
(*and five other cases*)

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

MARCH 18, 1924

OPINION OF THE COURT

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suits, by the Chicago, Rock Island & Pacific Railway Company, by the Chicago, Milwaukee & St. Paul Railway Company, by the Chicago, St. Paul, Minneapolis & Omaha Railway Company, by the Northern States Power Company, by the City of Sioux Falls, and by the Great Northern Railway Company, respectively, against A. G. Risty and others, as County Commissioners, and others. From decrees for plaintiffs (282 Fed. 364) the defendants in each case appeal. Affirmed.

In the year 1907 the board of county commissioners of Minnehaha county, S. D., acting under the drainage statutes of that state, established and had constructed a drainage ditch known as drainage ditch No. 1, bottom width of 40 feet, at an expense of $46,600. This ditch was north of Sioux Falls and ran first in a southerly direction from its initial point; thence easterly past the pumping station of the city of Sioux Falls; thence southeasterly about 1,000 feet to the Big Sioux river near the north limits of Sioux Falls. It passed through a ridge and descended approximately 100 feet in the terminal thousand feet. A spillway was constructed to carry the water down the descent. This ditch was approximately three miles in length, and there was a spur 670 feet long extending northwest into a bayou about 2,000 feet south of the initial point.

In 1910 the board of county commissioners established another drainage ditch known as drainage ditch No. 2, which extended north from the northern terminal of drainage ditch No. 1, for a distance of about 12 miles. This ditch likewise had a 40-foot bottom and was constructed at a cost of $81,106.19. These two ditches, making in fact one continuous ditch, drained certain agricultural lands, and traversed the land north of the city of Sioux Falls near the gravel bed from which the city obtained its water supply. It also passed near the state penitentiary lands and emptied into the Big Sioux river north of the falls in said river.

In the year 1916 there was a breaking of the river through the natural barrier into the bayou drained by the lateral branch. This, coupled with the large volume of water passing through these ditches, made it impossible for the spillway to carry the same, and it was washed out and destroyed. The waters therefore being uncontrolled descended from the steep bluff to the level of the Big Sioux river, and serious damage was threatened to various interests. There was danger that the Big Sioux river which flowed through the city of Sioux Falls would be diverted from its course and flow through these ditches cutting off the water supply of the city of Sioux Falls, injuring the Northern States Power Company, and depriving it of its water power.

The board of county commissioners attempted to devise some plan to reconstruct the spillway and to protect these various interests from the threatened damages.

April 8, 1916, certain parties filed a petition with the board of county commissioners asking that that portion of drainage ditch No. 1 containing the old spillway be closed and abandoned, and the course of said ditch extended in a southerly direction through Covell's Lake to the Big Sioux river; and said board did pass a resolution that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof.

August 3, 1916, a petition of F. L. Blackman and other parties was filed entitled, "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property Persons and Corporations Benefited Thereby." This petition was transmitted by the board to the state engineer, and on August 14, 1916, a survey was ordered.

September 13, 1916, a report of the survey was made and filed by the engineer in charge. A resolution was thereupon adopted by the board fixing the line and width of said new proposed ditch in the exact location of old ditches No. 1 and No. 2, and providing for the time and place of hearing the petition. Notice was published for three successive weeks describing the route of the proposed drainage, and the tract of country likely to be affected thereby, in the general terms provided by the statute; also, the separate tracts of land through which the proposed ditch would pass, and the names of the owners of said tracts. Such notice informed all persons affected by the proposed drainage to appear at such hearing and show cause why the same should not be established. Upon the return date of the notice the commissioners adopted a resolution purporting to establish the so-called drainage ditch No. 1 and 2, and providing for the reconstruction of the spillway.

No appeal was taken from this order establishing the purported new project.

The commissioners then caused ditches No. 1 and No. 2 to be cleaned out, widened, deepened, and diked so as to increase the carrying capacity; caused the spillway to be reconstructed, and

certain portions of the Big Sioux river to be straightened. This work cost approximately $255,000, and drainage warrants were issued to be paid out of taxes assessed against the property determined to be benefited within the area of the purported new drainage ditch No. 1 and 2. The largest holders of these warrants are interveners in this action.

In April, 1919, notice was published of a hearing upon the matter of equalizing benefits resulting from said drainage ditch No. 1 and 2, and this was the first intimation that certain of appellees had that benefits might be assessed against them. The property of some of the appellees was not covered by the notice. However, the proceedings under this notice were abandoned.

June 10, 1921, appellant board by resolution fixed a proportion of benefits in units, which had been decided upon as a fair method of arriving at the same, on drainage ditch No. 1 and 2, and designated Monday August 1, 1921, at the office of the county auditor, as the time and place for hearing on the question of equalizing benefits, and caused notice of such hearing to be published as provided by the statute. Under the unit system adopted by the board upon recommendation of their engineer, the various appellees had units allotted against them as follows:

Chicago, Rock Island & Pacific Railway Company, out of a total of 32,569.62 units, 839.45.

Chicago, Milwaukee & St. Paul Railway Company, 1,681.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, 839.45.

Northern States Power Company, 5,351.63.

Great Northern Railway, 613.85.

City of Sioux Falls, 3,147.95.

The amount due on warrants issued for this work at the time the actions were brought was about $300,000. The total units of benefit aggregate 32,549.62, so each unit of benefit amounts to slightly in excess of $9. If no changes had been made by the board, had they been permitted to proceed; the amounts charged against various appellees would have ranged from $50,000 against the Northern States Power Company to substantially $6,000 against the Great Northern Railway Company.

Appellees brought suit to restrain appellants from proceeding further with the equalization of said purported benefits and from levying any assessment upon their property to pay therefor. Some of the appellees had no property in original ditch district No. 1 and No. 2; others of appellees did have, and some difference is made in the contention of those not having property in the original ditch district and those who did have, but the issues in the main were the same as to all the parties.

All of the appellees contended in the trial court that the South Dakota drainage law was unconstitutional, violating the Fourteenth Amendment to the Constitution of the United States; that it also violated sections 2 and 3 of article 6 of the Constitution of the State of South Dakota. Some of the appellees contended

that the board exceeded its powers in what it attempted to do, in that the same was not for the drainage of agricultural lands, but being for other public purposes, could only be carried on by the corporate authority of drainage district entities established for that purpose, which had not been done, and that consequently the proceedings were void.

Others of the appellees contended that the proceeding seeking to establish drainage ditch No. 1 and 2 was a subterfuge to impose liability on new territory to pay for the maintenance of the former ditches, and that the proceedings were for maintenance and repair of the old drainage ditch and were not carried on as provided by section 8470 of the Code of South Dakota relating to assessments for the maintenance of drainage already established; that drainage ditch No. 1 and 2 was not a new ditch and not a new enterprise.

Further claim is made by the railroad appellees that the South Dakota drainage law is unconstitutional so far as respects assessments of railroad property, in that it provides for the giving of notice whatever of the apportionment and equalization of benefits to railroad companies.

All appellees claim that the attempted assessments upon their property are arbitrary, unjust and illegal, and constitute a discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law; and that the proceedings create a cloud upon their title.

It was the position of appellants, on the other hand, that the statutes referred to were constitutional; that the federal court in equity had no jurisdiction because there was a complete remedy at law; that there was no equitable question involved; no irreparable injury shown; no facts sufficiently pleaded to show any threatened cloud upon title; that the amount involved was not sufficient to give jurisdiction; that the bringing of the suit was premature; that ditch No. 1 and 2 was legally established as a new drainage project under the statute of South Dakota; and that the board of county commissioners had full jurisdiction to do each and every act which they performed.

The trial court held that section 8461 of the Reversed Statutes of South Dakota, being the statute particularly attacked as unconstitutional, gave sufficient notice and opportunity to be heard before an assessment became a lien against the property, and was constitutional. The court also held that the proceedings of the commissioners were proceedings for the maintenance of the original ditches No. 1 and No. 2; that there was no abandonment of the old ditches; that the formation of the new ditch was a pretense and subterfuge carried on for the purpose of compelling property outside of the original ditches No. 1 and No. 2 to share the burden of the repair and maintenance of these ditches, and held that the proceedings of the commissioners with relation to ditches No. 1 and No. 2, by attempting to constitute a new drainage district and calling it district No. 1 and 2, were void.

The court further found that the complaints presented a real and substantial question under the Constitution of the United States; that the amount involved was in excess of $3,000 exclusive of interest and costs, and that each complainant stated a case in his bill cognizable in equity in the federal court; and that there was no adequate remedy at law. Also found that diversity of citizenship existed as to all appellees, except as to the city of Sioux Falls; also, that the method of attempted assessment was discriminatory and arbitrary. The injunctions as prayed were granted.

N. B. Bartlett and E. O. Jones, both of Sioux Falls, S. D., for appellants.

A. B. Fairbank, of Sioux Falls, S. D. (Edward S. Stringer, Thomas D. O'Brien, and Alexander E. Horn, all of St. Paul, Minn., on the brief), for appellee Chicago, R. I. & P. Ry. Co.

C. O. Bailey, of Sioux Falls, S. D., and E. L. Grantham, of Aberdeen, S. D. (H. H. Field, of Chicago, Ill., and J. H. Voorhees, P. G. Honegger, T. M. Bailey, and C. O. Bailey, Jr., all of Sioux Falls, S. D., on the brief), for appellee Chicago, M. & St. P. Ry. Co.

C. O. Bailey, of Sioux Falls, S. D. (R. L. Kennedy, of St. Paul, Minn., and J. H. Voorhees, P. G. Honegger, T. M. Bailey, and C. O. Bailey, Jr., all of Sioux Falls, S. D., on the brief), for appellee Chicago, St. P., M. & O. Ry. Co.

Harold E. Judge, of Sioux Falls, S. D. (R. M. Campbell, of Chicago, Ill., on the brief), for appellee Northern States Power Co.

C. O. Bailey, of Sioux Falls, S. D. (Roy B. Marker, of Sioux Falls, S. D., on the brief), for appellee City of Sioux Falls.

Harold E. Judge, of Sioux Falls, S. D., for appellee Great Northern Ry. Co.

Before KENYON, Circuit Judge, and TRIEBER and DYER, District Judges.

KENYON, Circuit Judge (after stating the facts as above). It is earnestly contended by appellees that the entire South Dakota drainage law is unconstitutional, not only as violative of the due process clause of the Fourteenth Amendment of the Federal Constitution, but also sections 2 and 13 of article 6 of the South Dakota Constitution. The constitutional questions raised are grave, serious, and doubtful. Their determination is not necessary to the solution of these cases. Therefore, under the well-established rule that federal courts will not pass upon the constitutionality of statutes unless absolutely necessary, we leave the questions aside. Howat et al. v. State of Kansas, 258 U. S. 181, 42 Sup. Ct. 277, 66 L. Ed. 550; Weyman-Bruton Co. v. Ladd, 231 Fed. 898, 146 C. C. A. 94; Allen, U. S. Atty., v. Omaha Live Stock Commission Co. et al. (C. C. A.) 275 Fed. 1.

The original drainage ditches No. 1 and No. 2 were properly established for the drainage of agricultural lands. When the spillway washed out, the maintenance of the ditches was impaired. Not only that, but the situation was fraught with grave

consequence to many interests. The steep bluff was being torn away by the uncontrolled waters; the waterworks and water supply of the city of Sioux Falls, as well as the penitentiary lands of the state, were endangered. A not improbable result of the Big Sioux river breaking through the natural barrier into the lateral ditch would be the entire diversion of its waters from their natural channel causing them to flow through said ditches and empty into the river north of the city, leaving Sioux Falls with an intermittent dry river bed.

The board of county commissioners under these conditions took steps to remedy the situation, and upon petition filed stating its object in its caption as follows: "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefited Thereby," proceeded to establish what is termed drainage ditch No. 1 and 2, Minnehaha county, S. D.

Appellees who have property within the area of the original drainage ditches, No. 1 and No. 2, insist that the proceedings established a new drainage ditch known as No. 1 and 2, which is also the position taken by appellants. Other appellees claim that the work was in truth and in fact a project for the repair of drainage ditches No. 1 and No. 2. The court held that the forming of the new ditch was a pretense and subterfuge resorted to for the purpose of attempting to burden appellees with the cost of maintenance of ditches theretofore constructed; that the commissioners did not act as by law provided for the maintenance and repair of the ditches; and that the proceedings attempting to establish the new drainage ditch were void. We think the court was correct in this holding. It clearly expressed the situation as follows:

"Under these circumstances the board of county commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the state when they assumed the right to reach out and attempt to assess the benefits for the repair and maintenance of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage ditch No. 1 and 2 was ever established and has no existence.

"I am of opinion that the proceedings of the board of commissioners in the repair and maintenance of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it district No. 1 and 2, and to assess benefits to the property of the plaintiffs, in so far as they are located in the city of Sioux Falls, are void. Entertaining this view, it follows that plaintiff's prayer for an injunction should be granted."

Record, p. 90, Case No. 6313.

The proceedings, regardless of how designated, were in fact for repair and maintenance, and were governed as to assessments to pay for the same by section 8470 of the South Dakota Statutes, which section is as follows:

"*Assessments for Maintenance.*—For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens, interest-bearing, perpetual and enforceable, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance, or may be collected directly by the board of county commissioners." Section 13, c. 98, 1905; section 13, c. 134, 1907.

There is no provision in this statute for the taking in of other lands to help bear the assessment of burdens created in maintaining the original drainage. This was the statute under which the board of county commissioners could have provided for payment of maintenance and repairs to the established ditches.

Section 8489 provides for a method of abandonment of drains under certain circumstances and the construction of new ones in the same location. Said statute is as follows:

"*Invalid or Abandoned Proceedings.*—If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned, or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned proceeding, the board of county commissioners shall proceed to ascertain the real value of the services rendered, money expended and work done under such invalid, abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may be at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate therefrom, but the board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part

of the cost of the new drainage. No use shall be made by any board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons." Section 33, c. 134, 1907.

The proceedings establishing drainage ditches No. 1 and No. 2 have never been set aside or abandoned under this statute. It is true a small portion of old ditch No. 1 was abandoned by the resolution adopted in the Covell's Lake proceeding, but the ditches were in no way abandoned. The Covell's Lake proceeding was itself abandoned and the ditches were left as they originally were, so it is apparent that the action of the board was not taken under section 8489. Either the proceedings were to repair and maintain ditches already constructed, or they were to take care of a situation resulting from their imperfect or inadequate construction. By reason of the water of the river breaking through into the lateral threatening a change of the river's course and the possible destruction of state lands, a situation was presented, not with relation to the drainage of agricultural lands, but rather to the failure of the ditches, due to inadequate or imperfect construction, to carry the increased flow of water. In other words, the project, if an entirely new one, was not for the drainage of agricultural lands. The court said in his opinion:

"Pursuant to this provision of the Constitution, the Legislature of the state has provided for the drainage of agricultural lands; but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands 'for any public use.' "

We are satisfied that under the South Dakota Constitution, section 6, art. 21, drainage of lands for any public use other than the drainage of agricultural lands, must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Whichever way, therefore, the matter is viewed, the board was acting without legal authority in its apportionment of benefits and threatened assessment of taxes.

Appellants challenge the jurisdiction of the court, claiming there was a plain, adequate, and complete remedy at law; that there was no equity in the bill; that action was premature, and that the necessary jurisdictional amount was not involved. These in their order.

It is fundamental that equity cannot give relief where there is a plain, adequate, and complete remedy at law. It is provided by the federal Judicial Code, Compiled Stat. 1918, § 1244, as follows:

"*Suits in Equity.*—Suits in equity shall not be sustained in any court of the United States in any case where a plain, ade-

quate, and complete remedy may be had at law. (R. S. § 723. March 3, 1911, c. 231, § 267, 36 Stat. 1163.)"

It must be a remedy as certain, complete, prompt, and efficient to attain the ends of justice as that in equity. Monmouth Inv. Co. et al. v. Means, 151 Fed. 159, 80 C. C. A. 527; McMullen Lumber Co. v. Strother et al., 136 Fed. 295, 69 C. C. A. 433; Morgan v. Beloit, City and Town, 74 U. S. (7 Wall.) 613, 19 L. Ed. 203; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82; Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796; Greene, Auditor, et al., etc., v. Louisville & Interurban Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Coler et al. v. Board of Com'rs of Stanly County et al. (C. C.) 89 Fed. 257.

It must be a remedy on the law side of the federal court. A remedy in the state court that cannot be pursued in the federal court is not an adequate remedy. Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; Smyth v. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; United States Life Ins. Co. in City of New York v. Cable, 98 Fed. 761, 39 C. C. A. 264; Brun et al. v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

The question is: Has party the adequate remedy at law in the federal court?

In Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 391, 14 Sup. Ct. 1047, 1052 (38 L. Ed. 1014), the court said:

"Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts."

It has been held that where the state statute provided an action at law against the county for the recovery of sums paid on account of invalid taxes that the same constitutes a plain, speedy, and adequate remedy at law. Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., 217 Fed. 540, 133 C. C. A. 392. The Supreme Court of the United States has held that the North Dakota statute permitting actions respecting title of the property or accruing on contract to be brought against the state the same as against a private person does not clearly allow an adequate remedy; and there, injunction restraining defendants from taking steps to enjoin certain taxes, was upheld. Wallace et al. v. Hines, Director General of Railroads, et al., 253 U. S. 66, 40 Sup. Ct. 435, 64 L. Ed. 782. There was no such proceeding as discuss-

ed in Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., supra, in the South Dakota statutes. The only remedy was to appear before the board of county commissioners (claimed by appellees to be acting without authority), and then appeal from their finding to the state court. Such was not the adequate remedy contemplated by the federal statute.

While the frequent exercise of equity jurisdiction is in staying the collection of taxes illegal in whole or in part, a suit in equity will not lie to restrain the assessment or collection of a tax on the sole ground that it is illegal. There must be special circumstances bringing the case under some recognized head of equity jurisdiction. The right to such equitable relief must be clear where it is asked to restrain the collection of a state tax.

In Hannewinkle v. Georgetown, 15 Wall. 547, 548 (21 L. Ed. 231), it is said:

"It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits, or some cause presenting a case of equity jurisdiction."

In Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 525, 526, 5 Sup. Ct. 601, 605 (28 L. Ed. 1098), the rule is clearly laid down by the court:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any grounds for equitable interposition. In ordinary cases a party must find his remedy in the courts of law and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these in proper cases, may be afforded

in courts of equity.' This statement is in general accordance with the decisions of this court as well as of many state courts."

See, also, Dows v. City of Chicago, 78 U. S. (11 Wall.) 108, 20 L. Ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Ogden City v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; Pittsburgh, etc., Railway v. Board of Public Works of W. Va., 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737.

In Keokuk & Hamilton Bridge Co. v. Salm et al., 258 U. S. 122, 42 Sup. Ct. 207, 66 L. Ed. 496, the alleged invalidity consisted in discriminatory overvaluation. There was no claim of absolute illegality in the assessment. Appellant had a remedy with the board of review to correct the assessment, and the court said that resort to the suit to prevent either a sale for an illegal tax creating a cloud upon title or other irreparable injury had no basis.

In Union Pacific R. Co. v. Board of Com'rs of Weld County, 217 Fed. 540, 133 C. C. A. 392, this court said with reference to the casting of a cloud upon real property creating an "equitable circumstance" that the remedy which the statute prescribes will dissipate any such cloud, and says:

"Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief are not applicable, when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the courts shall hold to have been illegally exacted."

There is no such provision in the South Dakota statute.

In Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796, it was held that equity should not enjoin the collection of a tax on the ground of cloud on title when the tax can only be collected in suit at law in which the defense of its illegality is open, and further it not appearing that the tax is a lien on any of complaint's property.

In Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651, certain assessments upon shares of stock in a corporation were involved. The court found that as there was no lien created on real estate there was no cloud on title.

It is well settled that an assessment that will put a cloud on titles gives rise to equitable jurisdiction unless there is an adequate remedy at law. Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; Green, Auditor, et al., etc., v. Louisville & Interurban Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

Section 8463 of the South Dakota Statutes provides for the board of county commissioners fixing the proportion of benefits of proposed drainage among the lands affected.

Section 8464 provides for the board making an assessment against each tract and property affected, and this is collectible

by the treasurer's office. Clearly the assessment would create a cloud upon the title. Fixing the proportion of benefits being preliminary to the assessment and a part of the machinery of assessment, likewise, we think, creates a cloud upon the title and gives equity jurisdiction. Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; Hopkins et al. v. Walker et al., 244 U. S. 486, 37 Sup. Ct. 711, 61 L. Ed. 1270.

Was the case prematurely brought? It is claimed that inasmuch as the board of county commissioners had not assessed the taxes complained of consequently the suit is premature.

In Western Union Telegraph Co. v. Howe et al., 180 Fed. 44, 103 C. C. A. 398, it was held by this court that the suit was prematurely brought because the telegraph company did not pursue the remedy afforded by law to have its assessment corrected by the state board of equalization. That was not a case, however, where it was claimed that the entire proceedings were without authority and illegal, as is the case here. The jurisdiction to act was not questioned.

In Keokuk & Hamilton Bridge Co. v. Salm et al., 258 U. S. 122, 42 Sup. Ct. 207, 66 L. Ed. 496, the question involved was the amount of the tax. It was not claimed that the proceedings were illegal.

In the late case of Milheim et al. v. Moffat Tunnel Improvement District et al., 262 U. S. 710, 43 Sup. Ct. 694, 67 L. Ed. 1194, there was no question of jurisdiction of the taxing body as there is here. Plaintiff's property was by legislative act placed within the taxing district.

The proceeding here involved, being without authority, the situation is quite different from where the only question involved is the inequality of taxes levied by a board having jurisdiction to act. The actions, we are satisfied, were not premature.

Appellants urgently insist that it does not appear from the record that the amount in controversy, exclusive of interest or costs, exceeds the sum or value of $3,000, and that the statements in the various complaints of appellees so alleging are false, and stated with the fraudulent purpose of imposing upon the jurisdiction of the federal court; that no tax has in fact been assessed; that the apportionment of benefits is tentative and subject to correction; and that there is no way of determining what the amount of the assessment against the respective appellees would have been had the proceedings not been interrupted by the injunctions; and that there is in fact no sum whatsoever in controversy between the parties hereto.

It has been held that future, undetermined, unaccrued, or unspecified taxes cannot be taken into consideration to give jurisdiction; that the court cannot engage in speculation as to such taxes. Holt v. Indiana Manufacturing Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374; New England Mortgage Security Co. v. Gay, 145 U. S. 123, 12 Sup. Ct. 815, 36 L. Ed. 646; Citizens' Bank

v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951. Also, that where there is a suit to enjoin collection of a tax the amount of the tax is the test of jurisdiction. Linehan Ry. Transfer Co. v. Pendergrass, 70 Fed. 1, 16 C. C. A. 585; Eachus v. Hartwell et al. (C. C.) 112 Fed. 564; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951; Board of Trustees of Whitman College v. Berryman et al. (C. C.) 156 Fed. 112; Citizen's Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; City of Ottumwa, Iowa, v. City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

It has also been held that where the complaint alleges the amount in controversy to equal the jurisdictional requirement and the contrary does not appear to a certainty from the evidence, that the jurisdiction will be sustained. Maffet v. Quine (C. C.) 95 Fed. 199; Von Schroeder v. Brittan (C. C.) 93 Fed. 9.

What is the situation here? Each one of the appellees is threatened with an assessment of more than $3,000. The Northern States Power Company is threatened with one of $50,000. And further, certain appellees who have no property within the original drainage districts No. 1 and No. 2 are brought into the district and made liable to further assessments for maintenance and repair of ditches. It appears from the record that the board of county commissioners had fixed against the different appellees the proportion of benefits on a unit basis. It is without question that the county commissioners have issued approximately $255,000 worth of warrants for this work, and that the amount due thereon is about $300,000. It is a matter then of mere mathematical calculation to arrive at the threatened assessment against each one of appellees.

Exhibit C is the notice to the various parties against whom proportions of benefits have been fixed. It provides as follows, to wit:

"All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed as stated, and the said determination of said board made final."

If no action whatever were taken by appellees the amounts would be final, and under these circumstances we believe the amount in dispute in each case exceeds the jurisdictional requirement. The claim of amount is evidently made in good faith, and not for the mere purpose of giving the federal courts jurisdiction. We do not believe that where the board has passed a resolution fixing benefits which exceed the jurisdictional amount and are the basis of a proposed assessment, and which parties claim are fixed by the board without authority, that because said board may equalize the benefits or even find that no benefits exists the parties must wait until the final action of the board. It is suggested that the board may so equalize benefits that the jurisdictional amount will not be involved, but as the matter

stood when the case was brought each appellee was threatened with the levying of a tax for more than the jurisdictional amount, and some of the necessary steps had already been taken.

As the proportion of benefits had been fixed subject to change by the board only if appellees should convince them that their conclusion was erroneous, and in view of the claim in apparent good faith in each of the bills that the amount involved exceeded the jurisdictional amount, we hold, from a careful survey of the entire record, that the necessary amount existed in each case to give jurisdiction to the federal court.

All bills of complaint raise questions under the federal Constitution that are substantial and not merely colorable. Hence the court has jurisdiction exclusive of diversity of citizenship, which existed as to all appellees except the city of Sioux Falls, necessary amount being involved, to determine all questions in the record, and it has not lost jurisdiction by omitting to decide the constitutional ones. Silver et al., etc., v. Louisville & Nashville R. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; Louis. & Nash. R. R. Co. v. Finn, 235 U. S. 601, 35 Sup. Ct. 146, 59 L. Ed. 379; Greene, Auditor, et al., etc., v. Louis. & Interurban R. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

Appellants plead estoppel against all of the appellees, and claim that appellees are not in position to maintain their actions, for the reason that as to some of the railroad companies the engineering departments have been in close touch with the drainage ditch proceedings; that some of them were assessed for benefits received upon the construction of the original drainage ditches in the same territory, received benefit thereby, and have not protested before the bringing of this action. As to some of the appellees it is claimed that their officers showed interest in the construction work and encouraged the board of commissioners to do the work; that some of the appellees, for instance, the Chicago, Milwaukee & St. Paul Railway Company, hauled men and materials used in the construction work, and stopped trains between stations to unload men and materials. As to the city of Sioux Falls, it is claimed by way of estoppel that under due authority the mayor and city auditor signed the petition for the project. There can certainly be no just claim of estoppel as to those appellees whose property was not within the area of the original drainage ditches No. 1 and No. 2. As to the other appellees, the decree related only to the property outside of the original assessment areas of drainage ditches No. 1 and No. 2. So we are to consider the situation as bearing on the question of estoppel only as to the property outside of the original assessment areas up to the time of the notice of the fixing of benefits. The various appellees as to such property had no notice, when the acts constituting the alleged estoppel took place, that the same was to be affected by the drainage construction or would be assessed for the cost thereof. Hence the claimed acts of agents and officers of appellees would not constitute estoppel. The situation

is quite different from that presented in Gilseth v. Risty (S. D.) 193 N. W. 132—at least as to all appellees except the city of Sioux Falls. We do not pass on the question of estoppel as to any appellees, as to assessments that may be made on their property within the original area of ditch No. 1 and ditch No. 2, for the purpose of maintaining such ditches.

Other questions are presented which we think are not involved in the determination of these cases.

The decree of the trial court in each case is affirmed.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 454.

A. G. RISTY, ET AL., AS COUNTY COMMISSIONERS, ETC., ET AL., PETITIONERS,

vs.

NORTHERN STATES POWER COMPANY, RESPONDENT

STATEMENT AND BRIEF IN RESISTANCE OF PETITION FOR CERTIORARI

Believing that if the court is fully and correctly informed with reference to the questions involved in this case it will not deem such questions of sufficient importance or of such nature as to induce it to exercise its power in certiorari, we respectfully ask consideration of the following in resistance of the petition for certiorari filed herein.

STATEMENT OF CASE

The Big Sioux River flows from the north in a southerly direction west of the city of Sioux Falls to a point southwest of the city, thence easterly and thence northerly through the city to a point where it is intersected by the outlet of the drainage ditch or ditches in controversy.

Respondent owns and operates an hydro-electric plant in the city of Sioux Falls operated partly by water power from the falls of the Big Sioux River and partly by steam power. All of its real property is of granite rock formation, the rock appearing at the surface of the ground without soil

thereon, and no part of such property is or ever can be suitable for agricultural purposes.

In or about the years 1907 to 1909, petitioners, county commissioners (hereinafter referred to as "The commissioners") caused to be constructed what was then known as Drainage Ditch No. 1, having its origin at a point about three and one-half to four miles north of the city of Sioux Falls, and emptying into the Big Sioux River at a point north of and below respondent's hydro-electric plant.

While the proceedings for the construction of Drainage Ditch No. 1 were pending a petition was filed for the construction of what was first known as Ditch No. 2. Subsequently another petition was filed, seeking the extension of proposed Ditch No. 2, and praying that it be made a part of Ditch No. 1. The commissioners finally, by resolution, established and caused to be constructed Drainage Ditch No. 2, having its origin at a point approximately fifteen miles north of the outlet of Ditch No. 1 on the east side of the Big Sioux River, and running thence in a southerly direction, intersecting the Big Sioux River at one point, and so close to the river at other points that the river subsequently cut into the ditch, and connecting with and emptying into Ditch No. 1 at its point of origin.

The commissioners, by resolution, determined that all of the property theretofore included within what they had determined to be the area of Drainage Ditch No. 1 was also benefited by Drainage Ditch No. 2; that the two ditches were mutually interdependent and should virtually be considered as one drainage system, and they assessed all of said property for the construction of both ditches. The system of drainage thus established was completed and paid for by assessment upon the property then deemed to be benefited which did not include any property lying south of the outlet of Ditch No. 1. No part of respondent's property was included within the drainage area thus established; it was given no notice of of any kind of the establishment of such drainage and no attempt was made to include its property within the drainage area or assess it for any part of the cost of the drainage.

As originally constructed, and after the connection of Drainage Ditches No. 1 and 2, the outlet of Drainage Ditch No. 1 consisted merely of a concrete apron hereinafter referred to as "spillway," extending from the lower terminus of Drainage Ditch No. 1 down over an abrupt slope to the Big Sioux River at a point below the falls of the river and as heretofore stated north of and below respondent's hydro-electric plant. In the year 1916, the volume of water passing through Ditches No. 1 and No. 2 washed out a portion of this concrete work with the result that the waters in the spillway were at that point uncontrolled and serious damage was threatened by the continued maintenance of the ditches in the absence of properly constructed works for the purpose of controll-

ing and confining the waters at their outlet. It is conceded that with the ditches in the condition in which they were after the washing out of the spillway there was great danger that the Big Sioux River would be diverted from its course around the city of Sioux Falls and caused to flow through the ditches from the point of intersection some miles north of the city returning to the river at the point where the old spillway was located below the falls and below respondent's plant, thus threatening to seriously damage its property, the water supply of the city of Sioux Falls, and many other properties and rights, and in fact, threatening to deprive respondent entirely of its water power.

It appears from the answer and the undisputed evidence that the commissioners started work of some character to attempt to control the waters at the spillway and to prevent the threatened damage; that certain property owners within the area theretofore determined to be benefited by the drainage objected to this work and instituted suit in the state court to restrain the same; that thereafter a petition was filed with petitioners seeking a change of the outlet of the Drainage Ditches No. 1 and No. 2 in such manner as to discharge the water from said ditches into what is known as Covell's Lake, situated in the northwesterly part of the city of Sioux Falls; that thereafter the owners of property within the drainage area as theretofore determined and the parties interested in the Covell's Lake project had numerous conferences with reference to the matter;, that as a result of such conferences and as a compromise between said parties (there being no contention or proof that respondent was a party thereto) the proceedings had under the petition last referred to were abandoned and a petition known as the petition of F. L. Blackman and others was filed, which petition is entitled "Petition to Reconstruct and improve Drainage Ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2 and to pay therefor by an assessment upon the property, persons and corporations benefited thereby." Upon this petition, confessedly filed and acted upon by petitioners as a compromise between the owners of property within the drainage area and the promoters of the so-called Covell's Lake project, and not including respondent, the commissioners adopted a resolution providing for its hearing and caused notice of said hearing to be published. Respondent was not named in said notice; its hydroelectric plant and water rights were not referred to, and no part of its property was described. It contained nothing which could be construed as giving any notice whatever to it that any claim would be made of benefit to its property or that any attempt would be made to assess its property in such proceeding.

Upon the return day of such notice, the commissioners adopted a resolution purporting to re-establish Drainage

Ditches No. 1 and No. 2 under the name of Drainage Ditch No. 1 and 2, *along the exact course of their previous construction* and for the re-construction of the outlet or spillway.

Purporting to act under this resolution, the commissioners caused Ditches No. 1 and No. 2 to be cleaned and otherwise repaired and caused the outlet or spillway thereof to be re-constructed, and pursuant to a resolution or resolutions thereafter adopted, without any notice to respondent, caused certain portions of the Big Sioux River to be straightened. The spillway was re-constructed under the cost plus plan without advertising for bids for its re-construction in accordance with the plans finally adopted, and warrants were issued for the cost of such work amounting, with interest, to approximately $300,000.00.

The first intimation contained in the record of any thought of assessment of or attempt to assess any part of respondent's property appears in a notice published in April, 1919, said notice being of a hearing upon the matter of equalization of benefits resulting from said Drainage Ditch No. 1 and 2 and in which certain tracts of real property owned by respondent were described and attempted to be apportioned benefits to the extent of a very few units. The commissioners did not at that time, however, attempt to assess the hydro-electric plant or water rights of respondent and such plant and rights were not referred to in the April, 1919, notice. Proceedings under this notice were abandoned.

Subsequently and in or about the month of July, 1921, the commissioners adopted a resolution apportioning the benefits derived from said Drainage Ditch No. 1 and 2 and apportioned to respondent and to its hydro-electric plant, dam, property rights and water rights benefits to the extent of 5,351.63 units, amounting, as will appear from a mathematical calculation, to approximately $50,000.00. This suit was instituted for the purpose of restraining the commissioners from proceeding further with the equalization of said purported benefits and from spreading an assessment upon respondent's property therefor.

The district court acquired jurisdiction both by virtue of well pleaded federal questions and because of diversity of citizenship.

Respondent predicated its claim that the entire proceedings of the commissioners were void upon the following contentions:

1. That the South Dakota drainage ditch statutes were violative of the Fourteenth Amendment to the Federal Constitution;

2. That the acts of the commissioners were so arbitrary and discriminatory as to deprive it of the equal protection of

the laws, and that such acts were, therefore, in violation of the Federal Constitution;

3. That the acts of the commissioners in attempting to increase the drainage area of Drainage Ditches No. 1 and No. 2, and to assess respondent's property, not included in such area as originally established, were void because not done pursuant to or authorized by any statutes of the state of South Dakota;

4. That the proceedings of the commissioners in attempting to create a new drainage proposition and a new drainage area were a mere subterfuge resorted to by them pursuant to agreement between them and the owners of property in the original drainage area for the purpose of enabling them to assess respondent's property for the cost of such repair and maintenance of the original ditches as was necessary in order to enable them to function without damage to or destruction of the property and rights of respondent and others.

The district court decided that the South Dakota drainage statutes were not violative of the Fourteenth Amendment to the Federal Constitution, but found, in substance, as follows:

1. That the forming of the so-called new ditch was simply a pretense and subterfuge resorted to by the commissioners for the sole purpose of attempting to burden respondent and others with the cost of the maintenance of the ditches theretofore constructed;

2. That the South Dakota statutes did not authorize the assessment of property not included within the drainage area of the ditches in question, as originally determined, for the maintenance of such ditches after they had been constructed and the benefits therefor had been assessed, and that the proceedings of the commissioners in so far as they purported to affect the property and rights of respondent were, therefore, void;

3. That the statutes of the state of South Dakota in so far as they purport to authorize drainage proceedings for any purpose other than the drainage of agricultural lands were in conflict with the constitutional provision of the state of South Dakota requiring the corporate organization of drainage districts as a condition precedent to drainage proceedings for any such other purpose, and further found that the proceedings in question, if treated as new proceedings resulting in the establishment of a new ditch, were void because the work done pursuant to such proceedings was not done for the purpose of draining agricultural lands, and that such proceedings were, therefore, not authorized by the state statutes or Constitution; and

4. That regardless of whether or not the alleged new drainage district had been legally constituted, respondent was entitled to the relief asked because of the arbitrary and dis-

criminatory acts of petitioners, bringing respondent within the rule expressed in the case of *Thomas, et al. v. Kansas City Southern R. R. Co.*, 261 U. S. 481, 67 L. ed. 758.

C. R. I. & P. Ry. Co. v. Risty et al. 282 Fed. 364.

The Circuit Court of Appeals did not pass upon the Federal constitutional questions involved because, although finding them "grave, serious and doubtful," it deemed their determination not necessary "to the solution of the case," but in other respects it approved the decision of the district court, and affirmed the decree restraining assessment of respondent's property lying outside the drainage area as originally established.

Risty et al. v. C. R. I. & P. Ry. Co. 297 Fed. 710.

BRIEF

We believe the foregoing statement, which in all respects is sustained by the record, is all that is necessary to present to the court in support of our suggestion that the importance and nature of the questions involved are not such as to demand the exercise of its power in certiorari. We desire, however, to briefly consider the proposition, apparently chiefly relied upon by petitioners, that the decision of the Circuit Court of Appeals has created a conflict between itself and the decisions of the Supreme Court of the State of South Dakota.

We assume that this court will not find that such conflict exists as to demand the exercise by it of the extraordinary power under consideration unless it clearly and conclusively appears: first, that the nature of the questions involved in this case is such that the decisions of the highest court of this state with reference to them will be regarded as authoritative by this court, and second, that such questions have been so decided by the state court as necessarily to foreclose respondent of such rights and remedies as the Federal courts have held it entitled to.

We shall not discuss the first of these two essentials because one of the questions involved, to-wit: as to whether or not the drainage statutes in so far as they purport to authorize drainage for a purpose other than the drainage of agricultural lands, are in conflict with the state Constitution, is of such nature, while the others are as clearly not. None of such questions, however, has been so passed upon by the Supreme Court of the state as to create any conflict.

The state court has never had before it for determination the question as to whether or not the drainage statutes, in so far as they purport to authorize drainage proceedings for any purpose other than that of draining agricultural lands, are violative of the state Constitution. In all cases in which the constitutionality of the statutes has been passed upon by that court the only questions involved were those with reference

to the drainage of agricultural lands, and the court very correctly held that such drainage might be provided for without the incorporation of drainage districts.

The case of *Gilseth v. Risty*, 193 N. W. 132, decided after the decision of the district court in this case, is chiefly relied upon by petitioners as establishing the alleged conflict between the state and Federal courts. The opinion in that case discloses the following situation: plaintiff was the owner of agricultural land within the drainage area of Drainage Ditches No. 1 and No. 2 as originally constructed; he was a party to the conferences alleged by respondent in this case to have taken place between the parties interested in the original ditch proceedings, which conferences resulted in the filing of the petition "for the re-establishment of Drainage Ditches No. 1 and 2;" he was present at the hearing upon that petition and took no appeal from the order of the county commissioners purporting to establish the new drainage; his property, as we have said, was in the drainage area as originally established and he was one of the parties responsible for the original construction of the ditches in question and for their proper maintenance, and one of the parties for whose benefit petitioners are attempting to assess respondent's property and that of others outside the original drainage area.

The court simply held that as to him, a party to the proceeding, the order establishing the drainage and subsequent orders from which he did not appeal, became final. A careful analysis of the opinion discloses that the court finally based its conclusion upon questions of estoppel and lack of equity in favor of plaintiff. After reciting the situation practically as above stated, it said: "Appellant having stood by and seen all the work performed without protest, and having received all the benefits that could result therefrom, should not now be permitted to escape payment for the same. The relief asked by appellant is equitable in its nature, but because of the circumstances above shown, all the equities of the case are against appellant and in favor of the board."

We submit that nothing that was actually decided in the *Gilseth* case is in conflict with the decision of the Circuit Court of Appeals with reference to the rights of respondent here. There is nothing in the *Gilseth* case which would preclude any able lawyer from conscientiously advising respondent that the questions upon which his rights depend have not been passed upon by the state court.

Respondent had no property within the original drainage area; it was not a party to the original proceedings; it was not named nor any of its property described or referred to in the proceedings resorted to for the purpose of enlarging the drainage area.

No constitutional question or question of the power to assess property outside the original drainage area was involved in the *Gilseth* case, and there could not have been a decision

in that case, based upon the facts as disclosed by the opinion, that would even furnish any assistance to another court in determining respondent's rights here. The Federal courts, in seeking to avoid conflict, are certainly not obliged to follow the dicta of state courts or give any effect to unnecessary or unessential statements in their opinions.

We respectfully submit that the writ of certiorari should not be granted.

JOHN H. ROEMER,
Chicago, Illinois.

R. M. CAMPBELL,
Chicago, Illinois.

HAROLD E. JUDGE,
Sioux Falls, South Dakota.

Solicitors for Respondent.

DENIED
JAN 26 1925
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FILED
DEC 22 1924
WM. R. STANBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, [redacted] 1925

No. [redacted] 98

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS, ET AL.,
Appellants,

vs.

NORTHERN STATES POWER COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO DISMISS APPEAL.

HAROLD E. JUDGE,
JOHN H. ROEMER,
R. M. CAMPBELL,
Counsel for Appellee.

DUNLAP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 454

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS, ET AL.,
Appellants,

vs.

NORTHERN STATES POWER COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO DISMISS APPEAL.

AND NOW COMES the appellee and moves the court to dismiss the appeal herein for the following reasons:

I. The fact that opposite parties to the suit were citizens of different states was sufficient to give jurisdiction to the Federal courts and the Federal questions raised by the pleadings were disposed of by the Circuit Court of Appeals in accordance with the contentions of appellants; wherefore this court has no jurisdiction of the case on appeal.

II. This case in the lower court did not involve a dispute or controversy as to the validity, construction

or effect of the Constitution of the United States upon the determination of which the result depended; wherefore the Supreme Court has no jurisdiction on this appeal to review the judgment and decree of said Circuit Court of Appeals.

III. Appellants having elected to appeal from the District Court to the Circuit Court of Appeals are bound by the decision on that appeal and cannot have the case again reviewed by appeal to the Supreme Court.

Respectfully submitted,

HAROLD E. JUDGE,
JOHN H. ROEMER,
R. M. CAMPBELL,
Counsel for Appellee.

ARGUMENT ON MOTION TO DISMISS APPEAL.

I.

STATEMENT.

This case is here on appeal from a decision of the United States Circuit Court of Appeals for the Eighth Circuit affirming the judgment of the United States District Court for the District of South Dakota. The action was brought in the District Court by appellee to restrain the County Commissioners and other county officials of Minnehaha County, South Dakota, from levying an assessment against the property of appellee under Chapter 5 of the South Dakota Revised Code, 1919, and amendments thereof, usually referred to as the South Dakota Drainage Act. The right to an injunction was asserted on two Federal grounds, one that the Drainage Act was invalid because violative of the Constitution of the United States, the other, that the assessment was so arbitrary and discriminatory as to constitute the taking of appellee's property without due process of law and to deprive appellee of the equal protection of the law (P. R. 79-80), and also upon the non-Federal ground that even if the statute were valid, the right to make an assessment did not exist under its terms.

The District Court held the Drainage Act valid but granted the injunction on other grounds asserted. The Circuit Court of Appeals expressly refused to decide the Federal questions and affirmed the lower court on the non-Federal questions upon which the decision of that court proceeded. With this appeal, appellants filed a petition for writ of certiorari to the Circuit Court of Appeals, which has been denied by the court.

The case is one of those in which the decision of the Circuit Court of Appeals is final under Judicial Code, Section 128, unless it involves some ground of Federal jurisdiction other than that of diversity of citizenship.

The bill of complaint in paragraphs I and II thereof alleges as a ground of Federal jurisdiction, the diversity of citizenship between the plaintiff therein, Northern States Power Company, a Minnesota corporation, and the defendants, who are residents and citizens of the State of South Dakota. (P. R. 4.)

In paragraph XVI of the bill there is an allegation of facts authorizing jurisdiction in the Federal Court upon the ground that the suit is one of a civil nature in which a law of the State of South Dakota is claimed to be in contravention of the Constitution of the United States. (P. R. 13.)

In the trial court, it was contended by the plaintiff, appellee here, that the drainage law of South Dakota was invalid because it contravened the Constitution of the United States. The appellants who were defendants below, in their answer specifically "allege that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, in that this suit is wholly based upon the alleged existence of a Federal question and diversity of citizenship, and that the amount sued for and the value of the special matter as alleged in said bill is not truly stated or alleged in food faith." (P. R. 24.) The defendants in the trial court, appellants here, specifically deny the allegations of paragraph XVI of the bill (P. R. 13) in which it was charged that the South Dakota Drainage Act was in contravention of the Constitution of the United States, and state that said allegations were made with the fraudulent purpose of imposing upon the jurisdiction of the court.

Throughout the trial of the case in the District Court, and in the appeal to the Circuit Court of Appeals, the appellants contended that the South Dakota Drainage Act was constitutional and valid. In this contention they were entirely successful in the District Court, the trial judge having held that the act was constitutional. (P. R. 88.)

In the Circuit Court of Appeals' opinion by Judge Kenyon, it is stated that the constitutional questions raised are grave, serious and doubtful, but that their determination is not necessary to the solution of the case—hence, under the well established rule that Federal courts will not pass upon the constitutionality of statutes unless it is absolutely necessary, the question is left aside. (*Risty, et al.* v. *Chicago, R. I. & P. Ry. Co.,* and five other cases, 297 Fed. 710.)

It is thus clear that both in the District Court and in the Circuit Court of Appeals, the question of the constitutionality of the South Dakota law was disposed of in accordance with the contentions of appellants. In both courts, the question was left aside; in the District Court, because the trial judge held the act was constitutional; in the Circuit Court of Appeals because that court found it was immaterial whether the act were constitutional or not.

What was actually done was to analyze the statute in the light of the record and to reach the conclusion that the County Commissioners, as drainage officials, were not authorized by the South Dakota law to do the things they were seeking to do. In other words, the courts construed the South Dakota statute and under their construction of it, found that the County Commissioners, appellants, had no authority in the statute for proceeding with the assessment against appellee.

II.

THE SUPREME COURT HAS NO JURISDICTION TO REVIEW THE JUDGMENT OF THE LOWER COURT ON THIS APPEAL BECAUSE THE CASE DOES NOT REALLY AND SUBSTANTIALLY INVOLVE A DISPUTE OR CONTROVERSY AS TO THE VALIDITY, CONSTRUCTION OR EFFECT OF THE CONSTITUTION UPON THE DETERMINATION OF WHICH THE RESULT DEPENDS.

The only ground of Federal jurisdiction considered by the Circuit Court of Appeals was that of diversity of citizenship. The allegations that the South Dakota law was unconstitutional and that the action of the drainage officers amounted to taking appellee's property without due process of law and to a deprivation of the equal protection of the law, were not essential to the result reached in the litigation.

We direct attention to the case of *Arbuckle* v. *Blackburn*, 191 U. S. 405, 48 L. Ed. 239, 24 S. C. R. 148, where this language appears:

> "In the present case the Circuit Court had jurisdiction on the ground of diverse citizenship; but it is now contended that jurisdiction also rested on the ground that the suit was one arising under the Constitution of the United States.
>
> The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form, such as is required in good pleading. *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, *ante*, 140; 24 Sup. Ct. Rep. 63, and cases cited."

In the case of *Empire State, etc. Mining Co.* v. *Hanley*, 195 U. S. 292, 49 L. Ed. 1056, 25 S. C. R. 691, this language occurs:

> "The decisions of the courts below did not turn

> on any Federal question. The circuit court held that Hanley had no title to the one-third interest because the Idaho statute relating to probate sales had not been complied with; the court of appeals, that Hanley was not entitled to the aid of a court of equity in respect of that interest, because of his conduct at the time of the transaction."

We think it may be said in the instant case, as was said by Mr. Chief Justice Fuller in the case last cited, that the decision of the Circuit Court of Appeals did not turn on any Federal question; in fact, there can be no question but that the language of the Chief Justice is pertinent. It is beyond cavil that the Federal questions pleaded here were not those upon the determination of which the final result depended.

The principle now being discussed is well stated in the case of *Shulthis* v. *McDougal,* 225 U. S. 561, 56 L. Ed. 1205, in the following language:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."

In the case of *Lovell* v. *Newman,* 227 U. S. 412, 57 L. Ed. 577, the discussion of this matter contained in *Shulthis* v. *McDougal, supra,* is repeated and approved; said quotation being followed by this question:

> "Does it, then, appear in the petition in the present case, in addition to averments of diverse citizenship, that the petitioner has asserted a ground of jurisdiction which 'really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of the United States, and upon which his right to recover depends?' "

The question above states the problem to be solved in determining whether or not the Supreme Court has jurisdiction in a case brought there by direct appeal.

The justices of the Supreme Court say that in order to invoke the jurisdiction of Federal courts the petitioner must assert a ground of jurisdiction which "really and substantially involves a dispute or controversy respecting the validity, construction or effect of a law of the United States, upon the determination of which the result depends." That language means exactly what it says. It may be contended that the justices had in mind, in making and repeating the solemn assertion to which we have referred, the result of a decision upon the particular allegation of unconstitutionality without reference to the decision of the case where other issues are involved. Their opinions have not so limited the meaning of the language, however, but have made such broad assertion time and again. Not only has it been stated positively, but the same rule has been conversely laid down.

In the case of *Henningsen* v. *United States Fidelity and Guaranty Co.* 208 U. S. 404, 52 L. Ed. 547, 28 S. C. R. 389, Mr. Justice Brewer said, in denying a motion to dismiss:

> "A motion is made to dsimiss on the ground that the jurisdiction of the Circuit Court was invoked solely on the ground of diversity of citizenship of the parties, and hence the decree of the Circuit Court of Appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and relief were also based on the statutes of the United States, as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the circuit court of appeals, and were necessary elements."

It cannot be said that the Constitution of the United States, or a Federal question, entered as an element into the decision of the Circuit Court of Appeals from which this appeal was taken. They did enter as elements in the case decided by Mr. Justice Brewer and were necessary elements. It was that fact which gave the Supreme Court jurisdiction in that case, and it must follow that if the Constitution or some Federal question had not entered as a necessary element in the case, the Supreme Court would have been without jurisdiction.

A Federal question to give jurisdiction to this court on appeal, must be essential to the disposition of the case. It must be so substantially fundamental that it cannot be set aside. The ends of justice must require its consideration and determination. In our judgment, jurisdiction to review this case on appeal does not exist here on the ground that Federal questions are involved, because those questions, as pleaded, do not really and substantially involve a dispute as to the validity, construction or effect of the constitution, upon the determination of which the result depends.

III.

APPELLANTS HAVING ELECTED TO APPEAL FROM THE DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS ARE BOUND BY THE DECISION ON THAT APPEAL AND CANNOT HAVE THE CASE AGAIN REVIEWED BY APPEAL TO THE SUPREME COURT.

If appellants had the right to have the judgment of the United States District Court reviewed by the Supreme Court, it was essential for the exercise of such right that a direct appeal to that court be taken. While such direct appeal must be taken on jurisdictional grounds, it is settled that when so taken the Supreme

Court must review the whole case and decide all questions involved, both jurisdictional and nonjurisdictional.

Horner v. *United States,* 143 U. S. 570; 36 L. Ed. 266.

Burton v. *United States,* 196 U. S. 283; 49 L. Ed. 482.

Williamson v. *United States,* 207 U. S. 425; 52 L. Ed. 278.

Wilson v. *United States,* 232 U. S. 563; 58 L. Ed. 728.

Having elected, however, to take the case by appeal from the District Court to the Circuit Court of Appeals for review, the appellants are bound by the decision there.

This court held in *Robinson* v. *Caldwell,* 165 U. S. 359, 41 L. Ed. 745, and later in *Loeb* v. *Trustees of Columbia Township,* 179 U. S. 472, 45 L. Ed. 280, approved the doctrine, that "it was not the purpose of the judiciary act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this court and in the Circuit Court of Appeals." No amendment of the Judiciary Act referred to now indicates any such purpose or permits such right. *Ohio* v. *Swift & Co.* 260 U. S. 146, 67 L. Ed. 176.

In the case of *Cary Manufacturing Company* v. *Acme Flexible Clasp Company,* 187 U. S. 427, 47 L. Ed. 244, this language is used:

> "Although it is insisted that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the denial of constitutional rights, and hence that this court has jurisdiction under Sec. 5 of that act; but it is settled that even if a party might be entitled to come directly to this court under that section, yet if he

does not do so, and carries his case to the circuit court of appeals, he must abide by the judgment of that court."

In *Ayers* v. *Polsdorfer*, 187 U. S. 427, 47 L. Ed. 314, it is said:

"Therefore, when the jurisdiction of the circuit court is invoked solely on the ground of diversity of citizenship, two classes of cases can arise, one in which the questions expressed in Section 5 appear in the course of the proceedings, and one in which other Federal questions appear. Cases of the first class may be brought to this court directly, or may be taken to the circuit court of appeals. But if taken to the later court they cannot then be brought here. Cases of the second class must be taken to the circuit court of appeals, and its judgment will be final. The case at bar falls under one or under the other of those classes."

IV.

THE FEDERAL QUESTIONS PLEADED HAVING BEEN DISPOSED OF IN ACCORDANCE WITH THE CONTENTIONS OF APPELLANTS CANNOT BE THE BASIS OF JURISDICTION ON APPEAL BY THEM.

We have already pointed out the manner in which the Federal questions were disposed of in the lower court. That disposition was in favor of appellants. They are now seeking to have the matter reheard in the Supreme Court on grounds which have already been disposed of in their favor and to their advantage. If the Supreme Court takes jurisdiction of this case it cannot render a decision on the Federal questions advanced by appellee that will be of any more benefit to appellants than was that of the Circuit Court of Appeals. If the Supreme Court passes on these questions at all, and its decision is to benefit appellants, the court will have to hold that

the South Dakota law was constitutional. Having so held, it must then go further and review the case upon grounds of jurisdiction which are not Federal in their nature so far as the questions at issue are concerned. If the Supreme Court says that the South Dakota act is constitutional and valid it must then begin at the very place where Mr. Justice Kenyon began after he had set the constitutional questions aside. There would be nothing left in the case except to analyze the South Dakota law and construe it in the light of the facts contained in the record in order to determine whether or not under that law the County Commissioners had the right to do what they were seeking to do in the matter of the assessment of benefits. This can be done where diversity of citizenship is the basis of Federal jurisdiction, as well as where a Federal question is pleaded. If the Supreme Court holds the South Dakota act unconstitutional, there will then be no occasion to review the decision of the Circuit Court of Appeals at all.

We think it is well established by the decisions of the Supreme Court that a litigant may not appeal from a decision in his favor. Referring again to the case of *Empire State* v. *Hanley*, 195 U. S. 292, 49 L. Ed. 1056, 25 S. C. R. 691, we find this language:

> "Appellants succeeded in their defense as to the one-third interest, and Hanley accepted the result on the second appeal. They now make a grievance of their own success, and ask that the supposed constitutional question as to the third interest only be made the basis of jurisdiction here, although, if the decree disposed of any such question, it was in their favor. In our opinion this cannot be permitted."

The language quoted is pertinent and apt in the instant case. Here the appellants succeeded in their defense as to the constitutionality of the law of South Dakota and hence there is no good reason why they

should be permitted to make a "grievance of their own success" any more than was true in the case from which the quotation is taken. The fact of the matter is that the sole purpose of the appeal is to get the Supreme Court to review the decision construing the South Dakota law and the only purpose that the allegation of unconstitutionality of the state law can possibly serve for the appellants is to give them access to the Supreme Court. Having succeeded in their contention that the law is valid, they cannot use the dispute as to its constitutionality, already disposed of in their favor, as a stepping stone to the Supreme Court in order to have another issue reviewed.

Until the Federal question involving its validity has been disposed of in their favor, it would be impossible for any court to hold with appellants in the construction of the South Dakota law. This question has already been disposed of in favor of appellants and they are not in position to have it reviewed. They have nothing in that regard of which to complain.

We call attention to the case of *Lampasas* v. *Bell*, 180 U. S. 276, 45 L. Ed. 527, 21 S. C. R. 228. The following paragraph is important both for the sententious way in which it expresses the law and for the distinguished authority by which that expression is supported:

> "We said in *Clark* v. *Kansas City*, 176 U. S. 114, 44 L. Ed. 392, 20 Sup. Ct. Rep. 284 (quoting from Cooley, Const. Lim. Sec. 196) that 'a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and * * * who has therefore no interest in defeating it.' That is, a legal interest in defeating it. The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance. 'To this extent only is it necessary to go in order to secure and protect the rights of all persons against the unwarranted

> exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose.' *Wellington, Petitioner,* 16 Pick. 87, 96, 26 Am. Dec. 631, 635."

If there was a grievance involved in the disposition of the Federal questions raised in the lower court, that grievance belonged to appellee, and appellants were strangers to it. Indeed, they were the direct beneficiaries of the disposition of those questions when they were set aside by the lower court.

In the case of *Loeb* v. *Trustees of Columbia Township,* 179 U. S. 472, 45 L. Ed. 280, it is asserted that under Revised Statutes, Section 709 (Judicial Code, Section 237), the Supreme Court "can review the final judgment of a state court upon writ of error sued out by the party who is denied a right, privilege or immunity specially set up or claimed *by him* under the Constitution or laws of the United States." The opinion points out, however, that Section 5 of the Circuit Court of Appeals Act (Judicial Code, Section 238) does not limit the right of review to the party making the claim, and says further:

> "In other words, if a claim is made in the circuit court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant."

The claim that the South Dakota Drainage Law violates a provision of the Fourteenth Amendment to the Constitution of the United States was urged by appellee in the District Court. That claim was rejected and the contention of appellants in that regard was there expressly sustained. That ruling constituted ground for

review at the instance of appellee by direct appeal to the Supreme Court under Section 238 of the Judicial Code. *Louisville and Nashville Railroad Company* v. *Western Union Telegraph Company*, 234 U. S. 369, 34 Sup. Ct. 810, 58 L. Ed. 1356. But the ruling of the District Court on the question of the validity of the state law, did not constitute ground for review at the instance of appellants for the very sufficient reason that this question was decided in their favor. In their appeal to the Circuit Court of Appeals, the appellants had no grievance to complain of except the decision of the District Court to the effect that the action of the drainage officers was not warranted by the Drainage Act. The Drainage Act was held valid and treated as a valid law.

In the Circuit Court of Appeals, appellee again urged the Federal questions, but they were ignored by the court because their determination was not essential to the result. This disposition of those questions had exactly the same effect on the appellants contentions as a holding that the South Dakota act was valid would have had. They have no grievance in this respect on which to base an appeal and no adverse ruling on a Federal question upon which to predicate jurisdiction in the Supreme Court. The judgment of the Circuit Court of Appeals is final because it is based on no jurisdictional grounds except diversity of citizenship.

We desire to call attention to the case of *Anglo-American Provision Co.* v. *Davis Prov. Co.* 191 U. S. 376, 48 L. Ed. 228. Here, in discussing the language of Section 238 of the Judicial Code authorizing appeals to the Supreme Court "in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States," Mr. Justice

Holmes, speaking for the court in a unanimous opinion, says:

> "Those words are general in form, but they do not mean that whenever a party makes a case of that sort he may appeal directly to this court whenever the decision is against him, no matter on what grounds, although his contention about the state law is sustained. If a party comes into the circuit court alleging that a state law is unconstitutional, and the circuit court decides for him on that point, the mere fact that there was such a question in the case does not authorize him to appeal to this court on grounds that otherwise would not support an appeal. See *Lampasas* v. *Bell*, 180 U. S. 276, 45 L. Ed. 527, 21 Sup. Ct. Rep. 368. The present case illustrates the principle. The argument for the appellant is devoted not to any constitutional or jurisdictional point, but to an attempt to upset the decision of the circuit court upon the question, mainly of fact, as to the good faith, etc., of Weed in taking the assignment of the judgment. The provisions of Sec. 5 of the act of 1891 were not intended to be made an instrument for such attempts."

It would seem that there is no escape for appellants from the decision last cited. They did not go into the court below as plaintiffs, but they did go as defendants alleging and contending that the state law was constitutional. The lower courts, both of them, disposed of that point in favor of appellants, and the mere fact that such a question was pleaded in the case does not authorize them to have the decision reviewed on appeal. It is true that the final decision of the lower court was against appellants, but it was not upon the point of the constitutionality of the Drainage Act. No court could do more for them in the disposition of that point than has already been done.

This appeal should be dismissed, because no Federal

question in the case was decided or disposed of against appellants.

All of which is respectfully submitted.

HAROLD E. JUDGE,
JOHN H. ROEMER,
R. M. CAMPBELL,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

NO. 98

A. G. RISTY, ET AL., AS COUNTY COMMISSIONERS ET AL., APPELLANTS,

VS.

NORTHERN STATES POWER COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF APPELLEE

Northern States Power Company, plaintiff and appellee, filed its bill in the district court of the district of South Dakota, praying for an injunction. From a decree granting an injunction defendants and appellants appealed to the Circuit Court of Appeals of the Eighth Circuit, in which court the decree was affirmed. From the decision of the Circuit Court of Appeals defendants have appealed to this court.

This suit involves the constitutionality of the drainage ditch statutes of the state of South Dakota under both the federal and state constitutions, and also involves the regularity and validity of proceedings taken under the statutes. The facts out of which the suit arises are as follows:

STATEMENT OF THE CASE

The Big Sioux River flows from the north in a southerly direction west of the city of Sioux Falls to a point southwest of the city, thence easterly and thence northerly through the city to a point where it is intersected by the outlet of the drainage ditch or ditches in controversy. (For illustration, see Map, R. 225).

Appellee owns and operates an hydro-electric plant in the city of Sioux Falls operated partly by water power from the falls of the Big Sioux River and partly by steam power. This plant was constructed in the years 1907 and 1908 by its predecessor in interest, the Sioux Falls Light & Power Company, which company prior to the construction of the present plant owned and operated with the same water power, by means of a dam constructed some time prior to 1899, the electric plant formerly owned by the Cascade Milling Company. All of appellee's real property is of granite rock formation, the rock appearing at the surface of the ground without soil thereon, and no part of such property is or ever can be suitable for agricultural purposes. (R. 246-248).

In or about the years 1907 to 1909, appellant County Commissioners caused to be constructed what was then known as Drainage Ditch No. 1, having its origin at a point about three and one-half to four miles north of the city of Sioux Falls, and emptying into the Big Sioux River at a point north of and below appellee's hydro-electric plant. (R. 126-131, 245, 248).

While the proceedings for the construction of Drainage Ditch No. 1 were pending a petition was filed for the construction of what was first known as Ditch No. 2. Subsequently another petition was filed, seeking the extension of proposed Ditch No. 2, and praying that it be made a part of Ditch No. 1. Appellant County Commissioners finally, by resolution, established and caused to be constructed Drainage Ditch No. 2, having its origin at a point approximately fifteen miles north of the outlet of Ditch No. 1 on the east side of the Big Sioux River, and running thence in a southerly direction, intersecting the Big Sioux River at one point, and so close to the river at other points that the river subsequently cut into the ditch, and connecting with and emptying into Ditch No. 1 at its point of origin. (R. 131-138, 245).

Appellant County Commissioners, by resolution, determined that all of the property theretofore included within what they had determined to be the area of Drainage Ditch No. 1 was also benefited by Drainage Ditch No. 2; that the two ditches were mutually interdependent and should virtually be considered as one drainage system, and they assessed all of said property for the construction of both ditches. The system of drainage thus established was completed and paid for by assessment upon the property then deemed to be benefited which did not include any property lying south of the outlet of Ditch No. 1. No part of appellee's property or of the property of its predecessor in interest was included within the drainage area thus established; appellee was given no notice of any kind of the establishment of such drainage and no at-

tempt was made to include its property within the drainage area or assess it for any part of the cost of the drainage. (R. 127-129, 138-142).

As originally constructed, and after the connection of Drainage Ditches No. 1 and 2, the outlet of Drainage Ditch No. 1 consisted merely of a concrete apron hereinafter referred to as "spillway," extending from the lower terminus of Drainage Ditch No. 1 down over an abrupt slope to the Big Sioux River at a point below the falls of the river and as heretofore stated north of and below appellee's hydro-electric plant. In the year 1916, the volume of water passing through Ditches No. 1 and No. 2 washed out a portion of this concrete work with the result that the waters in the spillway were at that point uncontrolled and serious damage was threatened by the continued maintenance of the ditches in the absence of properly constructed works for the purpose of controlling and confining the waters at their outlet. It is conceded that with the ditches in the condition in which they were after the washing out of the spillway there was great danger that the Big Sioux River would be diverted from its course around the city of Sioux Falls and caused to flow through the ditches from the point of intersection some miles north of the city returning to the river at the point where the old spillway was located below the falls and below appellee's plant, thus threatening to seriously damage appellee's property, the water supply of the city of Sioux Falls, and many other properties and rights, and in fact, threatening to deprive appellee entirely of its water power. (R. 29-33).

It appears from the answer and the undisputed evidence that the appellant County Commissioners started work of some character to attempt to control the waters at the spillway and to prevent the threatened damage; that certain property owners within the area theretofore determined to be benefited by the drainage objected to this work and instituted suit in the state court to restrain the same; that thereafter a petiton was filed with the appellant County Commissioners seeking a change of the outlet of the Drainage Ditches No. 1 and No. 2 in such manner as to discharge the water from said ditches into what is known as Covell's Lake, situated in the northwesterly part of the city of Sioux Falls; that thereafter the owners of property within the drainage area as theretofore determined and the parties interested in the Covell's Lake project had numerous conferences with reference to the matter; that as a result of such conferences and as a compromise between said parties (there being no contention or proof that appellee was a party thereto) the proceedings held under the petition last referred to were abandoned and a petition known as the petition of F. L. Blackman and others was filed, which peti-

tion is entitled "Petition to Re-construct and improve Drainage Ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by an assessment upon the property, persons and corporations benefitted thereby." Upon this petition, confessedly filed and acted upon by the appellant Commissioners as a compromise between the owners of property within the drainage area and the promoters of the so-called Covell's Lake project, and not including appellee, the appellant Commissioners adopted a resolution providing for its hearing and caused notice of said hearing to be published. Appellee was not named in said notice; its hydro-electric plant and water rights were not referred to, and no part of its property was described. It contained nothing which could be construed as giving any notice whatever to it that any claim would be made of benefit to its property or that any attempt would be made to assess its property in such proceeding. (R. 29-33, 39, 43-65).

Upon the return day of such notice, appellant Commissioners adopted a resolution puporting to re-establish Drainage Ditches No. 1 and No. 2 under the name of Drainage Ditch No. 1 and 2, along the exact course of their previous construction and for the re-construction of the outlet or spillway. (R. 33, 52-55, 263-267).

Purporting to act under this resolution, appellant Commissioners caused Ditches No. 1 and No. 2 to be cleaned and otherwise repaired and caused the outlet or spillway thereof to be re-constructed, and pursuant to a resolution or resolutions thereafter adopted, without any notice to appellee, caused certain portions of the Big Sioux River to be straightened. The spillway was re-constructed under the cost plus plan without advertising for bids for its re-construction in accordance with the plans finally adopted, and warrants were issued for the cost of such work amounting, with interest, to approximately $300,000.00. (R. 34-37).

The first intimation contained in the record of any thought of assessment of or attempt to assess any part of appellee's property appears in a notice published in April, 1919, (Plaintiff's Exhibit A, R. 142-194) said notice being of a hearing upon the matter of equalization of benefits resulting from said Drainage Ditch No. 1 and 2 and in which certain tracts of real property owned by appellee were described and attempted to be apportioned benefits to the extent of a very few units. Appellant Commissioners did not at that time, however, attempt to assess the hydro-electric plant or water rights of appellee and such plant and rights were not referred to in the April, 1919, notice. Proceedings under this notice were abandoned by the appellant Commissioners. (R. 194, 203.)

Subsequently and in or about the month of June, 1921, appellant Commissioners adopted a resolution apportioning the benefits derived from said Drainage Ditch No. 1 and 2 and apportioned to appellee and to its hydro-electric plant, dam, property rights, and water rights benefits to the extent of 5,351.63 units, amounting, as will appear from a mathematical calculation, to approximately $50,000.00. This suit was instituted for the purpose of restraining appellants from proceeding further with the equalization of said purported benefits and from spreading an assessment upon appellee's property therefor. (R. 17-20, 37, 194, 208).

DISTRICT COURT'S DECISION

(R. 80-100, 282 Fed. 364)

The District Court did not agree with appellee's contention that the drainage statutes of the state of South Dakota were violative of the Fourteenth Amendment to the Constitution of the United States in that they do not provide for proper notice to, and right to be heard of, property owners and deprive them of their rights and property without due process of law, but correctly held that it acquired jurisdiction not only by virtue of diversity of citizenship but because the bill involved a real and substantial question under the Constitution of the United States and therefore proceeded to determine all the questions, (*Davis, Director General v. Wallace* 257 U. S. 478; 66 L. ed. 325) and found, in substance, as follows:

(1) That the situation disclosed by the evidence "presented no question of the drainage of agricultural lands" but rather that of maintenance of ditches No. 1 and No. 2 "and the prevention of the dangers threatened by the water that they were conducting down through these ditches, through this hill, into the river;" that the drainage of the agricultural lands would not have been interfered with if the spillway had not been re-constructed; that the people who constructed Ditches No. 1 and No. 2 originally were responsible for the threatened damage, and it was their duty to maintain the ditch, "and to stop the ravages of the water cutting into it and through it;" that what was done under the pretense of proceeding under the so-called Blackman petition was merely to maintain the ditch or ditches originally constructed and that in the attempt to include additional lands in the drainage area and assess them any portion of the cost of such maintenance, appellant Commissioners were acting entirely without authority of law, there being no provision in the statutes of the state of South Dakota "for the taking in of any other lands and

assessing them for the maintaining of a ditch after it has been constructed and the benefits of its building have been assessed."

(2) That the forming of the so-called new ditch was simply a pretense and a subterfuge "resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed."

(3) That § 8489 of the South Dakota Revised Code, 1919, with reference to invalid and abandoned proceedings had no application, the proceedings for the construction of old Ditches No. 1 and No. 2 never having been held void, set aside or abandoned; and

(4) That the proceedings of the appellant Commissioners in "assuming the right to constitute a new drainage district, calling it district No. 1 and 2, and to assess benefits to the property of the plaintiffs in so far as they are located in the city of Sioux Falls," were void.

The District Court further found:

(5) That even if it had found that the alleged new drainage district had been legally constituted and that the appellant Commissioners had the right to extend the benefits to property outside the drainage area as originally established, appellee would still have been entitled to the relief sought because "the proofs overwhelmingly bring the plaintiffs within the rule recently expressed *In re Thomas, et al v. Kansas City Southern Railway Co., et al.*" (277 Fed. 708, affirmed by this Court, 261 U. S. 481, 67 L. ed. 758) "in that the taxation that is imposed upon each of the plaintiffs is a much higher rate and upon a different basis than the tax upon land lying within the district," stating:

> "Even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the board could be predicated. * * * The Northern States Power Company was assessed $50,000.00, one-fifth of the entire expense although there is included in the pretended district agricultural land something like twenty miles in length and several miles in width. The injustice of this is apparent when it is noted that the record disclosed that it was located upon the rapids of the Sioux River, in the city of Sioux Falls, had been located there for many years. It was, therefore, entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business. * * * Even if there had been a valid establishment of a drainage ditch at the time and place in controversy, and even if

the Board of County Commissioners had jurisdiction, *there was an entire failure to present any evidence upon which any benefit could possibly be predicated against this plaintiff.* The engineer who pretended to work out the hypothetical benefit admitted that he was not a hydro-electric engineer, and therefore, not able to analyze and state the result of the different conditions of the water in the river. The suggestion applies with special force to the status of this plaintiff that the *amount of benefits were fanciful, exorbitant and arbitrary, with no possible appreciation in value of its property as a result of this improvement.*" (Italics are ours.)

(6) That the re-construction of the spillway without change of location and the repair of the ditch etc., "could not be viewed in the same light or as serving the same purpose as the construction of the original ditches" because the object and purpose of such work was not to drain agricultural lands but to prevent the damage threatened because of the original imperfect construction of the ditches and spillway; in other words, to prevent the destruction of the water supply of the city of Sioux Falls, the water power of appellee, etc., by means of the agency set in motion by the original construction, and that although such object and purpose might have constituted a public use the appellant Commissioners were acting without authority of law because the applicable state constitutional provision was not self-executing and the acts of appellants lacked the necessary legislative authority.

DECISION OF CIRCUIT COURT OF APPEALS (292 Fed. 710)

The Circuit Court of Appeals did not pass upon the Federal constitutional questions involved because, although finding them "grave, serious and doubtful," it deemed their determination not necessary "to the solution of the case," but in other respects it approved the decision of the district court and affirmed the decree restraining the assessment of appellee's property lying outside the drainage area as originally established.

SUMMARY OF ARGUMENT

PROPOSITIONS RELIED UPON BY APPELLEE AS SUSTAINING THE JUDGMENT APPEALED FROM.

1. The South Dakota drainage ditch statutes are violative of the Fourteenth Amendment to the Constitution of the United States and deprive one of rights, and property without due process of law in that they provide for the taxation of

property without giving the owner thereof proper notice and the right to be heard upon the question as to the validity and amount of the tax and as to whether or not such tax is in excess of the benefit.

2. Such statutes are likewise violative of the Fourteenth Amendment to the Constitution of the United States because they do not afford to all persons the equal protection of the laws and deprive persons of their rights and property without due process of law, in that they prescribe no definite standard for determining benefits and are "of such a character that there is no reasonable presumption that substantial justice generally will be done but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred." (*Kansas City Southern Ry. Co. v. Road Imp. Dist No. 6*, 256 U. S. 658, 65 L. ed. 1151.)

3. In this instance the application and administration of the laws in question by appellant Commissioners have been so arbitrary, discriminatory, and extensively oppressive as to result, if not restrained, in depriving appellee of its property without due process of law, and in depriving it of the equal protection of the laws in violation of the Fourteenth Amendment.

4. Appellant Commissioners in attempting to include appellee's property within the drainage area and assess it, acted without any authority of law, attempted in excess of their powers to create a burden upon appellee and a cloud upon the title to its property, and proceeded without right to do something not authorized by the law under which they purported to act, this being true for the following reasons:

(a) Because what they did constituted merely maintenance and repair of the ditches as originally constructed, and the statutes do not purport to give them any power or authority to enlarge the drainage district and assess for that purpose property not originally assessed, the maintenance statute clearly providing that assessments for maintenance and repairs shall be made upon the property and in the proportions originally assessed.

(b) Because the purported establishment of a new drainage ditch in the exact location of the old ditches and construction of a new spillway in the location of the old spillway was confessedly a mere scheme or subterfuge resorted to by appellant Commissioners for the purpose of enabling them to lessen the burden upon the property owners in the original drainage area, and to cast the greater part of it upon property owners not included within the drainage area or benefited by the drainage.

(c) Because it clearly appears from the record that the work for which the assessment is sought to be made, unless

it be treated as the repair and maintenance of the original ditches, was done, not for the purpose of draining agricultural land, but for the purpose of preventing damage to property that was threatened by the existence of the drainage theretofore established, and appellant Commissioners were not authorized by any law of the state of South Dakota to establish a drainage district or assess property for the cost of the accomplishment of any such object or purpose.

(d) No part of appellee's property sought to be assessed is or ever can be agricultural land. The law in question does not purport to authorize the assessment of any property other than agricultural land and the property of railroad companies.

5. It clearly appears from the record that appellee's property has derived no benefit whatever from the so-called drainage, the benefits sought to be charged to it being purely fanciful, speculative, arbitrary and out of all proportion to those sought to be charged to other properties, and not being benefits directly or indirectly derived from the drainage of agricultural lands.

ARGUMENT

I.

THE SOUTH DAKOTA DRAINAGE LAWS ARE VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellee contended in the lower courts and still contends that the statutes under which appellant Commissioners claim to have proceeded are in conflict with the Fourteenth Amendment to the Constitution of the United States and therefore void in that their enforcement will deprive persons of property without due process of law and deny to them the equal protection of the laws.

This is true because: the statutes provide no proper method for the organization of a drainage district; they do not provide for any determination that the cost of the proposed drainage will not exceed the benefit to be derived; they do not afford property owners the right to be heard at any time or place, before any tribunal, upon the questions as to whether or not such cost will exceed the benefit, as to whether or not their lands and property shall be included within the drainage district, and as to the amount and validity of the tax to be assessed against their property.

It must be conceded that when a legislature, for any purpose within its powers, creates a taxing district and provides that the property in such district under certain designated rules of procedure shall be assessed for the cost of certain pub-

lic work, such legislative determination is conclusive upon the question as to whether or not the property included within such district will be benefited by the improvement provided for and, with certain modifications hereinafter referred to, as to whether or not such benefit will be less than the cost, and upon such questions property owners would have no right to be heard, but the rule is different when such a determination is delegated by the legislature to a subordinate body. In that event, property owners are entitled to notice and hearing upon those questions.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763-768.

Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. ed. 369-394.

Road Improvement District No. 2 v. Missouri Pacific R. Co., 275 Fed. 600.

The conclusion reached by the District Court that due process of law is afforded, provided an opportunity to be heard with reference to the amount of the tax is given the land owner before the assessment becomes a lien upon his property, is not applicable to the situation presented by this record, because in the state of South Dakota there has been no legislative declaration or finding as to the limits of the districts to be taxed for the purpose of, or with reference to the benefits to be derived by any property or district from, drainage.

This Court in *Fallbrook Irrigation District v. Bradley, supra*, stated the correct applicability of the rule announced in *Paulson v. Portland*, 149 U. S. 30-41, 37 L. ed. 637-641, cited by the District Court in support of its conclusion, saying:

> "It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits for the purpose of assessing upon the lands within the district the cost of a local public improvement. The legislature when it fixes the district itself is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the land included in the district and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e. the amount of the tax which he is to pay. *Paulson v. Portland*, 149 U. S. 30-41 (37: 637-641). But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited and the decision of that question is submitted to some tribunal (the board of supervisors in this case) the parties whose lands are those included in the petition are entitled to a hearing upon the

question of benefits and to have the land excluded if the judgment of the board be against their being benefited. *Unless the legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken.*" (Italics are ours)

The court also recognized the distinction sought to be made, in *Spencer v. Merchant, supra,* saying:

"When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.

In *Road Improvement District No. 2 v. Missouri Pacific R. Co., supra,* the Circuit Court of Appeals for the Eighth Circuit said:

"But in the case in hand the legislature did not undertake itself to make the assessment on the property in this district, but it delegated that power to and imposed that duty upon the board of the district. And when the legislature delegates to a board or to commissioners the determination of the question what lands will be benefited, or what the amount of benefits to such lands will be, the inquiry becomes in its nature, judicial, in such a sense that property owners are entitled to a hearing, or an opportunity to be heard, after notice, before these questions are determined."

It is, therefore, only when there has been legislative determination as to benefits, in which the determination that the benefits equal or exceed the cost is necessarily involved, that the property owner's right to be heard is limited to the question as to the proportional amount and the validity of his tax. In all cases where the authority to determine such questions is delegated by the legislature to another body, jurisdiction cannot attach in such subordinate body unless the property owner, by requirment of the delegating statute, is given notice of and an opportunity to be heard upon the question of whether or not his property is or can be benefited by the improvement to an extent equal to or exceeding the cost thereof.

A statute without such a provision fails to afford due process of law and is void.

As stated by the District Court, the South Dakota drainage statutes differ from those of most other states in that they make no provision "for the organization, at the inception of the proceedings, of a drainage district with boundaries defined, organized after notice to all property owners within the district, and endowed by statute with certain powers consistent with the purpose for which the district is organized," and that no opportunity is given the property owner to be heard upon the question as to whether or not the benefits will equal or exceed the cost and as to whether or not the particular lands of the owner shall be included within the drainage district. It is because of the omission of these essential requirements that the statutes are unconstitutional.

By a constitutional provision of the state of South Dakota, hereinafter more specifically referred to, the drainage of agricultural lands is declared to be a public purpose and the legislature is authorized to provide therefor and to vest the corporate authorities of counties with power to construct drains "by special assessments upon the property benefited thereby according to benefits received." (State Constitution §6, Article XXI.)

The legislature enacted certain drainage laws, those applicable to this proceeding being found in §§ 8458 to 8491 of the South Dakota Revised Code, 1919, but in so doing merely attempted to delegate some of its powers to the county commissioners, and established certain rules of procedure. The constitutionality of these laws must be determined by the following excerpts from them, which excerpts contain all the provisions applicable to the questions under discussion and are here set out for the convenience of the court.

> § 8458. *Power of County Commissioners.* The board of county commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural lands.
>
> § 8459. *Petition.* Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in

whole or in part, and a general statement of the territory likely to be affected thereby. * * Such petition may be presented at any regular or special meeting of the board and, if sufficient in form, shall be ordered filed with the county auditor.

§ 8460. *Inspection of Proposed Route.* It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together with the board of county commissioners, shall as soon as practicable inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such survey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage, but may be a complete survey such as will be required for the construction of the proposed drainage and assessment of its cost, or as much less as the board may require. * * *

§ 8461. *Surveyor's Report—Notice of Hearing.* The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall determine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition, and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceeding for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compen-

sation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing.

§ 8462. *Hearing on Petition.* At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. * * * When the board of county commissioners shall have fully heard and considered such petition and all matters in opposition to or in support of the same, it shall, if it finds the proposed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition. * * * If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property through which the same shall pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimant's right to have the same assessed by a jury. Such drain shall be given a name and the proceedings thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office.

§ 8463. *Equalization of Benefits.* After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once in each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of

the office of the register of deeds, at the date of the filing of the petition, and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed.

§ 8464. *Assessments.* After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. * * * At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same will be so filed, by publication at least once in each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due, and payable and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the state and the United States and, if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest

from the date of the order of the assessment at six per cent per annum payable annually. * * * Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale. * * * The provisions of chapters 7, 8, 9, part 9 of this title shall apply to the enforcement of the lien of drainage assesments so far as such provisions are applicable * * *. Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at six per cent per annum, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any damages allowed and costs of establishment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage.

§ 8467. *Assessments for Further Costs.* At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction, including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain, and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessment and certificates. The board of county commissioners may sell such assessment certificates at not less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants, only one assessment need be made. In any case, in the discretion of the board, several assessments may be made as the work progresses. Assessments shall be paid to the

county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners for the purpose of the particular drainage.

§ 8469. *Appeals.* An appeal shall lie from any final order or determination of the board of county commissioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage, to the circuit court of the county in which such drainage is located, by any one deeming himself aggrieved by any such order or determination. * * * Upon an appeal from an assessment of benefits, the court or jury shall consider not only the relative benefits to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not and, if benefited, to what extent.

§ 8474. *Further Powers of Board.* Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as to all lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly

It is clearly apparent from the foregoing statutes that the legislature has attempted to vest in the county commissioners the power to establish and construct a system of drainage without first doing any of the following things:

Creating and defining the boundaries of a drainage district;

Determining the approximate probable cost of the work;

Determining that the benefit to the property to be included within the district and assessed for the cost of the work will equal or exceed such cost.

The only finding the commissioners are required to make before proceeding with the work is that "the drainage pro-

posed or any variation thereof" is "conducive to the public health, convenience or welfare or necessary or practicable for draining agricultural lands" (§ 8462 South Dakota Revised Code). Upon such determination alone they are authorized to proceed, *without limit as to cost*, and fully complete the work without any notice whatever to property owners or any right given to property owners to be heard at any stage of the proceedings thereafter until the hearing provided for by § 8463, South Dakota Revised Code, upon the equalization of benefits.

Certainly such a proceeding cannot be held to constitute due process of law. A fundamental prerequisite necessary to the validity of a special assessment for benefits must be the determination that such benefits will equal or exceed the cost.

Village of Norwood v. Baker, 172 U. S. 269; 43 L. ed. 443.

Such question not having been determined by the legislature, due process of law demanded that the subordinate body to whom the entire matter of drainage construction and control was attempted to be delegated, should have been required to determine it and that such determination be made only after due notice and an opportunity to be heard given to all property owners whose property would eventually be subject to assessment. There is certainly as much reason for this as for the requirement that a property owner be heard upon the question as to whether or not his property was actually benefited.

It cannot be contended that it was the legislative intent that the commisioners, in determining whether or not the proposed drainage would be "practicable", should base such determination upon the relation of cost to benefit, because § 8460, *supra*, authorizes them to act upon a preliminary survey made merely for the purpose of aiding the board in determining the necessity of the proposed drainage, leaving it discretionary with them as to whether or not "a complete survey such as will be required for the construction of the proposed drainage and *assessment of its cost*" shall be made. In other words the statute purports to authorize the commissioners to establish the drainage without first determining either its cost or the resultant benefits. (Italics are ours)

It will be observed that the statutes provide for but two notices of hearing: that of hearing upon the original petition and surveyor's report in § 8461, and that upon the equalization of benefits in § 8463. The hearing provided for by § 8461 is merely, as we have stated, upon the sole question (exclusive of the question of damage in which we are not interested) as to whether or not the proposed drainage will be

conducive to the public health, convenience or welfare or necessary or practicable for draining agricultural lands.

The jurisdiction of the county commissioners over any particular piece of property, if acquired at all, must be acquired by virtue of the notice provided for in § 8461. The pertinent requirements of that notice are that it "shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass, and give the names of the owners thereof * * * Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established or constructed."

In the instant case, pursuant to this statute, the notice appearing in the record on pages 56-65, inclusive, was published. Appellee was not named in said notice nor its property described, nor was anything contained in the notice from which it might possibly infer that it was in any manner affected by the proceeding.

In this connection it is interesting to note that there is no evidence "that the tract of country likely to be affected by the establishment and construction of the said proposed drainage" described in general terms in the notice was selected or determined upon by any action of the board of commissioners. The resolution providing for the hearing (R. 51, 52), merely provides that notice be given "in accordance with" the statutes. This is followed by a purported resolution establishing the drainage (R. 52-55) and the only record we find having any reference to the tract of country "likely to be affected" is in the notice itself which never appears to have been acted upon by the board.

As to persons claiming damages to their property or compensation for the taking of it, the notice is sufficient as it describes the land through which the drainage is to pass and names the owners thereof. It may be fair to assume that all persons to whom such notice is given know whether or not they have a claim for damages but as to persons who are not named, whose property is not so described, and who may be affected by the proposed drainage, we contend that no adequate notice—no notice that would constitute due process of law—is given.

How can persons owning land some miles removed from the drainage ditch or parties such as appellee owning a hydro-electric plant situated upon rocky and non-agricultural land, know that in the judgment of the board their properties were or would be affected by the drainage? The statute does not require the naming of such persons but in general terms requires the notice to be addressed to all persons affected. Such

notice assumes that the persons affected either have been determined by the board or else it places upon such persons the making of that determination at their peril.

But for what purpose are they summoned before the board? Not that they may show that their property is not affected but that they may show cause why the drainage should not be established and constructed. They are not by this language given the opportunity to show cause why their property should not be included in the drainage area. If such persons are directed to show that their property is not benefited at all, the statute gives such permission to the persons affected only for the purpose of opposing the establishment and construction of the ditch.

If one owned a piece of land not agricultural in character and utterly impossible of being made agricultural land, not subject to overflow, and of such character that it would be impossible for water to collect or stand thereon, and such land were located on the river bank and some distance away from the drainage project, it would seem to be utterly absurd that a notice in the words of the statute should be binding on him so that if he failed to appear and contest the establishment and construction of the ditch his land would be subject to an assessment for benefits therefrom. If he did appear and contest the esablishment of the ditch, he would be told, in all probability, that his objection only went to the amount of benefits to be assessed against his property and would have to be urged at a subsequent hearing. But he would be in the drainage area and the ditch would be established as to him and as to his property. We do not believe that jurisdiction for such purpose could be obtained in that manner; yet that is exactly what is claimed in this case by appellants.

The only further notice provided for is that of hearing upon equalization of benefits (§ 8463). This hearing may be had at any time after the establishment of the drainage and the fixing of the damages and either before or after the completion of the work. In the instant case no notice of it was given until the work was completed. At this hearing nothing is determined except the proper apportionment of the benefits as between the various parties claimed to have been affected. The question as to the amount of the tax and its validity is not involved. Whether or not the total cost of the work is in excess of the total benefits is not a relevant question and is not determined. The only question at issue is whether or not the proportion of benefits theretofore fixed by the commissioners constitutes a fair distribution of the cost of the improvement as between the various properties.

Under this statute the commissioners proceed to determine what they think is the actual benefit to a tract of land,

calling such tract a unit. They then proceed to determine what they think is the actual benefit to all other tracts. Each of the amounts so arrived at is divided by the amount of the benefit to the unit and each tract is assessed the number of units ascertained as the quotient. It is readily apparent that in this proceeding the cost and therefore the actual amount of the assessment is not involved. The cost per unit may be many times the benefit per unit. Upon that question there is no hearing at any stage of the drainage proceedings. If this constitutes due process of law we submit that the term has become meaningless and that the constitution has lost its power to protect.

In *Martin v. District of Columbia*, 205 U. S. 135; 51 L. ed. 743, the statute under consideration required a jury to apportion the cost of a local improvement "according as each lot or part of land in such square may be benefited by the opening, widening, extending, or straightening of such alley." The court sustained the constitutionality of the act but sustained it only because it permitted "the interpretation that in any event the apportionment is to be limited to the benefit." The court said: "We think it apparent as was assumed by the court of appeals that the jury understood their duty to be to divide the whole cost among the landowners whether the benefit was equal to their share of the cost or not. It must be admitted that the language of the statute more or less lent itself to that understanding. * * * For this reason, the assessment must be quashed." The language of the South Dakota statute is quite different. It (§ 8464) provides that "after the equalization of the proportion of benefits the board may make an assessment against each tract or property affected in *proportion to the benefits as equalized*, for the purpose of paying the damages and the cost of establishment."

This language admits of but one interpretation when it is considered in connection with the provisions of § 8463. It clearly requires the board of county commissioners to first determine the proportion of actual benefits and then to assess the entire cost in such proportion. The question of whether or not the cost exceeds the benefits is never determined and has no effect whatever upon the assessment under the South Dakota statutes.

The further points relied upon in questioning the Federal constitutionality of the South Dakota drainage laws, and the constitutionality of the proceedings in this case are:

The statutes prescribe "no definite standard for determining benefits from proposed improvements;"

They are "of such a character that there is no reasonable presumption that substantial justice generally will be done but the probability is that the parties will be taxed disproportion-

ately to each other and to the benefit conferred," and

That their application and administration in this case have been so arbitrary, discriminatory and extensively oppressive as to result, if not restrained, in depriving appellee of its property without due process of law and in depriving it of the equal protection of the laws.

These propositions, which may be considered together, are supported by the following Federal decisions:

Gast Realty & Inv. Co. v. Schneider Granite Co., 240 U. S. 55: 60 L. ed. 523.

Kansas City Southern Ry. Co. v. Road Improvement District Number 6, 256 U. S. 658; 65 L. ed. 1151.

Yick Wo. v. Hopkins, 118 U. S. 356; 30 L. ed. 220.

Road Improvement District No. 2 v. Missouri Pacific Railroad Co. (C. C. A.) 275 Fed. 600, 604.

Village of Norwood v. Baker, 172 U. S. 269; 43 L. ed. 443.

Myles Salt Co. v. Iberia Drainage District, 239 U. S. 478; 60 L. ed. 392.

Abernathy v. Fidelity Nat. Bank & Trust Co. (D. C.) 274 Fed. 801.

Thomas v. Kansas City Southern Railway (C. C. A.) 277 Fed. 708 (affirmed by the Supreme Court, 261 U. S. 481; 67 L. ed. 758).

Board of Directors v. Pipe Line Co. 292 Fed. 474.

Thornton v. Road Imp. Dist. No. 1 (C. C. A.) 291 Fed. 518.

We deem it unnecessary to discuss the principles stated or quote further from the authorities cited in their support.

The important question is that of the application of these authorities to the South Dakota statutes and the acts of the commissioners as shown by this record.

So far as the statutes are concerned they prescribe absolutely no standard or rule for determining benefits. The county commissioners are simply told by the legislature to fix the proportion of benefits among the lands affected and that "benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed." (§ 8463, South Dakota Revised Code, 1919).

The statute of itself, however, is discriminatory in that it requires the county commissioners to fix with reference to "lands affected" the "proportion of benefits" and with reference to the property of railroad companies "the benefits." In the one case thus requiring the determination of a relative benefit and in the other of an actual benefit. If the benefits

should materially exceed the cost, the result of the discrimination would be most obvious.

In this connection, it is desired that the court have in mind the fact that no provision is made in § 8463 or any other part of the law for the fixing of benefits to and assessment of any property such as appellee's hydro-electric plant and water rights, and the appellant Commissioners in attempting to assess them have acted entirely without any color of right or authority. The statute was amended in this respect, in 1921, but the amendment was not in force at the time of the proceedings here complained of.

It is our contention that the law is unconstitutional because it fixes no standard or method for the determination of benefits; that its operation naturally results in the use of arbitrary and discriminatory measures, and that "there is no reasonable presumption that substantial justice generally will be done."

This contention is sustained by the conduct of the appellant Commissioners in this case. It clearly appears from the record that Drainage Ditches No. 1 and No. 2 were completely established, put in operation, and paid for several years prior to the institution of the proceedings here complained of, by assessment of the property then deemed to be benefited thereby and thus included within their drainage area, *no part of appellee's property being then thought to be affected;* that after all this had been done and while these ditches were presumably performing the function for which they had been constructed they became out of repair, the spillway or outlet washed out, and because the Big Sioux River forms what might be called a horse-shoe bend around the city of Sioux Falls, the opening end of the horse-shoe being connected by the drainage ditches, there was great danger after the washing out of the spillway, that the entire course of the river would be diverted from its channel through the cut-off of the ditch, thus destroying the water supply of the city of Sioux Falls, and the water power of the appellee and causing much other great damage; and the appellant Commissioners were naturally forced to the conclusion that something must be done—not to take care of the drainage, there being no evidence that it was being interfered with—but to prevent the machinery which they had set in motion for drainage purposes from destroying the rights and property of those not responsible for its existence. It likewise conclusively appears from the answer of the appellant Commissioners that the owners of property within the drainage area became much exercised, that various meetings were held, and that finally, pursuant to an agreement among such property owners and as a compromise measure, proceedings were started which result-

ed in the pretended establishment over exactly the same line as the ditches then constructed, of a new ditch to be known as Drainage Ditch No. 1 and 2. It is apparent that this aptly termed "subterfuge" was resorted to for the sole and only purpose of attempting to lay a foundation which would permit appellant Commissioners to assess the owners of the property and rights, the destruction of which was threatened by the existence of the then drainage project, a great proportion of the cost of the work necessary to be done in order to avoid the threatened injury, and thus lessen the burden upon the property owners responsible in the first instance for the drainage and who confessedly planned the scheme which the appellant Commissioners adopted "as a compromise."

It is evident that the entire proceeding was in bad faith, possibly not intentionally so upon the part of the commissioners, but so in fact. The proceedings of the commissioners were purely arbitrary and discriminatory.

All this of course has nothing to do with the method of assessment of proportion of benefits, but the appellant Commissioners proceeded to attempt to perform their alleged duties in that respect in the same arbitrary and discriminatory manner.

The evidence is conclusive that appellee owns no agricultural land which is sought to be assessed. The appellant Commissioners, pursuant to their scheme to aid the property owners up the river and already included in the drainage district, concluded that some plan should be worked out by which appellee might be compelled to pay approximately $50,000.00, or one-sixth of the cost of the entire work. Their imaginations not being sufficiently fertile, to enable them to visualize benefit to a water power plant by diverting water therefrom, they employed an engineer who finally reached the bald conclusion that because the ditch, operating as a river cut-off or flood water by-pass, might in flood time divert a portion of the flood waters of the river and prevent the portion thus diverted from running through appellee's wheels and into its tail race, and thus prevent its head from being lowered and its power thereby diminished, appellee was greatly benefited; and without any fixed basis for calculation, the appellant Commissioners, upon the report of the engineer, arbitrarily decided that appellee was benefited approximately $50,000.00, taking into consideration not only the theory of the engineer above stated but the alleged fact that appellee received some benefit because of a dam that the record shows had been constructed for the sole purpose of preventing the river from continuing to flow into the ditch and thus depriving appellee of the water power to which it was entitled. (R. 199-201, 206, 290, 291).

The situation thus created was bad enough. If the $50,-

000.00 sum, which the appellant Commissioners and the engineer, Rettinghouse, guessed at as approximately the value of appellee's benefits, had been divided by $25.00, the value of the benefit to the one acre unit, as testified to by the witness Risty, chairman of the appellant Commissioners (R. 199, 207, 208) the result of course would have been 2000 units, but the number of units actually apportioned to appellee as disclosed by Exhibit C (R. 19) is 5351.63.

Exhibit B attached to the complaint (R. 17) is admitted in the answer to be "an analysis of the resume or deduction drawn from the facts set out in the (engineer's) report, merely for the purpose of showing the results shown by the proportion of benefits recommended." It appears from Exhibit B, as well as from a mathematical calculation based upon the approximate cost of the work at the time and the number of units involved, that each of the 5351.63 units thus arbitrarily charged to appellee represents in money at least $9.50, the sum total of the charge against appellee's property being $50,840.49. Bearing in mind the fact that the value of the benefit to the one acre unit was determined to be $25.00, and that the actual charge against that unit, as the cost of producing the benefit, was $9.50, it is apparent that there has been no attempt to apportion benefits to appellee's property upon the same basis as that used in making the apportionment with reference to agricultural lands. Upon that basis, appellee's property, in order to warrant an apportionment of 5351.63 units to it, and an assessment of approximately $50,000.00, must have been actually benefited to the extent of $133,790.75, instead of approximately $50,000.00 as claimed.

On the other hand, if the total benefit to the appellee was approximately $50,000, then its proportion of the cost of the improvement would be approximately $19,000, being the ratio of $9.50, actual cost per unit to $25.00, actual benefit per unit.

Just how the appellant Commissioners arrived at the number of units apportioned to appellee is not shown by the record except by inference. The inference, however, is obvious and is that instead of attempting to determine how much, if any, appellee's property was benefited, appellant Commissioners arbitrarily concluded that it should pay approximately $50,000.00, amounting, as appears from Exhibit B (R. 17), to 16.5 per cent of the entire cost of the work, and fixed the units accordingly.

The mere recital of the foregoing is sufficient to disclose the arbitrary and discriminatory character of these proceedings, especially in view of the fact that the engineer employed admitted that he was not a hydro-electric engineer; that he did not know the capacity of the ditch except that he assumed that it was some 2600 to 3000 cubic feet per second; that he

did not know its capacity at the point where it was taking the waters out of the river; that he did not know how much of the water discharged by the ditch at the outlet was flood water, and how much was water drained from adjacent lands; in short, he admitted that he knew no facts whatever upon which to base his opinion with reference to the amount of the benefits. As to the probable increase of the head, it was based entirely upon the unwarranted and unsupported assumption that the ditch at flood times would carry 3000 cubic feet per second of the flood waters of the Big Sioux River, and so divert that amount of water that would not pass over appellee's dam and through its tail race. (R. 293, 294.)

The record, however, furnishes further conclusive proof that the appellant Commissioners in these proceedings were not acting pursuant to any definite standard for determining benefits. In March, 1919, they passed a resolution attempting to fix the proportion of benefits from the same work now under consideration and published a notice (Plaintiff's Exhibit A, R. 143-194). This proceeding was subsequently abandoned because of certain defects but it is of value in comparison with the proportion of benefits made in 1921 for approximately the same work, as illustrating the manner in which the law was attempted to be applied and as throwing light upon the query as to whether or not the attempted application of the law was arbitrary and discriminatory.

The chairman of the appellant board of county commissioners testified that the commissioners adopted the same method of determining the benefits in 1919 that they did in 1921 (R. 198). He further testified that he was not certain whether the approximate cost of each unit used in 1919 was $80.00 to $85.00 or $7.00 to $8.00 per acre, although in fairness to him as well as to the court we state that it appears from the record that the then unit was a ten-acre tract and as then used probably represented, as may be determined by a mathematical calculation, an approximate cost of about $80.00.

A comparison of the two resolutions, without other evidence, furnishes, as we have said, conclusive proof of the speculative and arbitrary application of the law. The proportion of benefits assessed to each of the railroad companies mentioned in the 1919 apportionment was several times less than its apportionment for the same benefit in 1921. In 1919 it appears from the notice in evidence (Plaintiff's Exhibit A, R. 143-194) that the assessment of the various railway companies then considered to be benefited was made purely upon a mileage basis; the mileage of each company is given in the notice and the several proportions of benefits assessed bear the same proportion to each other as the mileage of each com-

pany bears to that of the other. In arriving at the proportion of benefits for the same work two years later, it conclusively appears that the mileage was given very little consideration. In the proportion of benefits attempted to be made in 1919, the track, right of way, and bridges of the Great Northern Railway Company and the hydro-electric plant and water rights of the Northern States Power Company were given no consideration whatsoever, although now an attempt is made to proportion benefits to the Great Northern Railway Company to the amount of approximately $5,800.00, and to the Northern States Power Company, as we have said, to the amount of approximately $50,000.00.

If substantial justice was done in 1919, it certainly was not done in 1921, and if done in 1921, it was not done under the law as applied in 1919. The conclusion must necessarily follow and scarcely bears stating that the method employed for ascertaining the benefits was so speculative and arbitrary as, if not restrained, to deprive appellee of its property without due process of law and deny it the equal protection of the laws. The District Court was fully justified in reaching the following conclusion:

> "Referring to the testimony showing the manner of making assessments and the amount, in a general way: I think it fairly appears from the record in the case that the contention of the plaintiffs that the attempt to assess the property of these plaintiffs was an afterthought. It, in my judgment, is established that they could not be benefited. Even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the Board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands. The plaintiff, Chicago, Rock Island & Pacific Railway Company, is simply arbitrarily assessed Eight Thousand Dollars, in raising a total of Three Hundred Thousand Dollars. The Northern States Power Company was assessed Fifty Thousand Dollars, one-fifth of the entire expense although there is included in the pretended district agricultural lands something like twenty miles in length and several miles in width. The injustice of this is apparent when it is noted that the record disclosed that it was located upon the rapids of the Sioux River, in

the City of Sioux Falls, had been located there for many years. It was, therefore, entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business.

"The injury that was to be remedied by this improvement was one that had been caused by Drainage Ditch No. 1 and Drainage Ditch No. 2, one that could not have existed but for the establishment of those ditches. The duty to maintain these ditches involved the duty to repair the break from the banks of the river and the duty to prevent the taking of the water from the river, that would or should, naturally flow therein to plaintiff's benefit.

"Even if there had been a valid establishment of a drainage ditch at the time and place in controversy, and even if the Board of County Commissioners had jurisdiction, there was an entire failure to present any evidence upon which any benefit could possibly be predicated against this plaintiff. The engineer who pretended to work out the hypothetical benefit admitted that he was not a hydro-electric engineer, and therefore, not able to analyze and state the result of the different conditions of the water in the river. The suggestion applies with special force to the status of this plaintiff that the amount of benefits were fanciful, exorbitant and arbitrary, with no possible appreciation in the value of its property as a result of this improvement."

II

THE PROCEEDINGS OF APPELLANT COMMISSIONERS COMPLAINED OF AND SOUGHT TO BE RESTRAINED WERE NOT AUTHORIZED BY THE STATE LAW AND CONSTITUTED THE EXERCISE BY THEM OF PRETENDED AUTHORITY AND POWERS NOT VESTED IN THEM BY ANY STATUTE OF THE STATE.

This involves the consideration of the following questions: whether such proceedings were not a mere subterfuge for the purpose of attempting to force appellee and others whose property was not within the original drainage area to bear a large portion of the expense of maintaining and repairing the ditches already constructed; whether such proceedings were valid proceedings resulting in the establishment of new drainage; whether the work done under them was but the necessary work for the repair and maintenance of the ditches already constructed; whether if the proceedings were in good faith for the purpose of establishing a new ditch the actual purpose was drainage or some other public use; and whether in any event appellee's hydro-electric plant and water rights are subject to assessment. These various propositions are somewhat interwoven and will be treated together.

There is ample ground for the finding of the District Court that the situation existing in 1916 presented no question of the drainage of agricultural lands; that it presented no question other than the duty of the appellant Commissioners to maintain and repair the ditches theretofore constructed; that the attempted formation of the new ditch "was simply a pretense and that the plaintiff's pleading that it was a subterfuge is supported by the proofs, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed."

It is not necesasry even to resort to the evidence to sustain these findings. The answer of appellant Commissioners is sufficient of itself. We refer particularly to paragraphs Ninth and Tenth (R., 29-33) and to the following allegation contained in paragraph Eight of the so-called affirmative defense: "and (defendants) further allege that the original petition for said drainage ditch, river cut-offs and spillway hereinbefore mentioned was a compromise between said petitioners therefor and others affected thereby as hereinbefore set forth" (R., 39).

The pleading that the proceedings were had "with the consent and aquiescence of this plaintiff" is not supported by any evidence.

The answer shows the situation to be exactly what we claim. The ditches had been constructed; they had become filled with mud and sand; the spillway had proven imperfect and inadequate; it had washed out with the result that there was imminent danger of the waters in the ditch, unless the spillway should be repaired and the waters properly controlled, causing great damage to property and rights outside the drainage area; appellant Commissioners at once commenced work to control the waters; certain property owners within the drainage area instituted an action to restrain them; these property owners conferred and as a result of such conferences a proceeding was commenced for the purpose of abandoning the spillway and establishing a new outlet connecting with what is know as Covell's Lake; further conferences were held resulting in an agreement that the Covell's Lake proceeding should be abandoned (and, as admitted by appellants in their answer *"the same were abandoned accordingly"*) and resulting in the further agreement "that a new petition should be filed and new proceedings instituted *for the re-establishment of said Drainage Ditches No. 1 and No. 2 and the re-construction and improvement thereof* and the re-establishment and the re-construction of the outlet to said ditches and for the establishment and construction of a new spillway to *properly control and take care of the waters flow-*

ing through said drainage ditches and for the enlargement of said drainage district," and that thereafter *"and in accordance with said agreement"* the petition, which is the alleged foundation for the proceedings in question, was filed as a "compromise between the said petitioners therefor and others affected thereby."

In view of the situation thus pleaded and also clearly shown by the evidence, the commissioners had but one duty. That was to proceed to repair and maintain the ditches, already constructed, so that they might continue to perform their functions without damage to property outside the area. They should have proceeded under § 8470, South Dakota Revised Code, 1919, which is as follows:

> "For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance, or may be collected directly by the board of county commissioners.

Under this section the cost should have been assessed and assessments made "upon the landowners affected in the proportion determined for such drainage." This was the only power the commissioners had.

There is no provision in the South Dakota statutes for extending the boundaries of a drainage area once determined and assessed, but it is contended that the proceedings were pursuant to the provisions of § 8489, South Dakota Revised Code, 1919, having reference to "Invalid or Abandoned Proceedings." Such contention is not tenable because the evidence clearly shows that the original proceedings had not been "enjoined, vacated, set aside, declared void, dismissed, or voluntarily abandoned." There was no pretense of abandoning the old ditches. It is claimed that the spillway was abandoned by the resolution adopted in the so-called "Covell's Lake" proceeding. Even if this were true it did not operate as an abandonment of the ditches, and appellants allege in their answer that the entire Covell's Lake proceeding was agreed to be abandoned and *was abandoned*. The withdrawal of the Covell's Lake proposition left the original ditches in existence,

unaffected by these abandoned proceedings.

The District Court was fully justified in its conclusions as follows:

"When this river cut through into the ditch, when the ditch became clogged in places and was not wide enough in others, when the spillway washed out by the force of the water they were conducting down the ditch, and the cutting of the bluff began and large areas of land were being washed away, and the other dangers were threatened, there was only one proposition presented to the Commissioners, and that was one of maintenance; was one of taking care of the water that they were conducting down these two ditches, No. 1 and No. 2.

"Instead of proceeding frankly to maintain the ditches they had established in the manner provided by statute; instead of carrying out the obligations they had assumed when they brought the water down through these ditches, and attempted to deliver it through this bluff into the river; instead of proceeding regularly under this statute to do that which it was their duty to do; instead of performing the obligation that they had assumed when they established the ditches, that of maintaining them, they proceeded to act upon the assumption that because they had conducted the water down into these ditches, and because of the inefficient manner in which they had constructed the ditches and built the spillway, and all of these dangers were threatened, therefore, the plaintiffs' and others in Sioux Falls were necessarily to be damaged. And, although a proper maintenance of these two ditches, No. 1 and No. 2, would stop the damage, would prevent any danger, the Commisioners evidently reasoned that because the plaintiffs and others in Sioux Falls were in danger, they must pay for the repair of these ditches. That could not be done by simply saying the ditches shall be repaired and the City of Sioux Falls, the plaintiffs, and others, shall pay for it, or pay a part of it, and therefore, they proceeded to do indirectly what it was conceded they could not do directly. In other words, they then began to look around and see what they would do in the way of taking care of the water and stopping these dangers.

"At first it was proposed to change the spillway and conduct the water down in a southerly direction, through a slough or lake, into the river west of the City, and save the great fall that is involved at the point where the water enters the river from the spillway northeast of the city.

"This was abandoned and they finally then pretended to act under a statute authorizing the abandonment of ditches. As a matter of fact there was no abandonment

in good faith. No attempt to abandon the ditches. In fact, the reading of the resolution shows it was simply that they abandoned the Spillway. That they filed a petition which was headed, 'To reconstruct and improve Drainage Ditches No. 1 and No. 2, Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by asessment upon the property, persons and corporations benefited thereby.'

"This petition was filed in July, 1916, with the Board of County Commissioners. There had never been an abandonment of Ditch No. 1 and Ditch No. 2. There had been a pretended abandonment of the spillway. But the Commissioners proceeded then to construct a proper spillway on the identical location of the old one. In other words, no change whatever was made in the two ditches, No. 1 and No. 2, except to properly construct an efficient, adequate substantial spillway, and prevent the river cutting from its bed into the ditch, cleaning out the ditch and repairing it, changing the gates at the head of the ditch where the flood waters were taken from the river.

"Upon this petition, for this purpose, the Board of Commissioners assumed authority and power to re-christen this Ditch No. 1 and Ditch No. 2, and call it Ditch No. 1 and 2, and for the purpose of making these repairs and maintaining the old ditches under the new name, proceeded as if no ditch had been established, and as if the Ditches No. 1 and No. 2 were not in existence, and as if no obligation had been assumed by the drainage districts when they diverted the water down through the bluffs of the river, and proceeded to make the repairs and to reach out and say that the various plaintiffs were benefited. Instead of charging the repairs and maintenance of the ditches to those who were responsible for their construction under the provisions of the statutes above referred to, the Commissioners proceeded to assume the right and authority to constitute a new drainage ditch without the abandonment of the old ditches, with no thought of using new or different drainage in any way, except to maintain them and to perfect that which had been inefficiently constructed with no thought or purpose except to repair the damage that had already been done, and prevent future damage.

"Under these circumstances, I am of the opinion that the Commissioners were acting entirely without authority of law. There is no provision in the statutes of the State of South Dakota for the taking in of any other lands and assessing them, for the maintaining of a ditch

after it has been constructed, and the benefits of its building have been assessed.

"I am of the opinion that the forming of this new ditch was simply a pretense, and that the plaintiff's pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed.

"I am of the opinion that Section 8489 of said Revised Statutes, in regard to invalid and abandoned proceedings is not applicable to any situation such as existed here. That section has reference to the abandonment of a ditch that has been enjoined, vacated, set aside or declared void, and specifically provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expenses paid on the old ditch, and give credit for any payment made upon the old ditch by people benefited. No such proceeding was attempted to be followed in this case. The proceedings establishing old ditches No. 1 and No. 2 have never been held void, never been set aside, never been abandoned. They are in force today and are responsible for the manner in which the ditches were constructed and the damages that result from their negligence.

"Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and maintainence of said ditches against the property of the various plaintiffs. They were mere tresspassers, for the reason that no drainage Ditch No. 1 and 2 was ever established and has no existence.

"I am of the opinion that the proceedings of the Board of Commissioners in the repair and maintenance of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the city of Sioux Falls, are void."

The Circuit Court of Appeals, in its opinion in this case, quoted with distinct and emphatic approval the last two preceding paragraphs. (*Risty v. C. R. I. & P. Ry. Co.* 297 Fed. 710).

If it be contended that the new proceedings constituted anything more than the necessary maintenance and repair of the ditches then it must conclusively appear that such purpose or purposes consisted of the by-passing of the flood waters of

the Big Sioux River through the cut-off created by the ditch properly repaired and maintained and of preventing the threatened damage to the water supply of the city of Sioux Falls, appellee's water power, etc., and if this be true appellant Commissioners acted without authority or color of right because § 6 of Article XXI of the South Dakota State Constitution authorizing the drainage of lands "for any public use" has never been made effective by appropriate legislation.

This section is as follows: "The drainage of agricultural lands is hereby declared to be a public purpose and the legislature may provide therefor, and *may provide for the organization of drainage districts for the drainage of lands for any public use and may vest the corporate authorities thereof, and* the corporate authorities of counties, townships, and municipalities with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state by special assessments upon the property benefited thereby according to benefits received." (Italics are ours).

The dual nature of this constitutional provision should be carefully observed. It first declares the drainage of agricultural lands to be a public purpose and that the legislature may provide therefor, and then declares that the legislature may also "provide *for the organization of drainage districts* for the drainage of lands for any public use." It is clear that the term "drainage districts" as so used contemplates a drainage district so organized as to constitute a corporate entity because the constitutional provision under consideration further provides for the vesting of certain powers in "the corporate authorities thereof."

It may be that the constitution authorizes provision to be made for the drainage of agricultural lands without the establishment of corporate drainage districts but it must be conceded that for the drainage of land for any other public purpose or use the legislature must first provide for drainage districts in such manner as to constitute such districts corporate entities, having corporate authorities who might be vested with the power to construct the drainage. There having been no such legislation, the only provision of the constitution that the legislature has attempted to make operative is that referring to the drainage of agricultural lands, and insofar as the ditches and spillway under consideration were constructed or purported to have been constructed for any purpose other than the drainage of agricultural lands, they were so constructed without any warrant of law whatsoever, and the entire proceeding is void under the State Constitution.

In construing this section of the state constitution, the Circuit Court of Appeals said: "We are satisfied that under

the South Dakota Constitution, section 6, art. 21, drainage of lands for any public use other than the drainage of agricultural lands, must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Whichever way, therefore, the matter is viewed, the board was acting without legal authority in its apportionment of benefits and threatened assessment of taxes." (*Risty v. C. R. I. & P. Ry. Co.*, 297 Fed. 710, 717.)

III.

THE SOUTH DAKOTA DRAINAGE STATUTES DO NOT PURPORT TO AUTHORIZE THE ASSESSMENT OF PROPERTY SUCH AS APPELLEE'S HYDRO-ELECTRIC PLANT AND WATER RIGHTS FOR THE PURPOSE OF DRAINING AGRICULTURAL LANDS.

In this connection we ask the court to carefully consider and analyze § 8463 of the Revised Code of 1919, hereinbefore quoted. It requires the county commissioners to proceed as follows:

(a) After the establishment of the drainage and fixing of damages, to "fix the proportion of benefits of the proposed drainage *among the lands affected*, and to appoint a time and place for equalizing the same;"

(b) To give notice of such proportion of benefits and equalization of benefits by publication and posting;

(c) To state in the notice the route and width of the drainage, "a description of *each tract of land affected*," and the names of the owners of the "*several tracts of land*," and the proportion of benefits "*for each tract of property*," and to notify "*all such owners*" to show cause why the proportion of benefits shall not be fixed.

The foregoing is all that this section requires the county commissioners to do with reference to the question of equalization of benefits prior to the hearing. They are required to give notice only to the owners of each tract of land affected by the proposed drainage.

The section then further provides that upon the hearing, without any provision whatever for notice, the benefits (not the proportion of benefits) "which any railroad company may obtain for its property by such construction" and the proportion of benefits which any county, city, town or township may so obtain "shall be fixed and equalized *together with the proportion of benefits to tracts of land*."

It will be observed that no reference is made to any class of property except tracts of land, the highways of municipal corporations, and the property of railroad com-

panies, and that there is not included in the language of the statute anything which might possibly be construed to refer to property such as an hydro-electric plant or water rights; certainly neither is a "tract of land" or "tract of property" in the sense used in the statute. The word "tract" must be given significance, and could have no application at all used in connection with hydro-electric plants or water rights. It should further be borne in mind that the attempt here is to assess appellee because of the benefit not to any land it owns, but rather because of the fanciful claim that the operation of appellee's machinery and hydro-electric apparatus through the use of its water power will be rendered more efficient by the assumed by-passing of the flood waters through the ditch. This is neither a direct nor indirect benefit to a tract of land or a tract of property resulting from the drainage of agricultural lands.

It will further be observed that the statute provides for the giving of no notice except to "such owners" of the "several tracts of land."

In this connection, it will be of interest to note that the fact that § 8463, Revised Code, did not provide for the apportionment of benefits to property similar to that of appellee here sought to be affected has received legislative consideration.

§ 8463 was amended in the year 1921, the amendment becoming effective July 1st, 1921 (Chapter 194 South Dakota Session Laws 1921).

We quote the portion of the statute as amended relevant to the question under consideration, italicizing the new matter:

> "The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company *or other corporation or property owner* may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land."

Here is a clear recognition by the legislature that the phrase "tract of land" was not intended to include, and did not include property, such as is sought to be assessed in this proceeding.

It is quite evident from the addition of the words "or other corporation or property owner" that the legislature deemed such addition necessary in order to include property other than agricultural lands.

The statute, as so amended, is sufficiently comprehensive to include all classes of property, but if the amendment had been in force at the time of the proceedings here in

question, appellee, with reference to the question of notice and right to be heard, would be in the same position as railroad companies in that the statute, as hereinbefore suggested, does not purport to require notice of hearing upon the question of equalization of benefits to be given to anyone other than the owner of a tract of land, but upon the hearing requires the *"benefits"* to railroad companies, and other property owners to be "fixed and equalized together with the *proportion of benefits* to tracts of land."

IV.

APPELLEE'S PROPERTY HAS RECEIVED AND CAN RECEIVE NO BENEFIT EITHER DIRECT OR INDIRECT FROM THE SO-CALLED DRAINAGE.

The arbitrary, fanciful and speculative method resorted to by appellant Commissioners in determining that appellee's property was benefited has been discussed. The District Court's conclusion that it was not benefited at all is fully sustained by the record. Certainly it cannot be charged that benefit resulted from the construction of a dam built to prevent the water from the Big Sioux River from being diverted into the ditch and built because appellee objected to the diminishing of its water power because of such diversion (R., 283). The conclusions of the engineer Rettinghouse have no force because of his admission that he had absolutely no knowledge of the facts upon which he based his estimates and conclusions, and there being no proof in the record of the existence of such facts.

It appears from the uncontradicted testimony of the witness Link (R., 250-256) and from that of the witness Reed (R., 246-248) that appellee's plant was designed and constructed in such manner as to fully protect it from damage by any flood conditions, and that if the plant were to be re-constructed good engineering would not permit any consideration of the drainage ditch and spillway in designing it.

Further than this, even if the operation of appellee's plant might be rendered more efficient because of the by-passing of the flood waters of the river (which the record shows is not the fact) such benefit would not be a benefit derived directly or indirectly from the drainage of agricultural lands, and would not be an assessable benefit under the South Dakota statutes.

It certainly would not be a direct benefit. It is not contended that any of appellee's land is drained by the ditch. It is not contended that appellee received any benefit from the drainage of any other lands, the contention being simply

that the means resorted to for the drainage of agricultural lands benefits appellee by increasing the efficiency of its plant.

The statutory definition of benefits in force at the time of this proceeding was as follows: (§ 8463).

> "Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed."

There is no contention that appellee is benefited "by virtue of such drainage being an outlet for connection drains that may be subsequently constructed," and such was the only indirect benefit for which the statute authorized the making of assessments in this proceeding.

The limitation thus placed upon "indirect benefits" received legislative consideration in the year 1921, § 8463 of the Revised Code having then been amended, the amendment becoming effective July 1st, 1921, and in no manner affecting this proceeding other than evidencing the legislative recognition of the necessity for the additional legislation.

The above definition of "indirect benefits" was amended in 1921 (Chapter 194 South Dakota Session Laws 1921) by the addition of the following language:

> "Indirect benefits accruing because of such drainage being an outlet for connection drains that have heretofore or may be hereafter constructed *or due to its improving public health, convenience or welfare* may be assessed against any drainage district, county or political subdivision affected thereby as a whole at the option of the board of county commissioners." (Italics are ours.)

It is apparent from this amendment that it is and has been the legislative interpretation and conclusion that direct benefits are only those benefits resulting directly to the owner of land from its drainage and not those to persons other than the owners of agricultural land because of a benefit other than drainage resulting from the operation of the drainage system.

V.

THE AUTHORITIES CITED BY APPELLANTS AND THE ARGUMENT MADE BY THEM IN SUPPORT OF THEIR CONTENTION THAT THE TRIAL COURT WAS WITHOUT JURISDICTION AND THAT THIS ACTION WAS PREMATURELY BROUGHT ARE NOT APPLICABLE TO THIS CASE.

If this action were one merely to restrain the enforcement and collection of a tax or special assessment, levied by a tribunal having power and jurisdiction to make such levy, and based upon some irregularity in the proceedings of such tribunal or involving only a dispute as to the amount of the tax many of appellant's contentions would be well founded.

But such is not the situation. A tribunal claimed to be acting beyond its jurisdiction and therefore without power passed a resolution attempting to proportion benefits to appellee which, as will appear from a mere mathematical computation, would result in the levying of taxes upon appellee's property to the amount of approximately $50,000.00; appellee was ordered to show cause before this tribunal why such tax should not be spread upon its property; appellee was not only threatened with the levying of such a tax but with the further and possibly more dangerous situation—that of having its property included within a drainage district, resulting in the extreme probability of its becoming involved in a project threatening to cause great and irreparable damage to property interests. The suggestion that under such circumstances it must first submit itself for a final determination of the questions involved to the tribunal having no jurisdiction, acting as it claims arbitrarily and without due process of law, we think has never received and never will receive the sanction of any court.

It has uniformly been held that courts of equity will intervene to prevent damage threatened by the acts of public tribunals beyond their jurisdiction and in excess of their powers. Mr. Justice Field recognized this in *Crampton v. Zabriskie*, 11 Otto 601; 25 L. ed. 1070, saying:

> "And from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the tax payers of a county to prevent the consummation of a wrong when the officers of those corporations assume in excess of their powers to create burdens upon prop-

erty holders. * * * The courts may be safely trusted to prevent the abuse of process in such cases."

The court acquired jurisdiction by virtue both of diversity of citizenship and the constitutional question involved. The amount in controversy cannot be questioned. Appellee is threatened with an assessment amounting to approximately $50,000.00, and its property will be so assessed upon its failure to show cause, before a tribunal having no power or jurisdiction, why a levy of that amount should not be spread. In addition to this is the great and irreparable damage that appellee is threatened with by having its property included within the drainage area. The action was not prematurely brought because appellee had the right at the time it instituted this action to have determined by a court of equity the question as to whether or not the appellant Commissioners were acting beyond their jurisdiction and without power, and whether their proceedings would result in depriving appellee of its property without due process of law.

It is asserted that appellee had a complete and adequate remedy at law but the remedy suggested is that appellee appear before the Board of County Commissioners and if dissatisfied appeal to the state courts. Such is not an adequate remedy. The remedy at law must be a remedy on the law side of the Federal court, not a remedy in the state courts of South Dakota.

Chapter 3, Simkins "A Federal Equity Suit."

United States Life Insurance Co. v. Cable, 39 C. C. A. 264.

We quote from the case last cited:

"It must, we think be conceded that the bill in this case alleges facts constituting a good cause of action in equity for the cancellation of the policy, unless the plaintiff has a full and adequate remedy at law for the same cause. A suit at law has been commenced in the state court of Illinois to recover upon the policy, and if it be an adequate remedy at law to turn the plaintiff over for litigation of its right in the state court under the circumstances set out in the bill, then the United States Circuit Court in equity should disclaim jurisdiction. But there are two reasons why we think the remedy thus open to the plaintiff, of having its rights determined in an action at law, does not meet the requirements of the rule: The first is that the plaintiff being a citizen of New York, and the defendant a citizen of Illinois, the plaintiff, under the constitution, has the right to come to the federal court for an adjudication. For a person entitled to litigate in the feder-

al court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights. * * * The remedy at law, in order to defeat the right to proceed in equity, should be full and adequate. It should be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. * * * In the federal courts it is well settled that the court will not turn a suitor in equity over to a remedy at law in the state courts, but only to the law side of the federal court."

The authorities cited in support of the contention that this suit was prematurely brought are easily distinguishable and their non-applicability is apparent.

We find it difficult, in the manner in which the brief of appellants is prepared, to locate all the authorities on which they rely as to any particular point and particularly as to the one now under consideration, but we call attention to the following cases cited by them, which are typical and which clearly demonstrate the fallacy of their position.

In *Western Union Telegraph Company v. Howe* (C. C. A.) 180 Fed. 44, there was no question of the jurisdiction of the taxing tribunal, and the court said: "The effect of an injunction would be to take away from the tax commission all powers of discretion and judgment in arriving at a fixed and proper valuation."

The contention here and the question that this court must decide is whether or not the tribunal assuming to levy the tax has any power whatsoever.

In *Keokuk & Hamilton Bridge Company v. Salm*, 258 U. S. 122, 66 L. ed. 496, there was again no question as to the jurisdiction or power of the taxing tribunal, and the court said:

> "*Before the suit was begun it had been decided that the taxing statute was valid; that the property was subject to taxation;* that it was assessable as real estate, and that the assessment should be made as was done by the county assessor and not by the state board of equalization. *The amount of the tax payable was, therefore, the only matter in controversy.*" (Italics are ours.)

In *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710, 67 L. ed. 1194, chiefly relied upon by appellants, there was again no question of jurisdiction of the taxing body. Plaintiff's property there in question was included within a taxing district by the state legislature. The court said:

> "It is well settled, however, that if a proposed improvement is one which the state has authority to make

and pay for by assessments on property benefited the legislature in the exercise of the taxing power has authority to determine by the statute imposing the tax what lands may be and are in fact benefited by the improvement; and if it does so, its determination is conclusive upon the owners and the courts and cannot be assailed under the Fourteenth Amendment *unless it is wholly unwarranted and a flagrant abuse and by its arbitrary character is mere confiscation of the particular property.* * * * *The legislature not only provided for the assessment of the lands within the district but specifically declared that the tunnel established was of special benefit to such lands, and that the special benefits accruing to them are in excess of the cost of the tunnel and of the assessment provided for against them.*" (Italics are ours.)

Again we find no question as to the jurisdiction or power of the taxing body.

Although appellee bases its contention that this suit was not prematurely brought principally upon the claim that appellant commissioners acted entirely without jurisdiction, we believe, even if we should concede for the sake of argument that the law is constitutional; that appellant commissioners acted pursuant to its provisions up to the time of adopting the resolution fixing the apportionment of benefits; that jurisdiction was obtained to form the so-called drainage district, and that appellee's property if benefited might be included within the boundaries thereof, it would still follow that the commissioners did not in fact acquire jurisdiction over appellee and its property because the basis upon which they acted in attempting to affect appellee's property was so arbitrary, speculative and discriminatory as to deny due process of law.

The record in this case clearly discloses that appellant commissioners never at any time had before them any evidence showing or tending to show that appellee's property would be benefited at all by the construction of the so-called Drainage Ditch No. 1 and 2. This being true it must follow that their action in adopting the resolution apportioning the benefits, so far as appellee is concerned, was based upon no foundation in fact and was therefore merely arbitrary and furnishes no jurisdictional basis for requiring appellee to appear before the appellant board and show cause why such tentative assessment should not be made permanent.

IN CONCLUSION

Appellants rely chiefly upon the decision of the state court in the case of *Gilseth v. Risty*, 46 S. D. 374, 193 N. W.

132. The opinion in that case discloses the following situation: The constitutionality of the drainage laws was not in question; plaintiff was the owner of agricultural land within the drainage area of Drainage Ditches No. 1 and No. 2 as originally constructed; he was a party to the conferences alleged in this case to have taken place between the parties interested in the original ditch proceedings and which resulted in the filing of the petition "For the Re-establishment of Drainage Ditches No. 1 and 2;" he was present at the hearing upon that petition and took no appeal from the order of the commissioners purporting to establish the new drainage; his property, as we have said, was in the drainage area as originally established; he was one of the parties responsible for the original construction of the ditches in question and for their proper maintenance, and one of the parties for whose benefit appellant commissioners are attempting to assess appellee's property and that of others outside the original drainage area.

The court simply held that as to him, a party to the proceeding, the order establishing the drainage and subsequent orders from which he did not appeal became final. A careful analysis of the opinion discloses that the court finally based its conclusion upon questions of estoppel and lack of equity in favor of plaintiff. After reciting the situation practically as above stated, it said: "Appellant having stood by and seen all the work performed without protest, and having received all the benefits that could result therefrom, should not now be permitted to escape payment for the same. The relief asked by appellant is equitable in its nature but, because of the circumstances above shown, all the equities of the case are against appellant and in favor of the Board."

The situation in the instant case is obviously vastly different. No part of appellee's property was within the drainage area of Ditches No. 1 and No. 2, as originally established; appellee took no part in the proceedings here in question; it owns no agricultural land and has received and will receive no benefits from the work no matter what the purpose of it may have been. The plaintiff in the *Gilseth* case was one of the persons responsible for the existence of the ditches in the first instance, and, as the facts are disclosed by the state court's opinion, his property should be assessed for the cost of the work done for the purpose of preventing the threatened damage, regardless of whether or not such work was done under the guise of a new drainage proceeding.

The state court has never had before it for determination the question as to whether or not the drainage stat-

utes, in so far as they purport to authorize drainage proceedings for any purpose other than draining agricultural lands, are violative of the state constitution. In all cases in which the constitutionality of the statutes has been passed upon by that court, the only questions involved were those with reference to the drainage of agricultural lands, and the court very correctly held that such drainage might be provided for without the incorporation of drainage districts.

We confidently maintain not only that the conclusions of the District Court upon which its judgment was based and those of the Circuit Court of Appeals expressed in affirmance thereof are fully sustained by the record but that the judgment appealed from is also sustained because the South Dakota drainage statutes are violative of the Fourteenth Amendment to the Constitution of the United States in the particulars hereinbefore urged.

Respectfully submitted,

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Solicitors for Appellee.

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Brief For Respondent on Petition For Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 99

A. G. RISTY, ET AL, AS COUNTY COMMISSIONERS ETC. ET AL, PETITIONERS,

vs.

CITY OF SIOUX FALLS, SOUTH DAKOTA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CHARLES O. BAILEY,
ROY D. BURNS,
J. H. VOORHEES,
T. M. BAILEY,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 455

A. G. RISTY, ET AL., AS COUNTY COMMISSIONERS ETC. ET AL, PETITIONERS,

vs.

CITY OF SIOUX FALLS, SOUTH DAKOTA, RESPONDENT.

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

The City of Sioux Falls, South Dakota, plaintiff in the District Court and respondent in this Court, brought its bill in the District Court for the District of South Dakota against A. G. Risty and others, as County Commissioners of Minnehaha county, South Dakota, defendants, praying for an injunction restraining the making of an assessment upon the property of respondent for the cost of the construction of certain drainage works. The holders of warrants issued in payment of expenses incurred in the drainage project became interveners in the suit. A decree was entered in the District Court in favor of the plaintiff in that Court and respondent in this Court, (282 Fed. 364). From this decree the defendants and the interveners in the District Court appealed to the Circuit Court of Appeals for the Eighth Circuit in which Court the decree of the District Court was affirmed (297 Fed. 710). The defendants and interveners in the District Court, appellants in the Circuit Court of Appeals, have taken an appeal to this Court and have also, as petitioners, filed in this Court their petition for a writ of certiorari.

The main ground upon which petitioners ask that this Court grant a writ of certiorari is that a conflict has arisen between the decisions of the Circuit Court of Appeals for the Eighth Circuit and the decisions of the Supreme Court of the State of South Dakota in a matter relating to the construction of a statute of the state of South Dakota; and petitioners pray for the granting of a writ of certiorari upon the strength of *Forsyth vs Hammond*, 166 U. S. 506.

Our reply to the contention of petitioners is that no conflict exists between the decision of the Circuit Court of Appeals in this case and the decisions of the Supreme Court of South Dakota.

This case involves the construction of the drainage ditch statute of South Dakota. In the Circuit Court of Appeals this statute was attacked by respondent as unconstitutional. The Circuit Court of Appeals deemed it unnecessary to pass upon this contention but decided the case upon the ground that the proceedings, had under the statute in the instance of the particular drainage project under consideration, were irregular.

In *Gilseth vs Risty*, 46 S. D. 374, the Supreme Court of South Dakota rendered a decision in a case between other parties, but involving the same drainage project. The records in the two cases were entirely different and the Supreme Court of South Dakota held that the plaintiff in the case before it was estopped by his own laches from complaining of irregularities in the proceedings. There was in that case no conflict with the holding of the Circuit Court of Appeals in the present case.

In none of the other South Dakota cases cited by counsel for petitioners is there involved the drainage ditch project in controversy in the present case or any of the questions involved in the present case which were resolved by the Circuit Court of Appeals in favor of respondent.

For the foregoing reasons we submit that no showing is made whereby a writ of certiorari should be issued under *Forsyth vs Hammond*, 166 U. S. 506.

The remaining points raised by counsel for petitioners are, we believe, best answered by the opinion of JUDGE KENYON in the Circuit Court of Appeals. We, therefore, append a copy of this opinion to this brief as being the most apt reply which we can make to the contentions of counsel for petitioners.

Respectfully Submitted,

CHARLES O. BAILEY,
ROY D. BURNS,
J. H. VOORHEES,
T. M. BAILEY,
Counsel for Respondent.

(297 FEDERAL REPORTER, 710)

A. G. RISTY, *et al*, as
County Commissioners, etc., *et al*,

vs.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY,
(*and five other cases*)

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

MARCH 18, 1924

OPINION OF THE COURT

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suits, by the Chicago, Rock Island & Pacific Railway Company, by the Chicago, Milwaukee & St. Paul Railway Company, by the Chicago, St. Paul, Minneapolis & Omaha Railway Company, by the Northern States Power Company, by the City of Sioux Falls, and by the Great Northern Railway Company, respectively, against A. G. Risty and others, as County Commissioners, and others. From decrees for plaintiffs (282 Fed. 364) the defendants in each case appeal. Affirmed.

In the year 1907 the board of county commissioners of Minnehaha county, S. D., acting under the drainage statutes of that state, established and had constructed a drainage ditch known as drainage ditch No. 1, bottom width of 40 feet, at an expense of $46,600. This ditch was north of Sioux Falls and ran first in a southerly direction from its initial point; thence easterly past the pumping station of the city of Sioux Falls; thence southeasterly about 1,000 feet to the Big Sioux river near the north limits of Sioux Falls. It passed through a ridge and descended approximately 100 feet in the terminal thousand feet. A spillway was constructed to carry the water down the descent. This ditch was approximately three miles in length, and there was a spur 670 feet long extending northwest into a bayou about 2,000 feet south of the initial point.

In 1910 the board of county commissioners established another drainage ditch known as drainage ditch No. 2, which extended north from the northern terminal of drainage ditch No. 1, for a distance of about 12 miles. This ditch likewise had a 40-foot bottom and was constructed at a cost of $81,106.19. These two ditches, making in fact one continuous ditch, drained certain agricultural lands, and traversed the land north of the city of Sioux Falls near the gravel bed from which the city obtained its water supply. It also passed near the state penitentiary lands and emptied into the Big Sioux river north of the falls in said river.

In the year 1916 there was a breaking of the river through the natural barrier into the bayou drained by the lateral branch. This, coupled with the large volume of water passing through these ditches, made it impossible for the spillway to carry the same, and it was washed out and destroyed. The waters therefore being uncontrolled descended from the steep bluff to the level of the Big Sioux river, and serious damage was threatened to various interests. There was danger that the Big Sioux river which flowed through the city of Sioux Falls would be diverted from its course and flow through these ditches cutting off the water supply of the city of Sioux Falls, injuring the Northern States Power Company, and depriving it of its water power.

The board of county commissioners attempted to devise some plan to reconstruct the spillway and to protect these various interests from the threatened damages.

April 8, 1916, certain parties filed a petition with the board of county commissioners asking that that portion of drainage ditch No. 1 containing the old spillway be closed and abandoned, and the course of said ditch extended in a southerly direction through Covell's Lake to the Big Sioux river; and said board did pass a resolution that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof.

August 3, 1916, a petition of F. L. Blackman and other parties was filed entitled, "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property Persons and Corporations Benefited Thereby." This petition was transmitted by the board to the state engineer, and on August 14, 1916, a survey was ordered.

September 13, 1916, a report of the survey was made and filed by the engineer in charge. A resolution was thereupon adopted by the board fixing the line and width of said new proposed ditch in the exact location of old ditches No. 1 and No. 2, and providing for the time and place of hearing the petition. Notice was published for three successive weeks describing the route of the proposed drainage, and the tract of country likely to be affected thereby, in the general terms provided by the statute; also, the separate tracts of land through which the proposed ditch would pass, and the names of the owners of said tracts. Such notice informed all persons affected by the proposed drainage to appear at such hearing and show cause why the same should not be established. Upon the return date of the notice the commissioners adopted a resolution purporting to establish the so-called drainage ditch No. 1 and 2, and providing for the reconstruction of the spillway.

No appeal was taken from this order establishing the purported new project.

The commissioners then caused ditches No. 1 and No. 2 to be cleaned out, widened, deepened, and diked so as to increase the carrying capacity; caused the spillway to be reconstructed, and

certain portions of the Big Sioux river to be straightened. This work cost approximately $255,000, and drainage warrants were issued to be paid out of taxes assessed against the property determined to be benefited within the area of the purported new drainage ditch No. 1 and 2. The largest holders of these warrants are interveners in this action.

In April, 1919, notice was published of a hearing upon the matter of equalizing benefits resulting from said drainage ditch No. 1 and 2, and this was the first intimation that certain of appellees had that benefits might be assessed against them. The property of some of the appellees was not covered by the notice. However, the proceedings under this notice were abandoned.

June 10, 1921, appellant board by resolution fixed a proportion of benefits in units, which had been decided upon as a fair method of arriving at the same, on drainage ditch No. 1 and 2, and designated Monday August 1, 1921, at the office of the county auditor, as the time and place for hearing on the question of equalizing benefits, and caused notice of such hearing to be published as provided by the statute. Under the unit system adopted by the board upon recommendation of their engineer, the various appellees had units allotted against them as follows:

Chicago, Rock Island & Pacific Railway Company, out of a total of 32,569.62 units, 839.45.

Chicago, Milwaukee & St. Paul Railway Company, 1,681.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, 839.45.

Northern States Power Company, 5,351.63.

Great Northern Railway, 613.85.

City of Sioux Falls, 3,147.95.

The amount due on warrants issued for this work at the time the actions were brought was about $300,000. The total units of benefit aggregate 32,549.62, so each unit of benefit amounts to slightly in excess of $9. If no changes had been made by the board, had they been permitted to proceed; the amounts charged against various appellees would have ranged from $50,000 against the Northern States Power Company to substantially $6,000 against the Great Northern Railway Company.

Appellees brought suit to restrain appellants from proceeding further with the equalization of said purported benefits and from levying any assessment upon their property to pay therefor. Some of the appellees had no property in original ditch district No. 1 and No. 2; others of appellees did have, and some difference is made in the contention of those not having property in the original ditch district and those who did have, but the issues in the main were the same as to all the parties.

All of the appellees contended in the trial court that the South Dakota drainage law was unconstitutional, violating the Fourteenth Amendment to the Constitution of the United States; that it also violated sections 2 and 3 of article 6 of the Constitution of the State of South Dakota. Some of the appellees contended

that the board exceeded its powers in what it attempted to do, in that the same was not for the drainage of agricultural lands, but being for other public purposes, could only be carried on by the corporate authority of drainage district entities established for that purpose, which had not been done, and that consequently the proceedings were void.

Others of the appellees contended that the proceeding seeking to establish drainage ditch No. 1 and 2 was a subterfuge to impose liability on new territory to pay for the maintenance of the former ditches, and that the proceedings were for maintenance and repair of the old drainage ditch and were not carried on as provided by section 8470 of the Code of South Dakota relating to assessments for the maintenance of drainage already established; that drainage ditch No. 1 and 2 was not a new ditch and not a new enterprise.

Further claim is made by the railroad appellees that the South Dakota drainage law is unconstitutional so far as respects assessments of railroad property, in that it provides for the giving of notice whatever of the apportionment and equalization of benefits to railroad companies.

All appellees claim that the attempted assessments upon their property are arbitrary, unjust and illegal, and constitute a discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law; and that the proceedings create a cloud upon their title.

It was the position of appellants, on the other hand, that the statutes referred to were constitutional; that the federal court in equity had no jurisdiction because there was a complete remedy at law; that there was no equitable question involved; no irreparable injury shown; no facts sufficiently pleaded to show any threatened cloud upon title; that the amount involved was not sufficient to give jurisdiction; that the bringing of the suit was premature; that ditch No. 1 and 2 was legally established as a new drainage project under the statute of South Dakota; and that the board of county commissioners had full jurisdiction to do each and every act which they performed.

The trial court held that section 8461 of the Reversed Statutes of South Dakota, being the statute particularly attacked as unconstitutional, gave sufficient notice and opportunity to be heard before an assessment became a lien against the property, and was constitutional. The court also held that the proceedings of the commissioners were proceedings for the maintenance of the original ditches No. 1 and No. 2; that there was no abandonment of the old ditches; that the formation of the new ditch was a pretense and subterfuge carried on for the purpose of compelling property outside of the original ditches No. 1 and No. 2 to share the burden of the repair and maintenance of these ditches, and held that the proceedings of the commissioners with relation to ditches No. 1 and No. 2, by attempting to constitute a new drainage district and calling it district No. 1 and 2, were void.

The court further found that the complaints presented a real and substantial question under the Constitution of the United States; that the amount involved was in excess of $3,000 exclusive of interest and costs, and that each complainant stated a case in his bill cognizable in equity in the federal court; and that there was no adequate remedy at law. Also found that diversity of citizenship existed as to all appellees, except as to the city of Sioux Falls; also, that the method of attempted assessment was discriminatory and arbitrary. The injunctions as prayed were granted.

N. B. Bartlett and E. O. Jones, both of Sioux Falls, S. D., for appellants.

A. B. Fairbank, of Sioux Falls, S. D. (Edward S. Stringer, Thomas D. O'Brien, and Alexander E. Horn, all of St. Paul, Minn., on the brief), for appellee Chicago, R. I. & P. Ry. Co.

C. O. Bailey, of Sioux Falls, S. D., and E. L. Grantham, of Aberdeen, S. D. (H. H. Field, of Chicago, Ill., and J. H. Voorhees, P. G. Honegger, T. M. Bailey, and C. O. Bailey, Jr., all of Sioux Falls, S. D., on the brief), for appellee Chicago, M. & St. P. Ry. Co.

C. O. Bailey, of Sioux Falls, S. D. (R. L. Kennedy, of St. Paul, Minn., and J. H. Voorhees, P. G. Honegger, T. M. Bailey, and C. O. Bailey, Jr., all of Sioux Falls, S. D., on the brief), for appellee Chicago, St. P., M. & O. Ry. Co.

Harold E. Judge, of Sioux Falls, S. D. (R. M. Campbell, of Chicago, Ill., on the brief), for appellee Northern States Power Co.

C. O. Bailey, of Sioux Falls, S. D. (Roy B. Marker, of Sioux Falls, S. D., on the brief), for appellee City of Sioux Falls.

Harold E. Judge, of Sioux Falls, S. D., for appellee Great Northern Ry. Co.

Before KENYON, Circuit Judge, and TRIEBER and DYER, District Judges.

KENYON, Circuit Judge (after stating the facts as above). It is earnestly contended by appellees that the entire South Dakota drainage law is unconstitutional, not only as violative of the due process clause of the Fourteenth Amendment of the Federal Constitution, but also sections 2 and 13 of article 6 of the South Dakota Constitution. The constitutional questions raised are grave, serious, and doubtful. Their determination is not necessary to the solution of these cases. Therefore, under the well-established rule that federal courts will not pass upon the constitutionality of statutes unless absolutely necessary, we leave the questions aside. Howat et al. v. State of Kansas, 258 U. S. 181, 42 Sup. Ct. 277, 66 L. Ed. 550; Weyman-Bruton Co. v. Ladd, 231 Fed. 898, 146 C. C. A. 94; Allen, U. S. Atty., v. Omaha Live Stock Commission Co. et al. (C. C. A.) 275 Fed. 1.

The original drainage ditches No. 1 and No. 2 were properly established for the drainage of agricultural lands. When the spillway washed out, the maintenance of the ditches was impaired. Not only that, but the situation was fraught with grave

consequence to many interests. The steep bluff was being torn away by the uncontrolled waters; the waterworks and water supply of the city of Sioux Falls, as well as the penitentiary lands of the state, were endangered. A not improbable result of the Big Sioux river breaking through the natural barrier into the lateral ditch would be the entire diversion of its waters from their natural channel causing them to flow through said ditches and empty into the river north of the city, leaving Sioux Falls with an intermittent dry river bed.

The board of county commissioners under these conditions took steps to remedy the situation, and upon petition filed stating its object in its caption as follows: "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefited Thereby," proceeded to establish what is termed drainage ditch No. 1 and 2, Minnehaha county, S. D.

Appellees who have property within the area of the original drainage ditches, No. 1 and No. 2, insist that the proceedings established a new drainage ditch known as No. 1 and 2, which is also the position taken by appellants. Other appellees claim that the work was in truth and in fact a project for the repair of drainage ditches No. 1 and No. 2. The court held that the forming of the new ditch was a pretense and subterfuge resorted to for the purpose of attempting to burden appellees with the cost of maintenance of ditches theretofore constructed; that the commissioners did not act as by law provided for the maintenance and repair of the ditches; and that the proceedings attempting to establish the new drainage ditch were void. We think the court was correct in this holding. It clearly expressed the situation as follows:

"Under these circumstances the board of county commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the state when they assumed the right to reach out and attempt to assess the benefits for the repair and maintenance of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage ditch No. 1 and 2 was ever established and has no existence.

"I am of opinion that the proceedings of the board of commissioners in the repair and maintenance of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it district No. 1 and 2, and to assess benefits to the property of the plaintiffs, in so far as they are located in the city of Sioux Falls, are void. Entertaining this view, it follows that plaintiff's prayer for an injunction should be granted."

Record, p. 90, Case No. 6313.

The proceedings, regardless of how designated, were in fact for repair and maintenance, and were governed as to assessments to pay for the same by section 8470 of the South Dakota Statutes, which section is as follows:

"*Assessments for Maintenance.*—For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens, interest-bearing, perpetual and enforceable, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance, or may be collected directly by the board of county commissioners." Section 13, c. 98, 1905; section 13, c. 134, 1907.

There is no provision in this statute for the taking in of other lands to help bear the assessment of burdens created in maintaining the original drainage. This was the statute under which the board of county commissioners could have provided for payment of maintenance and repairs to the established ditches.

Section 8489 provides for a method of abandonment of drains under certain circumstances and the construction of new ones in the same location. Said statute is as follows:

"*Invalid or Abandoned Proceedings.*—If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned, or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned proceeding, the board of county commissioners shall proceed to ascertain the real value of the services rendered, money expended and work done under such invalid, abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may be at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate therefrom, but the board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part

of the cost of the new drainage. No use shall be made by any board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons." Section 33, c. 134, 1907.

The proceedings establishing drainage ditches No. 1 and No. 2 have never been set aside or abandoned under this statute. It is true a small portion of old ditch No. 1 was abandoned by the resolution adopted in the Covell's Lake proceeding, but the ditches were in no way abandoned. The Covell's Lake proceeding was itself abandoned and the ditches were left as they originally were, so it is apparent that the action of the board was not taken under section 8489. Either the proceedings were to repair and maintain ditches already constructed, or they were to take care of a situation resulting from their imperfect or inadequate construction. By reason of the water of the river breaking through into the lateral threatening a change of the river's course and the possible destruction of state lands, a situation was presented, not with relation to the drainage of agricultural lands, but rather to the failure of the ditches, due to inadequate or imperfect construction, to carry the increased flow of water. In other words, the project, if an entirely new one, was not for the drainage of agricultural lands. The court said in his opinion:

"Pursuant to this provision of the Constitution, the Legislature of the state has provided for the drainage of agricultural lands; but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands 'for any public use.'"

We are satisfied that under the South Dakota Constitution, section 6, art. 21, drainage of lands for any public use other than the drainage of agricultural lands, must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Whichever way, therefore, the matter is viewed, the board was acting without legal authority in its apportionment of benefits and threatened assessment of taxes.

Appellants challenge the jurisdiction of the court, claiming there was a plain, adequate, and complete remedy at law; that there was no equity in the bill; that action was premature, and that the necessary jurisdictional amount was not involved. These in their order.

It is fundamental that equity cannot give relief where there is a plain, adequate, and complete remedy at law. It is provided by the federal Judicial Code, Compiled Stat. 1918, § 1244, as follows:

"*Suits in Equity.*—Suits in equity shall not be sustained in any court of the United States in any case where a plain, ade-

quate, and complete remedy may be had at law. (R. S. § 723. March 3, 1911, c. 231, § 267, 36 Stat. 1163.)"

It must be a remedy as certain, complete, prompt, and efficient to attain the ends of justice as that in equity. Monmouth Inv. Co. et al. v. Means, 151 Fed. 159, 80 C. C. A. 527; McMullen Lumber Co. v. Strother et al., 136 Fed. 295, 69 C. C. A. 433; Morgan v. Beloit, City and Town, 74 U. S. (7 Wall.) 613, 19 L. Ed. 203; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82; Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796; Greene, Auditor, et al., etc., v. Louisville & Interurban Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Coler et al. v. Board of Com'rs of Stanly County et al. (C. C.) 89 Fed. 257.

It must be a remedy on the law side of the federal court. A remedy in the state court that cannot be pursued in the federal court is not an adequate remedy. Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; Smyth v. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; United States Life Ins. Co. in City of New York v. Cable, 98 Fed. 761, 39 C. C. A. 264; Brun et al. v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

The question is: Has party the adequate remedy at law in the federal court?

In Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 391, 14 Sup. Ct. 1047, 1052 (38 L. Ed. 1014), the court said:

"Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts."

It has been held that where the state statute provided an action at law against the county for the recovery of sums paid on account of invalid taxes that the same constitutes a plain, speedy, and adequate remedy at law. Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., 217 Fed. 540, 133 C. C. A. 392. The Supreme Court of the United States has held that the North Dakota statute permitting actions respecting title of the property or accruing on contract to be brought against the state the same as against a private person does not clearly allow an adequate remedy; and there, injunction restraining defendants from taking steps to enjoin certain taxes, was upheld. Wallace et al. v. Hines, Director General of Railroads, et al., 253 U. S. 66, 40 Sup. Ct. 435, 64 L. Ed. 782. There was no such proceeding as discuss-

ed in Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., supra, in the South Dakota statutes. The only remedy was to appear before the board of county commissioners (claimed by appellees to be acting without authority), and then appeal from their finding to the state court. Such was not the adequate remedy contemplated by the federal statute.

While the frequent exercise of equity jurisdiction is in staying the collection of taxes illegal in whole or in part, a suit in equity will not lie to restrain the assessment or collection of a tax on the sole ground that it is illegal. There must be special circumstances bringing the case under some recognized head of equity jurisdiction. The right to such equitable relief must be clear where it is asked to restrain the collection of a state tax.

In Hannewinkle v. Georgetown, 15 Wall. 547, 548 (21 L. Ed. 231), it is said:

"It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits, or some cause presenting a case of equity jurisdiction."

In Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 525, 526, 5 Sup. Ct. 601, 605 (28 L. Ed. 1098), the rule is clearly laid down by the court:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any grounds for equitable interposition. In ordinary cases a party must find his remedy in the courts of law and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these in proper cases, may be afforded

in courts of equity.' This statement is in general accordance with the decisions of this court as well as of many state courts."

See, also, Dows v. City of Chicago, 78 U. S. (11 Wall.) 108, 20 L. Ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Ogden City v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; Pittsburgh, etc., Railway v. Board of Public Works of W. Va., 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737.

In Keokuk & Hamilton Bridge Co. v. Salm et al., 258 U. S. 122, 42 Sup. Ct. 207, 66 L. Ed. 496, the alleged invalidity consisted in discriminatory overvaluation. There was no claim of absolute illegality in the assessment. Appellant had a remedy with the board of review to correct the assessment, and the court said that resort to the suit to prevent either a sale for an illegal tax creating a cloud upon title or other irreparable injury had no basis.

In Union Pacific R. Co. v. Board of Com'rs of Weld County, 217 Fed. 540, 133 C. C. A. 392, this court said with reference to the casting of a cloud upon real property creating an "equitable circumstance" that the remedy which the statute prescribes will dissipate any such cloud, and says:

"Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief are not applicable, when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the courts shall hold to have been illegally exacted."

There is no such provision in the South Dakota statute.

In Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796, it was held that equity should not enjoin the collection of a tax on the ground of cloud on title when the tax can only be collected in suit at law in which the defense of its illegality is open, and further it not appearing that the tax is a lien on any of complaint's property.

In Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651, certain assessments upon shares of stock in a corporation were involved. The court found that as there was no lien created on real estate there was no cloud on title.

It is well settled that an assessment that will put a cloud on titles gives rise to equitable jurisdiction unless there is an adequate remedy at law. Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; Green, Auditor, et al., etc., v. Louisville & Interurban Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

Section 8463 of the South Dakota Statutes provides for the board of county commissioners fixing the proportion of benefits of proposed drainage among the lands affected.

Section 8464 provides for the board making an assessment against each tract and property affected, and this is collectible

by the treasurer's office. Clearly the assessment would create a cloud upon the title. Fixing the proportion of benefits being preliminary to the assessment and a part of the machinery of assessment, likewise, we think, creates a cloud upon the title and gives equity jurisdiction. Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; Hopkins et al. v. Walker et al., 244 U. S. 486, 37 Sup. Ct. 711, 61 L. Ed. 1270.

Was the case prematurely brought? It is claimed that inasmuch as the board of county commissioners had not assessed the taxes complained of consequently the suit is premature.

In Western Union Telegraph Co. v. Howe et al., 180 Fed. 44, 103 C. C. A. 398, it was held by this court that the suit was prematurely brought because the telegraph company did not pursue the remedy afforded by law to have its assessment corrected by the state board of equalization. That was not a case, however, where it was claimed that the entire proceedings were without authority and illegal, as is the case here. The jurisdiction to act was not questioned.

In Keokuk & Hamilton Bridge Co. v. Salm et al., 258 U. S. 122, 42 Sup. Ct. 207, 66 L. Ed. 496, the question involved was the amount of the tax. It was not claimed that the proceedings were illegal.

In the late case of Milheim et al. v. Moffat Tunnel Improvement District et al., 262 U. S. 710, 43 Sup. Ct. 694, 67 L. Ed. 1194, there was no question of jurisdiction of the taxing body as there is here. Plaintiff's property was by legislative act placed within the taxing district.

The proceeding here involved, being without authority, the situation is quite different from where the only question involved is the inequality of taxes levied by a board having jurisdiction to act. The actions, we are satisfied, were not premature.

Appellants urgently insist that it does not appear from the record that the amount in controversy, exclusive of interest or costs, exceeds the sum or value of $3,000, and that the statements in the various complaints of appellees so alleging are false, and stated with the fraudulent purpose of imposing upon the jurisdiction of the federal court; that no tax has in fact been assessed; that the apportionment of benefits is tentative and subject to correction; and that there is no way of determining what the amount of the assessment against the respective appellees would have been had the proceedings not been interrupted by the injunctions; and that there is in fact no sum whatsoever in controversy between the parties hereto.

It has been held that future, undetermined, unaccrued, or unspecified taxes cannot be taken into consideration to give jurisdiction; that the court cannot engage in speculation as to such taxes. Holt v. Indiana Manufacturing Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374; New England Mortgage Security Co. v. Gay, 145 U. S. 123, 12 Sup. Ct. 815, 36 L. Ed. 646; Citizens' Bank

v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 ... Ed. 451; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951. Also, that where there is a suit to enjoin collection of a tax the amount of the tax is the test of jurisdiction. Linehan Ry. Transfer Co. v. Pendergrass, 70 Fed. 1, 16 C. C. A. 585; Eachus v. Hartwell et al. (C. C.) 112 Fed. 564; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951; Board of Trustees of Whitman College v. Berryman et al. (C. C.) 156 Fed. 112; Citizen's Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; City of Ottumwa, Iowa, v. City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

It has also been held that where the complaint alleges the amount in controversy to equal the jurisdictional requirement and the contrary does not appear to a certainty from the evidence, that the jurisdiction will be sustained. Maffet v. Quine (C. C.) 95 Fed. 199; Von Schroeder v. Brittan (C. C.) 93 Fed. 9.

What is the situation here? Each one of the appellees is threatened with an assessment of more than $3,000. The Northern States Power Company is threatened with one of $50,000. And further, certain appellees who have no property within the original drainage districts No. 1 and No. 2 are brought into the district and made liable to further assessments for maintenance and repair of ditches. It appears from the record that the board of county commissioners had fixed against the different appellees the proportion of benefits on a unit basis. It is without question that the county commissioners have issued approximately $255,000 worth of warrants for this work, and that the amount due thereon is about $300,000. It is a matter then of mere mathematical calculation to arrive at the threatened assessment against each one of appellees.

Exhibit C is the notice to the various parties against whom proportions of benefits have been fixed. It provides as follows, to wit:

"All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed as stated, and the said determination of said board made final."

If no action whatever were taken by appellees the amounts would be final, and under these circumstances we believe the amount in dispute in each case exceeds the jurisdictional requirement. The claim of amount is evidently made in good faith, and not for the mere purpose of giving the federal courts jurisdiction. We do not believe that where the board has passed a resolution fixing benefits which exceed the jurisdictional amount and are the basis of a proposed assessment, and which parties claim are fixed by the board without authority, that because said board may equalize the benefits or even find that no benefits exists the parties must wait until the final action of the board. It is suggested that the board may so equalize benefits that the jurisdictional amount will not be involved, but as the matter

stood when the case was brought each appellee was threatened with the levying of a tax for more than the jurisdictional amount, and some of the necessary steps had already been taken.

As the proportion of benefits had been fixed subject to change by the board only if appellees should convince them that their conclusion was erroneous, and in view of the claim in apparent good faith in each of the bills that the amount involved exceeded the jurisdictional amount, we hold, from a careful survey of the entire record, that the necessary amount existed in each case to give jurisdiction to the federal court.

All bills of complaint raise questions under the federal Constitution that are substantial and not merely colorable. Hence the court has jurisdiction exclusive of diversity of citizenship, which existed as to all appellees except the city of Sioux Falls, necessary amount being involved, to determine all questions in the record, and it has not lost jurisdiction by omitting to decide the constitutional ones. Silver et al., etc., v. Louisville & Nashville R. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; Louis. & Nash. R. R. Co. v. Finn, 235 U. S. 601, 35 Sup. Ct. 146, 59 L. Ed. 379; Greene, Auditor, et al., etc., v. Louis. & Interurban R. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

Appellants plead estoppel against all of the appellees, and claim that appellees are not in position to maintain their actions, for the reason that as to some of the railroad companies the engineering departments have been in close touch with the drainage ditch proceedings; that some of them were assessed for benefits received upon the construction of the original drainage ditches in the same territory, received benefit thereby, and have not protested before the bringing of this action. As to some of the appellees it is claimed that their officers showed interest in the construction work and encouraged the board of commissioners to do the work; that some of the appellees, for instance, the Chicago, Milwaukee & St. Paul Railway Company, hauled men and materials used in the construction work, and stopped trains between stations to unload men and materials. As to the city of Sioux Falls, it is claimed by way of estoppel that under due authority the mayor and city auditor signed the petition for the project. There can certainly be no just claim of estoppel as to those appellees whose property was not within the area of the original drainage ditches No. 1 and No. 2. As to the other appellees, the decree related only to the property outside of the original assessment areas of drainage ditches No. 1 and No. 2. So we are to consider the situation as bearing on the question of estoppel only as to the property outside of the original assessment areas up to the time of the notice of the fixing of benefits. The various appellees as to such property had no notice, when the acts constituting the alleged estoppel took place, that the same was to be affected by the drainage construction or would be assessed for the cost thereof. Hence the claimed acts of agents and officers of appellees would not constitute estoppel. The situation

is quite different from that presented in Gilseth v. Risty (S. D.) 193 N. W. 132—at least as to all appellees except the city of Sioux Falls. We do not pass on the question of estoppel as to any appellees, as to assessments that may be made on their property within the original area of ditch No. 1 and ditch No. 2, for the purpose of maintaining such ditches.

Other questions are presented which we think are not involved in the determination of these cases.

The decree of the trial court in each case is affirmed.

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BRIEF AND ARGUMENT FOR APPELLEE

Supreme Court of the United States

October Term 1925

No. 99.

A. G. RISTY *et al*, as County Commissioners, etc., *et al.*,
Appellants,

vs

THE CITY OF SIOUX FALLS,
Appellee

APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

C. O. BAILEY,
J. H. VOORHEES,
T. M. BAILEY,
ROY D. BURNS,
Solicitors for Appellee.

(30,420)

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Brief and Argument for Appellee

Supreme Court of the United States

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Appellants,

vs

THE CITY OF SIOUX FALLS,
Appellee

APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE

The City of Sioux Falls, Plaintiff and Appellee, filed its bill in the District Court of the District of South Dakota praying for an injunction. From a decree granting an injunction the Defendants and Appellants appealed to the Circuit Court of Appeals of the Eighth Circuit, in which latter court the decree of the District Court was affirmed. From the decision of the Circuit Court of Appeals the defendants appeal to this Court.

This suit involves the constitutionality of the Drainage Ditch Statute of the state of South Dakota under both the federal and state constitutions and also involves the regularity and validity of proceedings taken under that statute. The facts out of which this suit arises, are, as follows:

STATEMENT OF FACTS

At the election in November, 1906, there was adopted an amendment to the constitution of South Dakota which is known as Section 6 of Article XXI of that constitution and which is as follows:

"§ 6. The drainage of agricultural lands is hereby "declared to be a public purpose and the legislature may "provide therefor, and may provide for the organization "of drainage districts for the drainage of lands for any "public use, and may vest the corporate authorities there- "of, and the corporate authorities of counties, townships "and municipalities, with power to construct levees, drains "and ditches, and to keep in repair all drains, ditches and "levees heretofore constructed under the laws of this "state, by special assessments upon the property bene- "fited thereby, according to benefits received."

The legislature of South Dakota has never enacted any law to carry into effect the powers, conferred upon it by the foregoing constitutional amendment providing for the organization of drainage districts, but has enacted, or attempted to enact various laws vesting the corporate authorities of the several counties of the state with power to construct levees, drains, and ditches and to keep the same in repair by special assessments upon the property benefited thereby.

The first drainage ditch enactment was Chapter 98 of the Session Laws of South Dakota, 1905, which was passed prior to the adoption of Section 6 of Article XXI of the South Dakota constitution. After the adoption of that section a new law was passed which is known as Chapter 134 of the Session Laws of South Dakota, 1907. The 1907 law was amended by Chapter 102 of the Session Laws of South Dakota, 1909. The 1907 law was further amended by Chapters 207 and 208 of the Session Laws of South Dakota, 1917. In 1919 the entire drainage law was recompiled and re-enacted as Sections 8458 to 8507, South Dakota Revised Code of 1919. Further amendments were enacted in 1919 which appear as Chapter 46 of the Session Laws of the First Special Session of the Sixteenth Legislature of South Dakota and by Chapters 193, 194, 195, 196, 197 and 198 of the Session Laws of South Dakota, 1921.

For the convenience of the court we are printing as Appendix A of this brief the portions of the South Dakota constitution, and as Appendix B the portions of the South Dakota laws which bear upon the questions at issue in this suit.

The Big Sioux river has its origin in a lake in the northeastern part of South Dakota and runs thence in a generally southerly direction, and in the eastern part of South Dakota, (of which state it is in places the boundary line) for about 100 miles and empties into the Missouri river at a point a short distance north of Sioux City, Iowa. In its course the Big Sioux river passes through the center of the city of Sioux Falls. It strikes Minnehaha county, in which Sioux Falls is situated, at its north line and flows in a generally southerly direction, but with many bends and curves, for a distance, in a straight line, of twenty-four miles, running in its course two and one-half miles west of the business center of the city of Sioux Falls and south to a point three miles south of the business center. It then flows in an easterly direction for about three miles and then turns north, running through the business center of the city of Sioux Falls and northerly to a point two miles from the business center. It then runs in an easterly direction for several miles when it again resumes its southerly course towards its junction with the Missouri river. The consequence is that at the city of Sioux Falls the river runs like an inverted letter "S," upon the bar of which Sioux Falls is situated.

From a point about five miles south of where the Big Sioux enters Minnehaha county it runs through a valley or flat from two to four miles in width until it reaches a point about three miles southwest of the business center of the city of Sioux Falls. From there on until it reaches the northeastern portion of the city the river is confined by high banks on either side and with no valley interposing between them.

There is comparatively little fall between the point where the Big Sioux river enters the flat about fifteen miles north of the city of Sioux Falls and the northeastern section of the city where the river passes over a series of falls of an aggregate height of more than one hundred feet. The result is that the level of the river bed, as it

passes over the falls in the northeastern portion of the city of Sioux Falls, is over one hundred feet below the level of the river at a point, four miles to the westward, where it passes to the west of the city of Sioux Falls.

About 1878, a dam was constructed for water power purposes across the Big Sioux river within the limits of the city of Sioux Falls a short distance above the falls and, between that dam and the falls, other dams were subsequently constructed, all of which were in existence long prior to any of the transactions out of which this suit arises. These dams for many years have been utilized, without complaint from any source, by the Northern States Power Company and its predecessors, as a source of water power, and upon the dams and power works several hundreds of thousands of dollars have been expended with the consent, express or implied, of the public authorities of Minnehaha county and of the city of Sioux Falls and of the property owners along the Big Sioux river.

The city of Sioux Falls, something over twenty years ago, located its municipal waterworks upon the flat north of the city, between the Big Sioux river where it flows in a southerly direction to the westward of the city and where it flows to the northward after it passes over the falls in the northeastern portion of the city. The flat where the waterworks are situated is a few feet higher than the level of the river bed to the westward of the waterworks plant and more than one hundred feet higher than the level of the river bed to the eastward. Between the two channels of the river (at this point about 3½ miles apart) there is an extensive gravel bed underlying the surface of the ground, which gravel bed is filled with water and is the source from which the city of Sioux Falls obtains its municipal water supply.

For many years, and from in fact shortly after the settlement of Minnehaha county in the late sixties and early seventies, complaints arose in regard to the flooding of the land in the valley of the Big Sioux river north of the city of Sioux Falls. The topography of the country along this valley being level and there being but little fall in the river bed for a distance of nearly thirty miles, between the north end of the flats and the falls of the Big

Sioux river, the surface waters, in times of freshets, would accumulate upon the flats and remain there for several days, and sometimes for weeks, before they gradually flowed off through the narrow river channel south of the city of Sioux Falls and through the city until they reached the falls. This situation was made still worse by the construction of the dam upon the river above the falls in 1878 which hindered still further the passage of the water along the river bed before it reached the falls. As the state of South Dakota became more and more densely settled in the counties along the Big Sioux river north of Minnehaha county, numerous drainage ditches were established, the effect of which was still further to accelerate the flow of surface water during freshets and to cause a still greater volume of water to accumulate upon the flats north of the city of Sioux Falls.

In December, 1907, the Board of County Commissioners of Minnehaha county, purporting to act under the authority of Chapter 134 Session Laws of South Dakota, 1907, established a drainage ditch known as Drainage Ditch No. 1. This ditch was some three miles in length and extended, from a point on the Big Sioux river below the falls, northward to a point on the flat north of the city of Sioux Falls. In 1910, the Board of County Commissioners, again purporting to be acting under the authority of Chapter 134 of the Session Laws of South Dakota, 1907, as amended by Chapter 102, Session Laws of South Dakota, 1909, established a second ditch, known as Drainage Ditch No. 2, which commenced at the north end of Drainage Ditch No. 1 and extended in a northerly direction for about twelve miles.

At the point Drainage Ditch No. 1 empties into the Big Sioux river below the falls it passed over a hill in a descent of about one hundred feet. The bottom of the ditch was covered along this descent with concrete, making a spillway through which the water accumulating upon the flats could run to reach the channel of the Big Sioux river below the falls.

Drainage Ditch No. 1 and Drainage Ditch No. 2 operated more or less successfully in draining the flats until the spring of 1916 at which time, during a somewhat heavy rainfall, the concrete bottom of Drainage Ditch No.

1, (or its spillway) washed out and the water began cutting a channel through the hill.

The fact that the concrete spillway had washed out did not in any manner decrease the efficiency of Drainage Ditch No. 1 and Drainage Ditch No. 2 as drainage propositions. In fact, the washout of the spillway made them still more efficient for draining purposes, and if they had been left alone they would very speedily have settled the question of drainage for the lands upon the flats. The effect of the washout was to open a passage for all of the water which accumulated upon the flats into the channel of the Big Sioux river below the falls and this channel was amply sufficient to have taken care of all of the water which ever accumulated upon the flats. In fact, it was a perfect success as a drainage proposition.

Unfortunately, while Drainage Ditch No. 1, after its spillway was washed out, succeeded in doing all in the way of drainage that the owners of the lands upon the flats desired to have done, it seriously affected other interests. If the water had been allowed to go without hindrance through the new channel it would, within a very short time, have diverted the entire course of the water in the Big Sioux river and would have formed a new channel for the river across the flats north of the city of Sioux Falls, in which channel all of the water coming down the river could have flowed into the channel below the falls without passing around and through the city of Sioux Falls and over the falls, thus cutting off about twelve miles of the river channel. The further effect would have been to destroy the waterpower formed by the dams across the Big Sioux river in the city of Sioux Falls above the falls, as the only water which would have flowed in the Big Sioux river channel through the city of Sioux Falls and over the falls would have been the water from Skunk creek, a tributary of the Big Sioux river, emptying into that stream south of the city of Sioux Falls. Another effect of allowing the river to run through its new channel would have been to destroy the municipal water plant of the city of Sioux Falls by draining the water from the gravel bed from which the city obtained its water supply.

After the spillway at the outlet of Drainage Ditch No. 1 had washed out in March, 1916, various plans were

proposed looking toward the control of the water which flowed through the ditch. Many conferences were had between the Board of County Commissioners and the representatives of the various interests affected. The Appellee was not represented at any of these conferences and never took any part in any manner in them or in the subsequent proceedings.

In October, 1916, the Board of County Commissioners took proceedings by which they attempted to establish a new ditch project which they named "Drainage Ditch No. 1 and 2." Thereafter, all proceedings with respect to Drainage Ditch No. 1 and with respect to Drainage Ditch No. 2 were abandoned and all subsequent work was done by the Board of County Commissioners upon the new project, "Drainage Ditch No. 1 and 2."

The Board of County Commissioners, after attempting to organize Drainage Ditch No. 1 and 2, proceeded to construct additional ditches, cut-offs, and dams in the flats above the city of Sioux Falls, and at the former outlet of Drainage Ditch No. 1, to construct a spillway, and other water retaining works for the purpose of controlling the flow of the water through the ditches. This work was done by the Board of County Commissioners without any regard to the requirements of the South Dakota drainage statutes and without having first had plans therefore prepared and approved by the state engineer. The most of the work was done by the board without letting a contract therefor and upon the cost-plus plan. The result was, that at the end of the construction period, the cost of the work done by the Board of County Commissioners upon Drainage Ditch No. 1 and 2 had amounted to a sum in excess of $250,000, of which upwards of $150,000 was expended upon the spillway and other water retaining works at the outlet of the ditch. For the amount expended, the Board of County Commissioners issued warrants upon the Drainage Ditch No. 1 and 2. These warrants were taken by the laborers and material men employed upon the construction work and were in most instances discounted to the local banks in Minnehaha county.

After a number of abortive attempts to levy an assessment for the purpose of raising the money to pay the warrants issued for the work done upon Drainage Ditch No.

1 and 2, the Board of County Commissioners, in June, 1921, adopted a notice of time and place for equalizing the proportion of benefits for the construction of the work on Drainage Ditch No. 1 and 2, in which notice the proportion of benefits assessed against Appellee was 3145.95 units out of a proposed total of 32549.62 units, upon the basis of which proportion the assessment against Appellee and its property would be in excess of $29,900.

The plaintiff and Appellee brought this suit to enjoin the making of any assessment upon its property for the work done upon Drainage Ditch No. 1 and 2. A temporary injunction was granted *pendente lite*. The defendants named in the bill were the Board of County Commissioners of Minnehaha County, the Auditor, and the Treasurer of that county. Subsequently, the various banks and other persons holding drainage ditch warrants filed a petition for leave to intervene in the suit. This petition was granted and answers were filed both by the defendants and by the intervenors. Upon the hearing of the suit upon its merits, a final decree was entered enjoining the Board of County Commissioners from making any assessment for the expense of the work done under the proceedings establishing Drainage Ditch No. 1 and 2. (Record pp. 86-88.) *Chicago, Rock Island & Pacific Railway Company vs Risty*, 282 Fed. 364.)

In its bill Appellee set up the facts concerning the construction of Drainage Ditches No. 1 and No. 2 and the subsequent construction of a spillway and attacked the constitutionality of the South Dakota Drainage Statute in the following allegations:

"That said purported statute of the state of South "Dakota 'Exhibit A' hereto, is unconstitutional and void, "in that the same is in violation of Section 2 of Article "VI, of the Constitution of the State of South Dakota, "and in that the same is in violation of the Fourteenth "Amendment of the Constitution of the United States; "that said Statute, 'Exhibit A', is further void and un- "constitutional in that the same provides no fixed and "determinable method or rule for the apportionment of "benefits upon the property and property owners situat- "ed within the drainage area, and especially in that said

"purported statute furnishes no fixed or determinable "basis for the apportionment of benefits upon the prop- "erty of railroad companies and other corporations, and "upon the property of municipal and quasi-municipal cor- "porations, and upon platted property in cities and vil- "lages. Said purported law, 'Exhibit A', is further un- "constitutional and void in that the same provides for an "assessment against property without the right of the "property owner to be heard thereon and without notice "of any character to the property owner; that if said ap- "portionment of benefits be made as threatened by the "said Board of County Commissioners of said Minnehaha "County, and as is provided in said notice, 'Exhibit C', "the same will constitute the taking of the property of "plaintiff and of the other property owner affected by "said notice without due process of law; that a cloud will "be placed upon the title of the plaintiff to its real prop- "erty situated within said drainage area affected by "said notice, 'Exhibit C' and that there will result a mul- "tiplicity of suits and that plaintiff and other property "owners affected will suffer irreparable injury." (Rec- ord, p. 13).

The bill also attacked the acts of the Board of County Commissioners of Minnehaha County in its proceedings relative to the construction of the spillway and other drainage works as being without jurisdiction on account of the unconstitutionality of the South Dakota Drainage Statute and also on account of such proceedings not being had in accordance with the provisions of the Statute. (Record, pp. 14-15). The apportionment of benefits made against the property of Appellee was further attacked as exorbitant, disproportionate to the assessment of other property and made upon an arbitrary and discriminatory basis. (Record, pp. 72-73).

In their answer, Appellants took issue upon the unconstitutionality of the South Dakota Drainage law and specifically set up the establishment by the Board of County Commissioners of a new ditch project under the title of "Drainage Ditch No. 1 and 2."

Upon the trial in the district court the issues involved were, under the pleadings:

1. The constitutionality of the South Dakota Drainage Ditch Statute.

2. The regularity of the proceedings of the Board of County Commissioners of Minnehaha county under the Statute.

3. The proper construction to be given to the provisions of the South Dakota Drainage Statute.

There was practically no dispute as to the facts out of which this suit arises. It was admitted by all parties to the controversy that originally the Board of County Commissioners of Minnehaha county had established two drainage ditches known respectively as Drainage Ditch No. 1 and Drainage Ditch No. 2. It was also conceded that after the spillway, at the outlet of Drainage Ditch No. 1, had been washed out, the Board of County Commissioners established a new ditch project known as Drainage Ditch No. 1 and 2.

This suit was one of six cases involving this same ditch project, but the positions taken by the plaintiffs in the various cases differed upon the proposition as to whether Drainage Ditch No. 1 and 2 was a new and independent proposition or whether it was merely a project for the maintenance and repair of Drainage Ditch No. 1 and Drainage Ditch No. 2 and consequently a continuation of those two propositions. In all of the six cases the contention of counsel for Appellants was that Drainage Ditch No. 1 and 2 was a new and independent proposition. This position was contested by plaintiffs in some of the cases who took the position that it was merely a maintenance and repair project. In the case at bar, the plaintiff (Appellee in this court) was content to coincide with the position taken by the defendants (Appellants in this court) and to base its right to an injunction upon a state of facts in which it conceded that Drainage Ditch No. 1 and 2 was a new and independent ditch proposition and not a continuation of the old Drainage Ditch No. 1 and Drainage Ditch No. 2.

In the District Court injunctions were granted to the plaintiffs in all the six cases, but in his opinion filed in the District Court, the District Judge took the position that Drainage Ditch No. 1 and 2 was merely a maintenance and repair project and a continuation of Drainage Ditch No.

1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company vs Risty,* 282 Fed. 364).

While we contend in this court, as we did in the Circuit Court of Appeals, that the decree of the District Court was properly entered and should be affirmed, we do not act as the defenders of the decree upon the grounds upon which it was based by the District Judge. The decree was, in our view of the controversy, properly entered, but the same decree should have been entered had the court been of the opinion that Drainage Ditch No. 1 and 2 was an independent and original ditch proposition and not a continuation and repair project of Drainage Ditch No. 1 and Drainage Ditch No. 2. In this position we do not coincide with the views expressed by counsel for the Appellees in other of the six cases now before this court. We accept the position of counsel for the Appellants that Drainage Ditch No. 1 and 2 was an original and independent ditch proposition and upon that basis shall proceed with our argument in support of the decree of the District Court and the decision of the Circuit Court of Appeals.

An appeal was taken by the defendants and by the intervenors to the Circuit Court of Appeals for the Eighth Circuit, in which court the decree of the District Court was affirmed. *Risty vs Chicago, Rock Island & Pacific Railway Company,* 297 Fed 710. The defendants and intervenors then filed a petition in this Court for a writ of certiorari and, at the same time, took this appeal. The application for a certiorari was denied. *Risty vs City of Sioux Falls,* 266 U. S. 622. The case is now before this court upon the appeal.

The foregoing being the facts in this suit, we submit on behalf of the Appellee, the City of Sioux Falls, the following:

BRIEF AND ARGUMENT

I.

THE SOUTH DAKOTA DRAINAGE LAW IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND IS THEREFORE UNCONSTITUTIONAL.

The first proposition which we desire to present for the consideration of the Court is that the entire South Dakota drainage law is unconstitutional, our contention being that it is in violation of the "due process of law" clause of the fourteenth amendment to the federal constitution. The consideration of this question involves an analysis of the provisions of the South Dakota drainage statute as it existed at the time the Board of County Commissioners of Minnehaha county attempted to establish Drainage Ditch No. 1 and 2 and did the work thereunder.

The first statutory step in the establishment of a drainage ditch is the filing of a petition. (§2, ch. 134, Laws of 1907; §8459, R. S. 1919). This petition must "set forth "the necessity for the drainage, a description of the pro- "posed route by its initial and terminal points and its "general course, or by its exact course in whole or in part, "and a *general statement of the territory likely to be "affected thereby"*. It will be noticed that in the petition, which is the initial and jurisdictional step in the for mation of a drainage ditch, it is not necessary to include a description of the property which will be affected and upon which assessments will be levied to pay the costs of the construction of the ditch. All that is required is a "general statement of the territory likely to be affected "thereby." The next step in the proceeding is for the County Auditor to transmit a copy of the petition to the State Engineer, who, together with the Board of County Commissioners is required to inspect the proposed route and "if in the opinion of the Board and the State Engi- "neer it is necessary," the Board of County Commissioners causes a survey of the proposed drainage to be made by a competent engineer, selected by the Board, but under the general supervision of the State Engineer. This survey is primarily for the purpose of aiding the Board in determining the necessity for the proposed drainage but

it may be a complete survey such as will be required for the construction of the drainage and the assessment of its cost. All this is within the jurisdiction of the Board of County Commissioners. The survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. (§ 3, ch. 134, Laws of 1907; § 1, ch. 102, Laws of 1909; §8460, R. S., 1919). While the survey may, at the option of the Board of County Commissioners, be a complete survey for the purpose of ascertaining all facts required for the construction of the proposed drainage and the assessment of its cost, such complete survey is not rendered obligatory by the statute and the Board of County Commissioners may have made only so much of the survey as may be necessary to determine the necessity for the proposed drainage.

After receiving the report of the surveyor, the Board of County Commissioners is required to determine the "exact line and width of the ditch, if the same shall not "be fixed in the petition, and shall file its determination "with the petition." The Board then fixes the time and place for the hearing of the petition and gives notice by publication in a newspaper for two weeks and by posting copies of the notice in three public places near the route of the proposed drainage. The notice "shall describe the "route of the proposed drainage and the tract of country "likely to be affected thereby in general terms, the sep- "arate tracts of land through which the proposed drain- "age will pass and give the names of the owners thereof "as appears from the records of the office of the Register "of Deeds on the date of the filing of the petition, and "shall refer to the files in the proceeding for further par- "ticulars." The notice shall also "summon *all persons* "*affected* by the proposed drainage to appear at such "hearing and show cause why the proposed drainage shall "not be established and constructed." (§ 4, ch. 134, Laws of 1907; § 2, ch. 102, Laws of 1909; § 8461, R. S. 1919). This notice is the only notice given to property owners prior to the establishment of a drainage ditch and is the only notice under which the Board can acquire jurisdic-

tion to make an assessment. The owners are named of the separate tracts of land through which the proposed drainage will pass but no description is given of the property *affected by the proposed drainage ditch or which will be assessed for the cost of the construction thereof.* The notice merely describes the route of the proposed drainage and the "tract of country likely to be affected thereby *"in general terms"* and then summons *"all persons af-"fected by the proposed drainage"* to appear at the hearing. A notice designating as the tract of country "likely "to be affected thereby in general terms" would be sufficient, if it named as such "tract of country" the entire county in which the drainage ditch is to be constructed. Nothing whatever is required in the notice by which any property owner, other than one owning land through which the ditch is to be constructed, is appr ised that he is affected or that his land will be assessed for the construction of the proposed drainage ditch. In fact, all that the South Dakota law requires is for the Board of County Commissioners of a South Dakota county to publish and post a general notice summoning "all persons affected" to appear at the hearing, in order to support an assessment, for the construction of the ditch, upon all of the real property situated within the county limits. There is absolutely nothing in the statutory notice to inform any property owner that he will be called upon to pay an assessment. After the ditch is constructed, the Board of County Commissioners is at liberty, under the South Dakota statute, to extend the assessment to all property in every direction up to the county boundary lines. If this be sufficient notice, then after it is given, the Board of County Commissioners has the power to assess for the cost of the construction of any ditch every acre of property within the county limits.

At the hearing upon the petition, the South Dakota statute kindly permits "any person interested" to appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the Board as to the width and route of the proposed ditch. After the hearing, the County Board may establish the drainage ditch. (§ 5, ch. 134, Laws of 1907; § 3, ch. 102, Laws of 1909; § 8462, R. S. 1919).

After the establishment of the drainage ditch, the Board of County Commissioners "shall fix the proportion of benefits of the proposed drainage among the lands affected and shall appoint a time and place for equalizing the same." (§6, ch. 134, Laws of 1907; § 4, ch. 102, Laws of 1909; § 8463, R. S. 1919). There is no statutory requirement as to how soon after the establishment of the drainage ditch this shall be done and it is not necessary that it be done before the drainage project has been completed. It must be done before an assessment is made for the purpose of paying the cost of the establishment of the drainage project but the assessment, when made, includes all costs already incurred, or thereafter to be incurred. (§ 7, ch. 134, Laws of 1907; § 5, ch. 102, Laws of 1909; ch. 130, Laws of 1911; § 8464, R. S. 1919.)

The notice of equalization of proportion of benefits is given by publication once in each week for two consecutive weeks in a newspaper of the county and by posting copies of the notice in three public places near the route of the proposed drainage. The law requires that the "notice "shall state the route and the width of the drainage estab- "lished, a description of each tract of land affected by "the proposed drainage and the names of the owners of "the several tracts of land as appears from the records "of the office of the Register of Deeds, at the date of filing "of the petition, and the proportion of benefits fixed by "each tract of property, taking any particular tract as a "unit, and shall notify all such owners to show cause why "the proportion of benefits shall not be fixed as stated." (§ 6, ch. 134, Laws of 1907; § 4, ch. 102, Laws of 1909; § 8463, R. S. 1919). Here for the first time there is published a description of each tract of land "affected" by the proposed drainage and the names of the owners of such tracts. As in the case at bar, the work may have been completed and an expense of over a quarter of a million dollars incurred before the Board of County Commissioners determines what particular lands are "affected" by the proposed drainage and gives notice to the owners of such lands. A property owner for the first time notified that his land is "affected" by the proposed drainage has no right to object in any manner to the establishment of the drainage project. He has nothing to say in re-

gard to its manner or cost of construction; he has no voice in the selection of the particular tract of land taken as a unit; and all concerning which he can be heard is as to whether the proportion of benefits "shall not be fixed "as stated."

It is now too late for the property owner to escape. He is like a rat in a trap. All that he can do is to appear before the Board of County Commissioners and object to the proportion of benefits which has been assessed against him and ask to have that proportion reduced by raising the proportion of some other property owner. He is precluded from raising any question whatsoever as to the right to include his property within the drainage area. He has nothing to say as to the necessity for the drainage project or as to its manner of construction or its cost. Without any notice, either personal or constructive, his property has been included in the drainage area under the general proclamation of the Board of County Commissioners and he has no redress.

Theirs not to make reply,
Theirs not to reason why,
Theirs but to do and die,

even though

Someone had blundered.

The property owner cannot question the validity of the proceedings. All that is left for him to do is to pay.

Our contention is that the South Dakota drainage statute is in violation of the due process of law clause of the fourteenth amendment to the federal constitution for the reason that no opportunity is given a property owner, whose property is "affected" by the proposed drainage project, to appear prior to the doing of the work and the making of the assessment for the construction cost.

In support of the constitutionality of the South Dakota drainage statute, counsel for appellants have cited *Spencer vs. Merchant*, 125 U. S. 345. That case was decided by a divided court. The legislature of the state of New York had, by express enactment, determined that certain lands should be included within an assessment district in which the cost of the improvement was to be proportioned. The majority of the court held "that the deter-"mination of the territorial district which should be taxed

"for local improvement is within the province of legisla-
"tive discretion." The courts in this and a line of suc-
ceeding cases have made a clear distinction between cases in which a taxing district has been established by an act of the legislature and cases in which special assessments are to be made by some taxing body upon the property "beneficially affected" but not included within any taxing district established by legislative enactment. In the cases of taxing districts established by act of the legislature no notice need be given to the property owners of the inclusion of their property within the district, but a different rule applies in cases in which the taxing district is determined by the area of the land "beneficially affected."

Fallbrook Irrigation District vs Bradley, 164 U. S. 112, also cited by counsel in support of the constitutionality of the South Dakota drainage law, is, when carefully read, a strong authority against the constitutionality of the South Dakota statute. In the very elaborate opinion in this case the Court (p. 167) says:

"The legislature not having itself described the dis-
"trict, has not decided that any particular land would or
"could possibly be benefited as described, and, therefore,
"it would be necessary to give a hearing at some time to
"those interested upon the question of fact whether or
"not the land of any owner which was intended to be in-
"cluded would be benefited by the irrigation proposed. If
"such a hearing were provided for by the act, the de-
"cision of the tribunal thereby created would be sufficient.
"Whether it is provided for will be discussed when we
"come to the question of the proper construction of the
"act itself."

Later on in the opinion the court discusses the question whether the statute does provide for a hearing prior to the formation of the district and holds that under the provision of the statute under consideration and under the construction given it by the supreme court of California, by which state it was enacted, the right of hearing is given the property owner prior to the formation of the district. The court discusses the statute (pp. 170-172):

"We come now to the question of the true construc-
"tion of the act. Does it provide for a hearing as to
"whether the petitioners are of the class mentioned and

"described in the act and as to their compliance with the "conditions of the act in regard to the proceedings prior "to the presentation of the petition for the formation of "the district? Is there any opportunity provided for a "hearing upon notice to the land owners interested in the "question whetheir their lands will be benefited by the "proposed irrigation? We think the right to a hearing "in regard to all these facts is given by the act and that it "has been practically so construed by the Supreme Court "of California in some of the cases, above cited from the "reports of that court and in the case cited in the briefs "of counsel. We should come to the same conclusion from "a perusal of the act. The first two sections provide for "the petition and a hearing. The petition is to be signed "by a majority of the holders of title to lands susceptible "of one mode of irrigation, etc. This petition is to be pre-"sented to the board of supervisors at a regular meeting, "and notice of intended presentation must be published "two weeks before the time at which it is to be presented. "The board shall hear the same, shall establish and de-"fine the boundaries, although it cannot modify those de-"scribed in the petition, so as to except from the district "lands susceptible of irrigation by the same system of "works applicable to the other lands in the proposed dis-"trict, and the board cannot include in the district, even "though included in the description in the petition, lands "which shall not, in the judgment of the board, be bene-"fited by irrigation by said system.

"If the board is to hear the petition upon notice, and "is not to include land which will not, in its judgment, be "benefited by irrigation by the system, we think it fol-"lows as a necessary and a fair implication that the per-"sons interested in or who may be affected by the pro-"posed improvement have the right under the notice to "appear before the board and contest the facts upon which "the petition is based, and also the fact of benefit to any "particular land included in the description of that pro-"posed district.

"It is not an accurate construction of the statute to "say that no opportunity is afforded the landowner to test "the sufficiency of the petition in regard to the signers "thereof and in regard to the other conditions named in

"the act; nor is it correct to say that the power of the "board of supervisors is, in terms, limited to making such "changes in the boundaries proposed by the petitioners "as it may deem proper, subject to the conditions named "in the act.

"When the act speaks of a hearing of the petition, "what is meant by it? Certainly it must extend to a "hearing of the facts stated in the petition, and whether "those who sign it are sufficient in number and are among "the class of persons mentioned in the act as alone having "the right to sign the same. The obvious purpose of the "publication of the notice of the intended presentation of "the petition is to give those who are in any way interest-"ed in the proceeding an opportunity to appear before "the board and be heard upon all the questions of fact, "including the question of benefits to lands described in "the petition. As there is to be a hearing before the "board, and the board is not to include any lands which "in its judgment will not be benefited, the plain construc-"tion of the act is that the hearing before the board in-"cludes the question as to the benefits of the lands, be-"cause that is one of the conditions upon which the final "determination of the board is based, and the act cannot "in reason be so construed as to provide that while the "board is to give a hearing on the petition it must never-"theless decide in favor of the petitioners, and must estab-"lish and define the boundaries of the district, although "the signers may not be fifty, or a majority of the hold-"ers of title, as provided by the act, and notwithstanding "some other defect may become apparent upon the hear-"ing."

It will be seen in *Fallbrook Irrigation District vs Bradley* that the California statute differs from the South Dakota statute in that the petition must "particularly de-"scribe the proposed boundaries of such districts" and the petition itself must be published. After the petition is published and has been passed upon by the Board of Supervisors the question of the formation of the irriga-tion district is submitted to an election of the electors of the district who are also freeholders. (*Fallbrook Irriga-tion District vs Bradley*, 164 U. S. 112, pp. 116-117). These facts differentiate the statute passed upon in *Fall-*

brook Irrigation District vs Bradley from the South Dakota statute under consideration. Under the California statute the boundaries of the proposed district are fixed in the first instance and after they have been determined then the question of the formation of the district is put to a vote of the freeholder electors. We submit therefore, that the decision in *Fallbrook Irrigation District vs Bradley* is a distinct authority in favor of our position that the South Dakota drainage statute is unconstitutional. The court expressly determines in that case that notice must be given to the property owner of the formation of the district before his property can be included in it, and one of the requisites of notice is that the property owner be advised in some manner, either actually or constructively, that his land will be included within the limits of the proposed project.

Embree vs Kansas City Road District, 240 U. S. 242, is another case relied upon by counsel in support of the constitutionality of the South Dakota law. Here, again, is a case which we submit directly sustains our contention as to the invalidity of the South Dakota statute. The Court in the opinion (pp. 246-248) says:

"The district was not established or defined by the "legislature, but by an order of the county court made "under a general law. Whether there was need for the "district and, if so, what lands should be included and "what excluded was committed to the judgment and dis-"cretion of that court subject to these qualifications: "First, that the district should contain at least 640 acres "of contiguous land and be wholly within the county; sec-"ond, that the court's action should be invoked by a peti-"tion signed by the owners of a majority of the acres in "the proposed district, and, third, that public notice—con-"ceded to be adequate—should be given, by the clerk of "the court, of the presentation of the petition and the "date when it would be considered, and that owners of "land within the proposed district should be accorded an "opportunity to appear, either collectively or separately, "and oppose its formation. In this connection the statute "says: 'The court shall hear such petition and remon-" 'strance, and shall make such change in the boundaries " 'of such proposed district as the public good may re-

"'quire and make necessary, and if after such changes "'are made it shall appear to the court that such petition "'is signed or in writing consented to by the owners of "'a majority of all the acres of land within the district "'as so changed, the court shall make a preliminary order "'establishing such public road district, and such order "'shall set out the boundaries of such district as estab-"'lished . . . but the boundaries of no district shall be "'so changed as to embrace any land not included in the "'notice made by the clerk unless the owner thereof shall "'in writing consent thereto, or shall appear at the hear-"'ing and is notified in open court of such fact and given "'an opportunity to file or join in a remonstrance.' The "order actually made shows that four of the present plain-"tiffs, with three others, appeared in opposition to the "petition, recites that 'the court, after hearing and con-"'sidering said petition and said protests and remon "'strances and all evidence offered in support thereof, "'finds that the public good requires and makes necessary "'the organization, formation and creation of such pro-"'posed public road district . . . with boundaries as stated "'in said petition,' and sets out the boundaries of the "district as established.

"The sole purpose in creating the district, as the "statute shows, was to accomplish the improvement of "public roads therein—the particular roads to be desig-"nated by the district commissioners and an approving "vote of the land owners.

"As the district was not established by the legisla-"ture but by an exercise of delegated authority, there was "no legislative decision that its location, boundaries and "needs were such that the lands therein would be benefit-"ed by its creation and what it was intended to accom-"plish, and, this being so, it was essential to due process "of law that the land owners be accorded an opportunity "to be heard upon the question whether their lands would "be thus benefited. If the statute provided for such a "hearing, the decision of the designated tribunal would be "sufficient, unless made fraudulently or in bad faith. "*Fallbrook Irrigation District vs Bradley*, 164 U. S. 112, "174-175.

"Did the statute contemplate such a hearing? We

"have seen that it required that adequate public notice "be given of the presentation of the petition for the crea- "tion of the district and the time when it would be con- "sidered, made provision for the presentation of remon- "strances by owners of lands within the proposed district, "and directed that the petition and remonstrances be "heard by the county court, that the court make such "change in the boundaries 'as the public good may re- "'quire' and that the boundaries be not enlarged unless "the owners of the lands not before included consent in "writing or appear at the hearing and be given an oppor- "tunity to present objections. That a hearing of some "kind was contemplated is obvious, and conceded."

The case of *Soliah vs Heskin*, 222 U. S. 522, is strongly relied upon by counsel. That is a case arising under the North Dakota drainage law. The opinion at first glance would seem to support the contention of counsel for Appellants but an examination of the North Dakota statute, upon which the case arose, discloses the fact that the North Dakota law was not subject to the same objections which are urged against the South Dakota enactment. Under the North Dakota statute, a petition for the construction of the drain is filed with the board of drain commissioners. This petition designates the starting point and terminus and general course of the proposed drain. The board of drain commissioners then employs surveyors who prepare profiles, plans, and specifications of the proposed drain, an estimate of the cost thereof, and a map or plat of the lands to be drained in duplicate, showing the regular subdivisions thereof, one copy of which is filed in the office of the county auditor in the county in which the drain is proposed to be constructed and the other with the board of drain commissioners, subject to inspection. Upon the filing of the surveyor's report, the board of drain commissioners fixes a date and public place for hearing objections to the petitions and gives notice of such hearing. The notices must contain a copy of the petition and a statement of the date of filing of the surveyor's report and the date when the board will act upon the petition, must be signed by a majority of the members of the drainage board and "shall be sent by "registered mail to the last known address of each and

"every *owner of land which may be affected* by the pro-"posed drain." The North Dakota statute therefore requires that the names of "each and every owner of land "which may be affected" be determined and actual notice given these at the very inception of the project and this notice must be given by sending to each owner a copy of the petition and of a statement of the date of filing the surveyor's report and the date upon which the board will act upon the petition. That is a very different proposition from merely publishing notice "to all persons whose "property is affected" without first determining who are affected, as required by the South Dakota statute. The opinion in the case of *Soliah vs Heskin* must consequently be read in the light of the North Dakota statute which provides for the giving of notice at two stages of the proceedings to the property owner, first, a notice before the drainage district is formed, and, second, a notice when the assessment of benefits is made. The North Dakota statute provides exactly the thing for the want of which the South Dakota statute is unconstitutional.

Counsel for Appellants place great reliance upon the recent case of *Milheim vs Moffat Tunnel District*, 262 U. S. 710. That case is clearly to be distinguished from the case at bar. It is a case arising upon an assessment made in a taxing district, the limits of which had been fixed by act of the legislature of the state of Colorado. The supreme court held, following *Spencer vs Merchant*, 125 U. S. 345, and other similar cases, that the legislative authority of a state extends to the formation of taxing districts and that a state legislature can enact a law fixing the boundaries of a taxing district without giving notice to the owners of property included therein. That is an entirely different proposition from the one arising under the South Dakota drainage law and the decision of the supreme court in *Milheim vs. Moffat Tunnel District* is not an authority in support of the South Dakota statute which on its face does not attempt to form a taxing district by legislative enactment.

The case of *Voight vs Detroit City*, 184 U. S. 115, was cited by JUDGE ELLIOTT in his opinion deciding this case in the District Court. This case is one of a line of cases involving the making of special assessments in cities

for various municipal purposes. See also *St. Louis Land Company vs Kansas City,* 241 U. S. 419. In this line of cases the courts hold that cities organized under general laws or special acts of the legislature may impose special assessments under general statutes authorizing the levying of assessments in proportion to benefits. In all such cases, it is held by the courts, some opportunity must be given the taxpayer to be heard as to the proportion of the benefits to be assessed against his property but the property owner is not entitled to a hearing upon the question of the determination whether the improvements shall be made for which the special assessment is levied.

In the case of *Central of Georgia Railway Company vs Wright,* 207 U. S. 127, the Supreme Court held (quoting from the syllabus): "Due process of law requires "that opportunity to be heard as to the validity of the tax "and the amount of the assessment be given to a taxpay-"er, who, without fraudulent intent and in the honest be-"lief that it is not taxable, withholds property from tax "returns, and this requirement is not satisfied where the "taxpayer is allowed to attack the assessment only for "fraud and corruption."

In *Londoner vs Denver,* 210 U. S. 373, the Court, passing upon a Colorado statute, says:

"In the assessment, apportionment and collection of "taxes upon property within their jurisdiction the Con-"stitution of the United States imposes few restrictions "upon the States. In the enforcement of such restric-"tion as the Constitution does impose this court has re-"garded substance and not form. But where the legis-"lature of a State, instead of fixing the tax itself, com-"mits to some subordinate body the duty of determin-"ing whether, in what amount, and upon whom it shall "be levied, and of making its assessment and apportion-"ment, due process of law requires that at some stage "of the proceedings before the tax becomes irrevocably "fixed, the taxpayer shall have an opportunity to be "heard, of which he must have notice, either personal, by "publication, or by a law fixing the time and place of the "hearing. *Hager vs Reclamation District,* 111 U. S. 701; "*Kentucky Railroad Tax Cases,* 115 U. S. 321; *Winona &* "*St. Peter Land Co. vs Minnesota,* 159 U. S. 526, 537;

"*Lent vs Tillson,* 140 U. S. 316; *Glidden vs Harrington,* "189 U. S. 255; *Hibben vs Smith,* 191 U. S. 310; *Security* "*Trust Co. vs. Lexington,* 203 U. S. 323; *Central of* "*Georgia vs Wright,* 207 U. S. 127. It must be remem- "bered that the law of Colorado denies the landowner "the right to object in the courts to the assessment, upon "the ground that the objections are cognizable only by "the boards of equalization.

"If it is enough that, under such circumstances, an op- "portunity is given to submit in writing all objections to "and complaints of the tax to the board, then there was a "hearing afforded in the case at bar. But we think that "something more than that, even in proceedings for tax- "ation, is required by due process of law. Many require- "ments essential in strictly judicial proceedings may be "dispensed with in proceedings of this nature. But even "here a hearing in its very essence demands that he who "is entitled to it shall have the right to support his alle- "gations by argument however brief, and, if need be, by "proof, however informal. *Pittsburg &c Railway Co. vs* "*Backus,* 154 U. S. 421, 426; *Fallbrook Irrigation District* "*vs Bradley,* 164 U. S. 112, 171, *et seq.* It is apparent "that such a hearing was denied to the plaintiffs in error. "The denial was by the city council, which, while acting "as a board of equalization, represents the state. *Ray-* "*mond vs Chicago Traction Co.,* 207 U. S. 20. The as- "sessment was therefore void, and the plaintiffs in error "were entitled to a decree discharging their lands from "a lien on account of it."

In *Turner vs Wade,* 254 U. S. 64, the Court held (quoting from the syllabus) as follows:

"The Georgia Tax Equalization Act (Laws, 1913, p. "123 §§ 6-7), empowers the Board of County Tax Assess- "ors to assess property for taxation and requires it to "notify the taxpayer of changes made in his returns; it "gives him, if dissatisfied, the right to demand an arbitra- "tion, and provides that a majority of three arbitrators, "one appointed by him, one by the Board and the third by "the two so selected, shall fix the assessment; but the "arbitrators must render their decision within ten days "from the naming of the arbitrator by the board, other- "wise the Board's decision—i. e., its assessment—stands

"affirmed; and no notice is afforded the taxpayer before "the making of the Board's assessment, nor any oppor- "tunity to be heard concerning it save that before the "arbitrators. Held, that an assessment so made by the "Board of County Tax Assessors, increasing the valua- "tion returned by a property owner, without notice or "hearing, was without due process of law, where his rem- "edy by arbitration proved abortive because the arbitra- "tors, though agreeing that the assessment was excessive, "could no two of them unite on a new assessment before "the ten day limitation expired."

We contend that an examination of the decisions of this Court pertinent to this case discloses that the following principles of law have been laid down:

First: That "due process of law" requires that at some stage of the proceedings the taxpayer must have an opportunity to appear and be heard *both as to the validity of the tax and as to its amount.*

Second: That the state legislature possesses the authority, by direct legislative enactment, to establish taxing districts and to fix the boundaries thereof without notice to the property owners included within such district.

Third: That where, by direct legislative enactment, certain territory has been formed into a taxing district the taxing authorities of such district may impose special assessments upon the property situated within the taxing district, pursuant to powers conferred by the legislature upon the taxing authorities, without first giving the property owner an opportunity to be heard as to the necessity for the making of the improvement, but in such cases the taxpayer must be given an opportunity to be heard as to the amount of the tax which he is to be compelled to pay.

Fourth: That in cases in which a taxing area or district is not formed by direct act of the legislature but is formed for the making of some public improvement by special assessments upon the property contained in the area or district, by local officers through authority delegated to them by the legislature to act upon petition of property owners, it is *absolutely essential to the validity of the proceedings that notice be given to the property owners whose interests are affected before the taxing area or dis-*

trict can be formed, the work done, and a tax imposed. The notice is not necessarily a personal one and may be by publication *but a notice of some character is essential.*

Analyzing all of the cases upon the subject, there cannot be found a single case in which a law containing the provisions of the South Dakota drainage law has been sustained by the courts. In every instance in which a law has been held valid there was a positive requirement that notice should be given to the taxpayer of a hearing upon the question of the making of the proposed improvements. In every instance the property affected has been definitely determined before the hearing and the property owner has been advised in some manner that his property is included within the area upon which it is intended that a tax or asssesment be imposed.

Search the law reports through; there cannot be found a case in which a mere general notice directed to "all persons affected" has been held to be a sufficient notice to a property owner that his property is to be included within an assessment area.

The inequity of a law like that of South Dakota is well illustrated by the results of the proceedings of the Board of County Commissioners of Minnehaha county in the case at bar. Under a notice to "all persons affected" it is sought to assess for the construction of the works in Drainage Ditch No. 1 and 2 not only the area formerly assessed for the construction of Drainage Ditch No. 1 and for the construction of Drainage Ditch No. 2, but to assess also property situated several miles from any of the work done in Drainage Ditch No. 1 and 2 and miles away from any of the land in the area assessed for the original construction of Drainage Ditch No. 1 or of Drainage Ditch No. 2. Property, that could not by any possibility be drained by the work done in Drainage Ditch No. 1 and 2 and that could not even remotely be benefited by that work, was included in the assessment area, and under the notice there could have been included just as well any other property situate within the limits of the 800 square miles comprising Minnehaha county.

If the County Commissioners of Minnehaha county had been required by the South Dakota drainage law to obtain, in the first instance, a survey and plat of the pro-

posed drainage area, and then to notify, either personally or by mail, publication, or posting, the property owners interested in that area, their proceedings might have had a semblance of legality, but under the South Dakota statute no such procedure is required. The County Commissioners have before them the names of the property owners through whose lands the drainage ditch passes but neither the Board of County Commissioners nor any one else has the slightest idea of what lands will be assessed for the cost of the construction of the drainage ditch. The only notice that is given to anyone is the general notice to "all persons affected." After the drainage works are completed, then for the first time a survey is made for the purpose of ascertaining what lands are "affected" and shall be assessed. The County Commissioners fix the proportion of benefits and publish the notice which, for the first time, informs the property owner that his land is liable for the assessment. It is then too late to lock the barn door. The horse has already been stolen. The drainage project has been constructed, the cost incurred, and all that is left for the property owner to do is to pay his assessment and "look pleasant." We reiterate, that never has a law of this character been sustained by this Court. All decisions of this Court, cited in support of the constitutionality of the South Dakota statute, can be easily distinguished as they are all of them based upon facts and principles of law which are not found in this case.

The bill in this case attacked directly the constitutionality of the South Dakota Drainage Statute. In the District Court the District judge upheld the constitutionality of the statute but granted an injunction upon other grounds (*Chicago, Rock Island & Pacific Railway Co. vs Risty,* 282 Fed. 364). In the Circuit Court of Appeals JUDGE KENYON, in delivering the opinion of the Court, expressly avoided passing upon the constitutional questions involved and while he expressly admitted that these questions were very grave ones, he held that their determination was not necessary to the decision of the case in that court and affirmed on other grounds the decision of the District Court.

Upon this appeal in this court, the constitutionality of the South Dakota Drainage Statute is again brought

before the court by the averments of the bill and answers and by the evidence introduced upon the trial in the District Court and preserved in the record in this Court. The position taken by the Plaintiff and Appellant is, that the South Dakota Drainage Law is in violation of the provisions of the Fourteenth Amendment to the Constitution and while, as will be discussed in a later portion of our argument, we contend that the proceedings taken by the Board of County Commissioners of Minnehaha County were so irregular as to render them invalid even if the statute were constitutional, we now submit, that on account of the unconstitutional provisions of the South Dakota Drainage Law the Board of County Commissioners of Minnehaha County possessed no authority to make assessments against the property of Appellee for the purpose of defraying the costs of the construction of Drainage Ditch No. 1 and 2.

In concluding our discussion upon this branch of this case we submit that the South Dakota drainage statute is unconstitutional in that no notice to property owners is required before a drainage assessment area is established or the work constructed and consequently the statute is unconstitutional as authorizing the taking of property without due process of law, contrary to the fourteenth amendment to the federal constitution.

II.

THE SOUTH DAKOTA DRAINAGE LAW IS IN VIOLATION OF SECTIONS 2 AND 13 OF ARTICLE VI OF THE SOUTH DAKOTA STATE CONSTITUTION AND IS THEREFORE UNCONSTITUTIONAL.

We now come to the question of the constitutionality of the South Dakota drainage law under the provisions of the South Dakota State Constitution. Section 2 of Article VI of the South Dakota Constitution provides as follows:

"§ 2. No person shall be deprived of life, liberty or "property without due process of law."

Section 13 of Article VI of the South Dakota Constitution provides as follows:

"§ 13. Private property shall not be taken for public "use, or damaged without compensation * * * * *"

It will thus be seen that the South Dakota state constitution contains not only the due process of law clause contained in the fourteenth amendment to the federal constitution but also the just compensation clause contained in the fifth amendment to the federal constitution, thus making the provisions applicable to the state which by the fifth amendment are made applicable to the federal government.

The South Dakota drainage statute has a number of times been before the South Dakota supreme court for construction in various of its phases but the question as to the constitutionality of the statute, by reason of its failure to provide a notice to property owners before the assessment area is determined, has never been presented to the South Dakota supreme court or passed upon by that court. Shortly prior to the institution of the case at bar, a suit was commenced in the circuit court of Minnehaha county, South Dakota, by one Oluf O. Gilseth against the Board of County Commissioners of Minnehaha county and other persons, to restrain certain acts with relation to the making of an apportionment of benefits for the construction of the drainage works in controversy in the case at bar. Gilseth, the plaintiff in that case, was a property owner residing upon the flats north of the city of Sioux Falls upon whose land the County Commissioners were attempting to make an assessment. The South Dakota supreme court held that Gilseth was estopped by his actions with respect to the construction of the drainage works from objecting to an assessment to pay for their cost of construction, and the decision appears as *Gilseth vs Risty*, 46 S. D. 374. In the opinion of the majority of the Court, the Court says: "We do not understand that "appellant questions the constitutionality of the law un- "der which the said project was carried out." The Court thereupon proceeds to determine the case under the assumption that the law is constitutional and that the plaintiff, Gilseth, makes no attack upon it. In the dissenting opinion filed by one of the Judges of the Supreme Court of South Dakota in *Gilseth vs Risty*, the question of the constitutionality of the statute is discussed but the opinion

of the majority of the Court decides the case under the express reservation that the question of constitutionality is not involved.

The Supreme Court of South Dakota, in the case of *Evans vs Fall River County*, 9 S. D. 130, stated the law in that jurisdiction in the following language:

"Notice to the taxpayer is a jurisdictional matter, "and his right to be heard in opposition to an assessment, "or to the amount thereof, is vitally essential to the valid- "ity of every assessment. *Black, Tax Titles*, 488; 2 "*Blackw. Tax Titles*, 953; *Cooley, Tax'n*, 227; *County of* "*Santa Clara vs Southern Pac. R. Co.*, 18 Fed. 385; *Pow-* "*ers vs. Larrabee (N. D.)*, 49 N. W. 724; *Bank vs. Maher*, "9 Fed. 884."

From the foregoing citation it will be seen that the Supreme Court of South Dakota recognizes the doctrine laid down by the Supreme Court of the United States to the effect that in a special assessment proceeding the taxpayer must have the right, at some time or other, and in some manner or other, to be heard both as to the validity and as to the amount of the assessment.

The same argument which we have made relating to the unconstitutionality of the South Dakota drainage statute under the fourteenth amendment to the federal constitution applies with equal force to the statute considered in the light of the provisions of the South Dakota constitution.

We therefore contend that the South Dakota drainage law is unconstitutional under the constitution of that State for the reason that no notice is given the property owner of the proceedings precedent to the determination of the boundaries of the assessment area.

Counsel for Appellants argue that the proceedings had in the case at bar are valid for the reason that, as a matter of fact, the drainage notice did contain a description of the property sufficient to give notice to each property owner whose lands were affected. We do not by any means concede that the notice given was sufficient to apprise property owners that their lands were to be subject to assessment for the payment of the cost of the construction of the drainage project, but even if the Board of County Commissioners of Minnehaha county had pub-

lished a notice sufficient for that purpose it would not have helped the situation. The statute does not require any such notice to be published and is consequently unconstitutional. Validity cannot be injected into an unconstitutional and void statute by taking under it the proceedings which would have to be taken under a constitutional and valid status. The law being unconstitutional, all proceedings under it are invalid *ab initio*.

III.

THE LEGISLATURE OF SOUTH DAKOTA HAS NEVER EXERCISED THE AUTHORITY GRANTED TO IT BY SECTION 6 OF ARTICLE XXI OF THE SOUTH DAKOTA CONSTITUTION PROVIDING FOR THE ORGANIZATION OF DRAINAGE DISTRICTS.

To the proper determination of this case, there is necessary a consideration of just what of the powers granted to it by the South Dakota constitution the legislature of that state has attempted to exercise by the enactment of the South Dakota drainage statute. This involves an analysis of the exact phraseology of the constitutional provision under which the legislature obtained its power to act. Section 6 of Article XXI of the constitution constitutes that authority and is as follows:

"§ 6. The drainage of agricultural lands is hereby "declared to be a public purpose and the legislature may "provide therefor, and may provide for the organization "of drainage districts for the drainage of lands for any "public use, and may vest the corporate authorities there-"of, and the corporate authorities of counties, townships "and municipalities, with power to construct levees, drains "and ditches, and to keep in repair all drains, ditches and "levees heretofore constructed under the laws of this "state, by special assessments upon the property bene-"fited thereby, according to benefits received."

The first clause of the foregoing section declares that the drainage of agricultural lands is a public purpose, and gives the legislature power to "provide therefor." This clause is complete in itself and to determine its meaning and intent requires no aid from the remainder of the section.

The section then goes further and gives the legislature authority to "provide for the organization of drainage districts for the drainage of lands for any public use." This is a power conferred upon the legislature distinct and in addition to that contained in the first clause of the section. It gives the legislature authority to establish drainage districts for the purpose, not only of carrying into effect the power to drain agricultural lands, but for the purpose of carrying on any drainage project for "any public use."

As the section stands, when the first and second clauses are considered together, it appears that three things are provided for: (a) the drainage of agricultural lands is made a public purpose, (b) the legislature is given power to provide for the drainage of agricultural lands, and (c) the legislature is given power to provide for the organization of drainage districts for the drainage of land for any public use.

The constitutional section then continues giving to the legislature authority, (a) to vest the corporate authorities of drainage districts with power to construct levees, drains and ditches and keep in repair all drains, ditches and levees theretofore constructed under the laws of the state, by special assessments upon property benefited thereby, according to benefits received, and (b) to vest the corporate authorities of counties, townships, and municipalities with power to construct levees, drains and ditches and keep in repair all drains, ditches, and levees theretofore constructed under the laws of the state, by special assessments upon the property benefited thereby, according to the benefits received.

Throughout the entire section there appears a clear intent to authorize the legislature to proceed in matters respecting drainage of lands in either of two ways, (a) by the organization of drainage districts with corporate authorities, and (b) by empowering the corporate authorities of counties, townships and municipalities with power to enter upon and carry out drainage projects. It is not made obligatory upon the legislature to follow either system for the construction of drainage. The constitution gives the legislature the option to carry on drainage work by drainage districts organized as separate en-

tities, or to carry on the work through the regularly constituted authorities of counties, townships, and municipalities. The legislature of South Dakota, acting under the constitutional option given it by Section 6 of Article XXI of the constitution, has declined to provide for the organization of drainage districts as separate corporate entities, and has provided for the doing of all drainage work through the corporate authorities of the various counties, to-wit, the Board of County Commissioners, county auditor, county treasurer, and other county officers.

It follows that in the case at bar there was not and could not under the law have been formed any drainage districts. The drainage projects, known as Drainage Ditch No. 1, and Drainage Ditch No. 2, and Drainage Ditch No. 1 and 2, were all conceived and carried out by the county authorities of Minnehaha county under the constitutional provision giving the legislature the power to vest in the county authorities the power to construct levees, drains, ditches, etc. The legislature never attempted to exercise the power given it by the constitution to organize drainage districts, and the application of the term "district" to the assessment area of Drainage Ditch No. 1, Drainage Ditch No. 2, or Drainage Ditch No. 1 and 2 is a misnomer. That term is reserved by the South Dakota constitution for an entirely different sort of organization and should not be used in connection with a drainage project carried on by the Board of County Commissioners under the South Dakota statute.

The situation with respect to this matter was pointed out by Judge Elliott in his opinion upon the trial of this case in the District Court. *Chicago, Rock Island & Pacific Railway Company vs Risty*, 282 Fed. 364. In this opinion, Judge Elliott says, (p. 368): "Pursuant to this "provision of the constitution, the legislature of the state "has provided for the drainage of agricultural lands: "*but nowhere is there any statutory enactment under "which drainage districts may be formed for the drain-"age of lands 'for any public use.'*"

A further examination of the particular wording of Section 6 of Article XXI of the South Dakota constitution discloses the important bearing which the failure of

the legislature to exercise the authority of establishing drainage districts has upon the decision of the case at bar. The wording of the constitutional provision is that the legislature "may provide for the organization of drain-"age districts for the drainage of lands for any public use," and may vest "the corporate authorities thereof," etc. Eliminate the quoted words (which are the only ones in the section referring to drainage districts) from the section and the result would be that the section would read, "The drainage of agricultural lands is hereby de-"clared to be a public purpose and the legislature may "provide therefor, and may vest the corporate authori-"ties of counties, townships and municipalities with pow-"er to construct levees, drains, and ditches, etc."

In other words, the South Dakota legislature is given authority to carry on drainage projects either through the formation of drainage districts as corporate entities, or through the municipal authorities of the counties, townships, and municipalities, but while drainage "for "any public use" may be constructed through corporate drainage districts, drainage of lands for agricultural purposes only may also be carried on by the county, townships and other municipal authorities. The constitution nowhere gives the legislature power to provide that drainage for "any public use" other than the drainage of agricultural lands may be constructed by the county, township, or other municipal authorities. Drainage for any other public purpose must be constructed by districts specially organized therefor.

It consequently follows that the legislature of South Dakota cannot, under the provisions of the state constitution, authorize drainage projects, for other than agricultural lands, to be conducted by the county, township, or other municipal authorities. Such authorities may construct drainage projects for the drainage of agricultural lands, but for any other public purposes the works must be constructed by the corporate authorities of drainage districts established for that purpose.

While the legislature of South Dakota had the right, under the state constitution, to enact a law authorizing the Board of County Commissioners of Minnehaha county to construct a drainage project for the drainage of agri-

cultural lands, it could not, under the constitution, authorize the Board of County Commissioners to carry on any drainage project for any public use other than the drainage of agricultural lands.

It follows, therefore, that if Drainage Ditch No. 1 and 2 was initiated by the Board of County Commissioners of Minnehaha county for a purpose other than the drainage of agricultural lands, the Board exceeded their powers in constructing the dams, ditches, spillway, and other works in Drainage Ditch No. 1 and 2, for which Appellee is now asked to pay a proportionate part. The question whether Drainage Ditch No. 1 and 2 was a project for the drainage of agricultural lands or for some other purpose we will discuss in a separate section of this brief.

IV.

DRAINAGE DITCH NO. 1 AND 2 WAS NOT A PROJECT FOR THE DRAINAGE OF AGRICULTURAL LANDS, AND THE ACTION OF THE BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY IN ENTERING UPON THE PROJECT AND IN CARRYING IT ON WAS *ULTRA VIRES*.

We now come to the consideration of the question as to whether Drainage Ditch No. 1 and 2 was a project for the drainage of agricultural lands or for the carrying out of some other purpose. There are at this time before this court pending appeals in six cases involving Drainage Ditch No. 1 and 2, and there is a divergence of views of the Appellees in various of the six cases as to the status of the drainage proposition. In some of the cases, the Appellees contend that Drainage Ditch No. 1 and 2 was simply a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and that the work was initiated and carried on by the Board of County Commissioners of Minnehaha county as a project for the repairing of Drainage Ditch No. 1 and of Drainage Ditch No. 2. In the case at bar, the position which we take is that Drainage Ditch No. 1 and 2 must be considered as an independent project entered upon by the Board of County Commissioners and that it is not a mere project for the re-

pair of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and is not in any manner controlled by the original proceedings for the construction of the old ditches. We contend that Drainage Ditch No. 1 and 2 must be considered as if it were an entirely new proposition entered upon after the spillway at the outlet of Drainage Ditch No. 1 had been washed out in the spring of 1916.

In the bill in this suit, it is alleged that the Board of County Commissioners of Minnehaha county has spent a sum in excess of $255,000 in the construction of a spillway, dams, and retaining gates, "designed not for the "purpose of drainage of agricultural lands, but solely "for the purpose of controlling and retarding the flow "of water, through the outlet of said Drainage Ditches "No. 1 and No. 2 into the Big Sioux river for the pur-"pose of preventing a change in the channel of said river "and of preventing the drainage of the gravel bed through "which the said city of Sioux Falls obtains its water "supply." It is further alleged that less than five per cent of such money has been expended for any purpose legitimately connected with the construction and maintenance of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The bill further sets up the alleged proceedings for the organization of Drainage Ditch No. 1 and 2.

The answer sets up the organization of Drainage Ditch No. 1 and 2 as a separate organization from Drainage Ditch No. 1 and Drainage Ditch No. 2, and the theory of Appellants is that Drainage Ditch No. 1 and 2 was a separate and independent organization and not a mere continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2, and that its formation was compelled for the purpose of saving the water supply of the city of Sioux Falls, and preventing the change of the channel of the Big Sioux river, and the imperiling of the interests of various property owners.

The position of Appellants throughout this case has been that Drainage Ditch No. 1 and 2 was a new and separate organization. They have so pleaded, and with their allegations in this regard we have no contention to make. The Appellee in this case is satisfied to rest this proposition upon the allegations of the answer and to concede that Drainage Ditch No. 1 and 2 was a new or-

ganization and was entirely independent of the original ditches. As we have said, in others of the six cases tried at the same time and upon the same record as this case, the plaintiffs (Appellees in this court) contested the claim of the defendants and intervenors (Appellants in this court) that Drainage Ditch No. 1 and 2 was a new and independent proposition and contended that all of the work done by the Board of County Commissioners was done merely as a continuation of the work upon the original ditches, Drainage Ditch No. 1 and Drainage Ditch No. 2. JUDGE ELLIOTT, in his opinion filed in the District Court, arrived at the conclusion that Drainage Ditch No. 1 and 2 was not a new and independent organization but was simply a continuation of the old original ditches. *Chicago, Rock Island & Pacific Railway vs Risty*, 282 Fed. 364 (p. 374 *et seq*).

With due respect to the opinion of the learned District Judge (who evidently felt inclined to hold so as not to preclude the holders of the drainage ditch warrants from a right to recover the amount of their investments from the property owners within the original assessment area of the Drainage Ditch No. 1 and of Drainage Ditch No. 2), we respectfully submit, that under the allegations of the bill and answer in this case, and under the evidence contained in the record, Drainage Ditch No. 1 and 2 must be deemed to be a new and independent organization and must stand or fall as such. If it possesses no life of its own, life cannot be injected into it by treating it as a continuation of the old original ditch organizations.

It appears from the evidence in this case that after the outlet of Drainage Ditch No. 1 had been washed out in the spring of 1916, various plans were proposed for the controlling of the water so as to prevent the formation of a new river channel and the draining of the gravel bed, from which the city of Sioux Falls obtained its water supply. No changes in Drainage Ditch No. 1 and Drainage Ditch No. 2 were required for the purpose of draining agricultural lands in the flats north of the city of Sioux Falls. The two ditches were working beautifully, so far as that purpose was concerned. They formed a perfect, complete and satisfactory system for the drainage of the flats. The property owners in the

flats could not have asked for any drainage system more complete. The trouble was, that instead of draining too little, the ditches drained too much, and were too efficient in their operation. No change in them was required for any purpose connected with the drainage of agricultural lands. The only people interested were those who objected to the formation of a new channel for the Big Sioux river and who were interested in maintaining a water supply for the city of Sioux Falls. The change in the course of the river, if made, would have operated to destroy various industries dependent upon the water power at the dams south of the falls. It would also have prevented the flow of the water through the city limits, and would have forced the city of Sioux Falls to seek some other municipal water supply.

The Board of County Commissioners, after various plans had been considered and for one reason after another abandoned, finally formed a new organization under the name of Drainage Ditch No. 1 and 2, and went ahead and expended upwards of $250,000 in the construction of a spillway, retaining walls, retaining dams, ditches, etc. The greater part of the money was invested in a spillway, dam and retaining walls which were purposely intended to retard, rather than to accelerate the flow of the surface water which collected upon the flats north of the city of Sioux Falls, and which consequently were intended to hinder rather than to facilitate the drainage of the flats.

After $255,000 and over had been expended upon the spillway and other water retaining works, the Board of County Commissioners proceeded to make an apportionment of benefits upon the lands "affected" by the improvement. In the assessment area, the Board of County Commissioners included not only the territory which had been included in the assessment area of the original ditches, Drainage Ditch No. 1 and Drainage Ditch No. 2, but also included all of the lands and lots within a considerable distance on either side of the Big Sioux river between the south boundary of the property in the assessment areas of the original ditches, along the channel of the Big Sioux river for a distance of some nine miles, along where the river runs west and south of

the city of Sioux Falls and through the city, and up to a point a short distance north of Sioux Falls. The ostensible reason for the inclusion of all this additional territory was the alleged fact that the property along the river was subject to floods at the time of freshets which would be relieved by the construction of the spillway and other water retaining works. Upon the trial, it was shown that with the exception of a small tract of territory immediately south of the original ditch assessment areas, the remainder of the lands, for a space of eight or nine miles along the channel of the Big Sioux river, had never suffered from flood waters, excepting in the spring of 1881, and that the occasion for the flood in that year was not the collection of water upon the flats north of the city of Sioux Falls, but the forming of an ice gorge at a point in the river in the southeast portion of the city. There was consequently a total lack of any proof in the record that the territory, along the channel of the river and through the city of Sioux Falls attempted to be included in the assessemnt area, was in any manner affected, beneficially or otherwise, by the construction of the spillway and other water retaining works.

In addition, the Board of County Commissioners attempted to proportion "benefits" to the City of Sioux Falls, (this Appellee), the Northern States Power Company (owner of the waterpower on the Big Sioux river above the falls), and upon four railroad companies having railroad tracks and station grounds situated within the attempted assessment area. In the case of Appellee, and of two of the railroad companies sought to be assessed, property was owned both in the assessment areas of the original ditches and in the additional territory attempted to be included within the assessment area of Drainage Ditch No. 1 and 2. The Northern States Power Company and two of the railroads owned property only in the new territory and had no mileage or other property in the original assessment areas. In the decrees entered in the various railroad cases, the District Court enjoined the assessment of the railroad properties not included in the original assessment areas but reserved, without prejudice, the determination of the question whether the

railroad companies having land both in the original assessment areas and in the new assessment area should be held liable for an assessment upon its property in the original assessment area. In the case at bar the decree enjoined any assessment upon all of the property of Appellee.

The question therefore arises whether, under the record in this case, the Board of County Commissioners of Minnehaha county possesses authority to make any apportionment of benefits whatsoever, or any assessment upon any property whatsoever, for the cost of the construction of the works in Drainage Ditch No. 1 and 2. Our contention in this regard is as follows:

It is alleged by the defendants and Appellants in their answer, and Appellee admits it to be a fact, that Drainage Ditch No. 1 and 2 was a new and independent proposition and not a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and cannot be considered as a proposition for the repair of the original ditches. It is a project which must stand or fall upon its own footing.

Under the evidence in this case, Drainage Ditch No. 1 and 2 was not a project for the drainage of agricultural lands but was a project for another "public use," to-wit, the preservation of the water flowage in the channel of the Big Sioux river and of the supply of water in the gravel bed from which the city of Sioux Falls obtains its water supply. Neither of these propositions involves the drainage of agricultural lands. Drainage Ditch No. 1 and Drainage Ditch No. 2 had completely accomplished the object of draining the flats north of the city of Sioux Falls. If those drainage works were damaging other property interests, the remedy for the persons interested was to have the ditches abated as nuisances. Instead of pursuing this course, the Board of County Commissioners of Minnehaha county entered upon the construction of an elaborate system of water retaining works by which the water, which was collected from the flats into Drainage Ditch No. 1 and Drainage Ditch No. 2, could be retained until it could be passed off gradually into the Big Sioux river. To have abated Drainage Ditch No. 1 and Drainage Ditch No. 2 as nuisances, would have been to permit

the water, accumlating upon the flats, to remain there until it could flow off through its natural channel around the bends in the Big Sioux river, the same as it did before Drainage Ditch No. 1 and Drainage Ditch No. 2 were constructed. Instead, however, of doing this, the Board of County Commissioners proceeded to construct a new water retaining system by which the water could be retained upon the flats until it could gradually be drawn off, partly through the natural channel of the river and partly through a restricted passageway formed by the spillway and its attendant retaining walls and dams. In other words, the Board of County Commissioners proceeded to spend $250,000 and over for the purpose of accomplishing the same object that could have been accomplished by damming up the original ditches and leaving the flats in the same condition that they were before the original ditches were constructed. While some evidence was introduced, tending to show that a portion of the water collecting upon the flats passed off through the spillway, it remained in the evidence almost uncontradicted that the situation in the flats above the city of Sioux Falls is as bad as it was before any drainage ditches were constructed.

From all of the evidence in the record in this case, it would appear that the construction of the spillway and other works, under the organization of Drainage Ditch No. 1 and 2, was not for the purpose of draining agricultural lands but was for an entirely different purpose. This is the conclusion to which JUDGE ELLIOTT came in his opinion in the District Court, and upon this subject JUDGE ELLIOTT says, *Chicago, Rock Island and Pacific Railway Company vs. Risty*, 282 Fed. 364 (p. 378):

"There is another and further suggestion: I am of "the opinion that this reconstruction of the old spillway "without change of location, the repair of the break from "the river into the ditch, the cleaning of the ditch, the "change of the headgates where the flood waters are "taken from the river, everything that was done under "this pretended establishment of a new ditch, could not "have been viewed in the same light or as serving the "same purpose as the construction of the original ditches,

"because the thing that caused the board of commis-
"sioners to take any action with reference to the condi-
"tion that then existed was the danger that existed be-
"cause of the conduct of the water down through these
"two drainage ditches to and through this spillway. The
"danger that was threatened was not that the agricultural
"lands would not be drained, but that immense damage
"was threatened, that the course of the river was to be
"diverted to this cut-off, that great areas of land were
"threatened to be cut away by this river 100 feet deep,
"and that the water supply of the city was threatened
"to be taken away because of this drainage ditch and
"this imperfect spillway, because the water was to be
"taken from the river and all of the benefits of the river
"for several miles, through and around the city of Sioux
"Falls, would be destroyed. The power of the Northern
"States Power Company would be destroyed, by taking
"the water from the river. If it had not been for those
"conditions, for these threatened dangers, no action would
"have been taken; the ditches would have continued to
"function as they had functioned before. If the spill-
"way had been properly constructed originally, and if it
"had not proven inadequate, there would have been no
"cause for any action by the board in the year 1916.
"Every consideration that impelled action by the board
"was some phase of the threatened danger by reason
"of the inadequate and imperfect construction of these
"two ditches. Neither of these considerations that in-
"fluenced the action of the board *had anything to do with*
"draining agricultural lands."

As has been shown, the legislature of South Dakota has never passed an act, putting into effect the authority vested by the constitution in the legislature to create drainage districts. As has also been shown, while drainage of agricultural lands can be carried on by county, township, and other municipal authorities, drainage for other "public uses" can only be constructed by drainage districts through their corporate authorities. It appearing from the record in this case that the work done under the organization of Drainage Ditch No. 1 and 2 was not for the purpose of agricultural lands but for other "public uses," it follows that the Board of County

Commissioners of Minnehaha county exceeded its authority in attempting to organize Drainage Ditch No. 1 and 2 and to construct the spillway and attendant works. Upon this proposition, JUDGE ELLIOTT, in his opinion, says:

"It may be said that to remedy these wrongs consti-
"tuted a public use, as referred to in the constitution of
"the state of South Dakota. Admitting that that is true,
"we are confronted with the proposition that there has
"been no legislation, conforming with the provisions of
"the constitution, authorizing the legislature to provide
"for the establishment of drainage districts and in the
"naming of officers with the powers therein referred to.
"If, therefore, any claim were made that the commis-
"sioners were acting under this authority, independent
"of the provision of law with reference to the drainage
"of agricultural lands, the answer is that the provision
"of the constitution is not selfexecuting, and that no leg-
"islation has been provided carrying this provision of
"the constitution into effect."

We therefore submit, that as the construction of the spillway and other attendant works was not a project for the drainage of agricultural lands, and as drainage for public uses other than the drainage of agricultural lands can, in South Dakota, only be carried on by the corporate authorities of drainage districts, and as the legislature of South Dakota has never authorized the organization of drainage districts with corporate authorities, all of the acts of the Board of County Commissioners of Minnehaha county, in attempting to organize Drainage Ditch No. 1 and 2, and in constructing the spillway and attendant works under such organization, were *ultra vires*, and that no apportionment of benefits or assessment for the cost of such construction can be made upon the property of Appellee.

V.

THE SOUTH DAKOTA DRAINAGE LAW IS UNCONSTITUTIONAL, SO FAR AS RESPECTS ASSESSMENTS OF THE PROPERTY OF APPELLEE, IN THAT IT PROVIDES FOR THE GIVING OF NO NOTICE WHATEVER OF THE APPORTIONMENT

AND EQUALIZATION OF BENEFITS TO MUNICIPALITIES.

In the preceding discussion of the South Dakota drainage law, we have considered the subject of the notice required by the statute to be given to property owners in general. We now desire to call the attention of the court to the provisions (or want of provisions) in the statute, relating to the notice to be given to railroad companies and to municipalities.

So far as concerns the statutory provisions relating to the notice to be given before a drainage project is entered upon by the Board of County Commissioners under the South Dakota drainage law, there is no difference as respects railroads, municipalities and other property owners. The only notice, as has been seen, is a general notice to all persons "affected" by the proposed drainage project.

When we come to the matter of the notice given for the equalization of benefits, a singular situation is presented by the provisions of the statute in, that while the law provides for the publication of a notice to the owners of land, there is no provision whatever for the publication of any notice to railroad companies and to municipalities.

The provisions respecting the notice to be given of the equalization of proportion of benefits is found in Section 8463, South Dakota Revised Code, 1919. This section was evidently originally drafted for the purpose of providing a method for the equalization of assessments upon agricultural lands. The method, provided by the statute, for arriving at the assessment and equalization of benefits, is to take some "particular tract as a unit" and then with this tract as a measuring stick to determine, in number of units, the benefits received by the remaining tracts of land. This system is one which is in its nature applicable to agricultural lands, but which cannot well be applied to other classes of property, such as railroads and the property of municipalities. In the case of railroads, the taking of a particular tract of land as the unit, or measuring stick cannot be made to work out successfully unless the taxing authorities are content to assess railroads merely by virtue of the railroad

ownership of the tracts of land comprised in the right of way within the assessment area. In other words, the only way in which the proportion of benefits to railroad property could be determined, under the system provided by the statute, would be to consider merely the area of the right of way and proportion benefits to it the same as to the other agricultural land within the assessment area. So too municipalities can only be assessed by virtue of the ownership of land within the assessment area.

Evidently the legislature, in enacting the South Dakota drainage law, was not satisfied to have railroad companies and municipal organizations pay assessments for the construction of drainage works upon the same basis as the owners of agricultural lands, and in enacting Section 8463, South Dakota Revised Code, 1919, after providing the method for the assessment of the proportion of benefits upon lands by selecting some particular tract as a unit, there was added to the Section (something in the nature of an afterthought) the clause, "the pro-"portion of benefits which any county, city, town or "township may obtain by the construction of such drain-"age to highways or otherwise, and *the benefits which "any railroad company may obtain for its property by "such construction,* shall be fixed and equalized together "with the proportion of benefits to tracts of land." No method of arriving at the assessment and equalization is provided by the statute. The "particular tract as a unit" system is selfevidently inapplicable in such cases but the legislature has provided nothing to take its place. The law gives the Board of County Commissioners the naked power to fix and equalize the proportion of benefits to counties, cities, towns, townships, and railroad companies, but provides no method upon which the assessment and equalization can be based.

The notice of equalization of proportion of benefits, provided by Section 8463, "shall state the route and "width of the drainage established, a description of each "tract of land affected by the proposed drainage and the "names of the owners of the several tracts of land as "appears from the records of the office of the Register of "Deeds, at the date of the filing of the petition, and the

"proportion of benefits fixed for each tract of property, "taking any particular tract as a unit, and shall notify "all such owners to show cause why the proportion of "benefits shall not be fixed as stated." This is a notice directed solely to the owners of tracts of land within the assessment area. It does not purport to be a notice to a county, city, town, township, or railroad company respecting the assessment or the equalization of proportion of benefits upon the property belonging to any of such organizations. The statute authorizes the Board of County Commissioners to assess the "proportion of benefits" which any county, city, town or township may obtain by the construction of drainage to highways or otherwise, but does not provide for the giving of any notice to the municipality affected.

The fact, however, remains that the legislature of South Dakota has made no provision whatever for the giving of notice to railroad companies, cities, towns, or townships, of the assessment or equalization of benefits supposed to be derived from the construction of the drainage works. It consequently follows that as far as railroad companies, counties, cities, towns, and townships are concerned, the statute provides for no notice whatever, at any stage of the proceeding, of the assessment or of the tax. Even if the South Dakota drainage statute should be held valid as far as respect the matter of notice to the owners of agricultural lands, it is clearly unconstitutional as to railroads and municipalities by reason of its failure to provide for any notice whatever at any stage of the proceedings. It clearly comes within the inhibition of the Fourteenth Amendment and within the doctrine laid down by the Supreme Court in numerous cases.

Central of Georgia Railway Company vs Wright, 207 U. S. 127,
Londoner vs Denver, 210 U. S. 373,
Soliah vs Heskin, 222 U. S. 522,
Turner vs Wade, 254 U. S. 64

The South Dakota drainage statute having failed to provide for the giving of any notice, at any stage of the proceedings prior to the time the tax becomes absolute,

to railroad companies or municipalities, any assessment or tax imposed upon each corporation or municipality under the statute is without due process of law and void.

VI.

THE ATTEMPTED ASSESSMENT UPON THE PROPERTY OF APPELLEE WAS ARBITRARY, UNJUST, AND ILLEGAL, AND CONSTITUTES A DISCRIMINATION SO PALPABLE AND ARBITRARY AS TO AMOUNT TO A DENIAL OF THE EQUAL PROTECTION OF THE LAW.

Under the proposed assessment of benefits, out of a total of 32,549.62 units there were assessed against Appellee 3145.95 units, upon which the assessment of Appellee would be in excess of $29,900. The methods used by the Board of County Commissioners in arriving at these figures is disclosed by the testimony of H. Rettinghouse, a civil engineer employed by the Board of County Commissioners to make a survey of the assessment area, and who made the computations contained in the assessment of benefits adopted by the Board. Mr. Rettinghouse was called by Appellants as a witness and upon the trial testified (Record pp. 271-280), as follows:

"We used this unit selected as one and compared "the other real estate with it. It was decided by the "Board that the acre in question was worth one hundred "dollars prior to the improvements and that it was "worth one hundred twenty-five dollars subsequent to the "improvements. Therefore the actual value of benefit "to the unit selected was twenty-five dollars. All the "agricultural land was assessed in relation to this unit. "Many of the lands were only 30 or 40 per cent depend-"ing upon the amount of benefit derived, as compared "with this unit, being one hundred per cent. There were "other lands that were as high as three hundred and fifty "per cent of this unit. I am familiar with the cost of "construction and upkeep of highways. In arriving at "the benefit to the highways within this drainage area "we estimated the benefit in this way. There is a certain "amount of annual maintenance necessary for any road, "and there is more than that amount under flood con-

"ditions. That is to say, a road that is periodically "flooded as against a road that never is flooded. The "difference in the estimated cost of maintenance was "capitalized, or represented the interest on a certain "sum of money, and we consider the capitalized portion "as a real benefit. We then, after obtaining that re- "sult after making a great many calculations, taking "into consideration the various locations, some of them "benefitted more than others.

"We divided the amount arrived at by the value of "the unit of $25, thereby obtaining the number of units "as a proportional benefit for these roads. The sum "we divided by the unit represented the capitalized value "to that part of the highway; we applied the same "method to the streets and highways of the City of "Sioux Falls. We did not apply the acreage basis to "the city property, excepting possibly the grounds where "the waterworks are located. In applying the benefit "to the unit and what the Board took into consideration "as elements of benefit to the Milwaukee Railway Com- "pany, we took into consideration the fact that in the "first place there were practically three elements. First "was the right-of-way on the acreage basis, which was "estimated in proportion to the adjacent lands. Second, "that it was possible to shorten or abandon certain "bridges. In order to determine the benefits derived "therefrom is simply a mathematical proposition. It "costs a certain amount of money each year in order "to maintain a bridge, whether it is a pile bridge or a "steel bridge. We know how long these structures will "last. We figure the cost of a bridge and divide it by "the number of years in order to get the amount that "is necessary to be expended each year for replace- "ment. Taking the amount in dollars and cents multi- "plied by the length of the bridge and divide that and "capitalize that at 7 per cent, which is the usual rate "of interest, and that determines the amount of benefit. "This is the second element. The third element is "the fact that by reason of the flooding of the territory "in which railroads are located, washouts often occur. "We obtained data and from my personal knowledge and "experience I have a very good idea what it costs to re-

"pair washouts periodically appearing and we estimated "as close as possible how much it would amount to every "year and capitalized that amount again.

"Again as an additional element, a road-bed is solid-"ified or made stronger by not being subject to floods. "A road-bed that is constantly or for great lengths of "time subjected to submersion is certainly weakened, "and again, so far as humanly possible, we figured the "amount of benefits in dollars and cents and after get-"ting all of these results or capitalized amounts, we di "vided that by twenty-five as our measure and determined "the number of units of benefit. That system and general "method and plan was used to determine the amount "of benefits that each railroad received from these "separate elements."

The statement of Mr. Rettinghouse, the engineer who made the assessment of benefits for the Board of County Commissioners of Minnehaha county, is upon its face sufficient to demonstrate the fact that in arriving at the proportion of benefits to be assessed against Appellee, the Board used as a basis for arriving at the assessment a method so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. The assessment was clearly upon a fanciful view of benefits to be derived by Appellee from the drainage project. The basis used was not authorized by any provision of the South Dakota drainage law but was evolved from the inner consciousness of the County Commissioners of Minnehaha county and of the civil engineer employed by them. The basis was so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. It constituted a discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law.

We do not deem it necessary to discuss this proposition at further length. In the recent case of *Kansas City Southern Railway Company vs Road Improvement District No. 6*, 256 U. S. 658, this Court has emphatically condemned similar methods of assessment.

We respectfully submit, that even if the South Da-

kota drainage were constitutional and there were no other valid objections to the proceedings of the Board of County Commissioners of Minnehaha County in the organization of Drainage Ditch No. 1 and 2, and in the construction work done thereunder, the assessment made upon Appellee cannot be sustained for the reason that it is so arbitrary and unjust and so confessedly founded upon a fanciful basis as to deprive Appellee of the equal protection of the law.

VII.

THE DISTRICT COURT POSSESSED JURISDICTION TO ENTERTAIN AND DETERMINE THIS SUIT.

Counsel for Appellants have filled a great portion of their brief with arguments upon objections to the jurisdiction of the District Court in this suit. We do not deem it necessary to take up these various objections and discuss them *seriatum*. The questions at issue, involving as they do the constitutionality under the Federal Constitution, together with the amount involved and the diversity of citizenship, are amply sufficient to sustain the jurisdiction of the court.

Counsel for Appellants strenuously contend that Appellee should have waited until after the Board of County Commissioners of Minnehaha county had finished the equalization of benefits before instituting this suit. This case is, however, not one in which any such delay of proceedings was necessary. The law, under which the Board of County Commissioners was proceeding, was unconstitutional. The Board was a trespasser from the very commencement of the assessment proceedings. After the Board of County Commissioners had committed one illegal act, in making the assessment of benefits, it was certainly not incumbent upon Appellee to wait before instituting legal proceedings until after the Board had committed further illegal acts. Jurisdiction to maintain a suit to restrain the commission of a tort becomes fixed as soon as the first tortuous step has been taken by the tort feasor. It is not necessary for the person injured

to wait until after the threatened damage has been completed. The Board of County Commissioners of Minnehaha county invaded the rights of Appellee when it made the assessment of benefits, and the right of action then became complete.

In our view of the issues involved in this case, the points which we have raised in the foregoing discussions in this brief are a sufficient answer to all questions concerning the jurisdiction of the court.

VIII.

APPELLEE IS NOT ESTOPPED BY ITS ACTS FROM MAINTAINING THIS SUIT.

In their brief, counsel for Appellants make a somewhat elaborate attempt to show that Appellee is estopped from maintaining this suit. It is conceded that Appellee is a municipal corporation. It further appears both from the pleadings and from the evidence that the washing out of the outlet to Drainage Ditch No. 1 in the spring of 1916 threatened to divert the water flowage in the Big Sioux river to a new channel which would cut off about nine miles of the natural river channel where it flows through the city of Sioux Falls, and would also operate to drain the gravel bed on the flats north of the city of Sioux Falls from which the city obtains its municipal water supply. It must consequently be conceded that the city of Sioux Falls was vitally interested from a municipal standpoint in the drainage situation in the areas drained by Drainage Ditch No. 1 and Drainage Ditch No. 2.

It also appears from the evidence in the case that on August 3, 1916, there was filed in the office of the city auditor of the City of Sioux Falls a certain petition signed by F. L. Blackman and other persons, and that this petition was signed by the mayor and city auditor of the city of Sioux Falls on its behalf. (Record pp. 41-46. 246-247.)

It further appears from the evidence that the Blackman petition, executed by Appellee by its mayor and city auditor, was the petition used by the Board of County Commissioners of Minnehaha county upon which they

based their proceedings in the organization of Drainage Ditch No. 1 and 2.

The contention of Appellants is that because Appellee was one of the petitioners who signed the Blackman petition, Appellee is estopped from making any complaint with respect to the establishment of Drainage Ditch No. 1 and 2, or objecting to the regularity of the proceedings taken by the Board of County Commissioners.

We concede the general principle of law that where a man asks to have a certain thing done he cannot afterwards complain because his request has been complied with. Our contention in this case is, however, that, under the record made upon the trial in the district court and now before this court, it does not appear that Appellee ever petitioned for or consented to the action taken by the Board of County Commissioners in establishing Drainage Ditch No. 1 and 2, and in constructing a spillway, retaining walls, dams, and other works under that organization.

A man may be estopped from complaining because the thing has been done which he has requested to be done, but there is no rule of law by which a man is estopped from objecting to the doing of an act which he has not requested, simply because he made a request that another and different act be performed. The mak ing of a request to a public officer, or board to perform a certain act within the scope of the official power of the officer, or board does not give carte blanche for the performance of the act in a wholly illegal manner. Public officials are to be presumed to act in accordance with the authority conferred by law upon them, and no one is bound to take notice of the fact that a public officer or board will act irregularly or illegally in any matter lawfully brought before him or it.

There is also a very clear distinction to be drawn between acts which constitute an estoppel as to an act to be done in the future and those which constitute an estoppel after full notice of the act having been done. A man, by accepting the benefits of an illegal act, may preclude himself from raising the question of the illegality of the act, but there is no principle of law by which a man is estopped from complaining of an illegal act to be

done in the future and, especially when the act alleged to constitute the estoppel is done without any knowledge of an intended illegal performance of a lawful duty.

If, after Drainage Ditch No. 1 and 2 had been organized and $255,000 expended by the Board of County Commissioners in the construction of the spillway, dams, retaining walls, and other works, Appellee had approved the acts of the Board of County Commissioners with full knowledge of their illegality, and had accepted the benefits of them, it might have placed itself in a position in which it would be estopped from objecting to the illegality of the acts of the Board of County Commissioners. No such situation appears in the record. The only estoppel proven is the signing of the Blackman petition on behalf of the Appellee. There is nothing in the record to show that Appellee by any act subsequent to the construction of the drainage works in Drainage Ditch No. 1 and 2 condoned the illegal acts of the Board of County Commissioners or in any manner estopped itself from complaining of them.

As a matter of fact, the Board of County Commissioners of Minnehaha County did not comply with the petition of Appellee and the other petitioners in the organization of Drainage Ditch No. 1 and 2. The petition is set out in full in the record. (Record pp. 43-46). This petition asked for the reconstruction and improvement of Drainage Ditch No. 1 and Drainage Ditch No. 2, and the construction of a spillway at the outlet of these ditches. The petition set forth in extenso the route of Drainage Ditch No. 1 and Drainage Ditch No. 2 and of the proposed additions thereto.

The Board of County Commissioners, on August 3, 1916, passed a resolution for the filing of the petition and the transmission by the county auditor of a copy to the state engineer. (Record pp. 46-47.) On August 14, 1916, The Board of County Commissioners adopted a resolution for a survey of the 'proposed drainage.' (Record p. 48.) On September 13, 1916, the Board passed a resolution 'fixing the exact line and width of ditch and fixing the time and place for hearing of petition.' On September 15, 1916, the Board made a 'drainage ditch notice' returnable October 2, 1916, (Record pp. 53-63)and on October 3,

1916, the Board adopted a resolution 'establishing Drainage Ditch No. 1 and 2.' (Record pp. 50-53.)

An examination of these proceedings of the Board of County Commissioners discloses the fact that the Blackman petition, which was the one signed by Appellee, was a petition to 'reconstruct and improve' Drainage Ditch No. 1 and Drainage Ditch No. 2, and to 'construct a new spillway or outlet to said drainage ditches.' It was not a petition for the organization of a new and separate ditch organization. All that Appellee and the other petitioners had in mind at the time the petition was signed was to have Drainage Ditch No. 1 and Drainage Ditch No. 2 repaired so that Drainage Ditch No. 1 at its outlet would not continue washing a new channel for the Big Sioux river through the bluff, thereby diverting the river flowage from its natural channel and draining the underlying gravel bed. There was no intention whatever upon the part of Appellee and the other petitioners to ask for the formation of a new, separate, and independent drainage organization.

In organizing Drainage Ditch No. 1 and 2, the Board of County Commissioners proceeded further than the Board was authorized to do by any petition which was before them for action. In signing the Blackman petition, Appellee had a right to rely upon the Board proceeding in a legal manner and had no notice of the fact that the Board, instead of acting under the petition and repairing Drainage Ditch No. 1 and Drainage Ditch No. 2, as requested in the petition, would attempt to organize an entirely new drainage proposition. Appellee is consequently not estopped from complaining of the action of the Board of County Commissioners in this regard.

The Blackman petition, as signed by Appellee and presented to the Board of County Commissioners, provided for the repair and improvement of Drainage Ditch No. 1 and Drainage Ditch No. 2. These ditches were organizations for the draining of agricultural lands, a purpose within the jurisdiction of the Board of County Commissioners. The proposition fathered by the Board in the organization of Drainage Ditch No. 1 and 2 was for an entirely different purpose and was intended for the protection of the various persons, corporations, and

municipalities interested in the preservation of the natural flowage of the Big Sioux river and in the conservation of the water supply in the gravel bed from which the city of Sioux Falls obtained its municipal water supply. This might be termed a 'public use' but under the South Dakota constitution drainage works for a public use other than the drainage of agricultural lands could only be carried on through the corporate authorities of a regularly organized drainage district. Such a project was beyond the powers of the Board of County Commissioners. In establishing Drainage Ditch No. 1 and 2 the Board of County Commissioners consequently acted ultra vires, and Appellee is not estopped from complaining of such action.

It will also be noticed that the Board of County Commissioners paid absolutely no attention to the request of the petitioners in the Blackman petition in establishing the drainage routes in Drainage Ditch No. 1 and 2, and the routes specified in the surveyor's report are different from those outlined in the petition, while the routes adopted by the resolution of the Board do not conform either to the routes specified in the petition or those outlined in the report of the surveyor. After Drainage Ditch No. 1 and 2 was formed and the Board of County Commissioners proceeded with the construction work, it relegated to the scrap pile the petition, the surveyor's report and the resolution establishing Drainage Ditch No. 1 and 2, and proceeded to construct ditches along lines entirely different from those set forth in either the petition, the surveyor's report, the drainage ditch notice, or the resolution establishing Drainage Ditch No. 1 and 2. All of these acts were without the consent of Appellee, and it can scarcely be said that it estopped itself from complaining of them because it signed the Blackman petition asking for making of repairs on Drainage Ditch No. 1 and Drainage Ditch No. 2.

A further answer to the estoppel plea is this: Under the South Dakota drainage law, no notice was required to be given Appellee until the assessment of benefits had been made. Up to that time, Appellee had no knowledge that its property, situated outside of the original assessment areas of Drainage Ditch No. 1 and of

Drainage Ditch No. 2, was 'affected' by the drainage construction, or would be assessed for the cost thereof. We do not concede that, under the South Dakota statute, any notice was ever given to Appellee that an assessment had been made upon its property for the statute, as had been seen, does not provide for the giving of any notice whatever to railroad companies or municipalities. If, however, it should be conceded, for the sake of argument, that the notice published by the Board of County Commissioners, after the assessment had been made, was a notice to Appellee, it was the first notice that Appellee had ever received. All of the acts under which an estoppel is claimed by Appellants were done during the time of the construction work and long prior to the making of the assessment of benefits and to the publishing of the equalization notice.

We respectfully submit that even if the acts set forth in the record were sufficient to constitute an estoppel upon the part of Appellee that such acts could not constitute an estoppel for the reason that, at the time they were done, Appellee had received no notice that its property within the new territory sought to be assessed was within the assessment areas of Drainage Ditch No. 1 and 2, and had no knowledge that an assessment was in contemplation. We deem it unnecessary to discuss the estoppel proposition at further length.

IX.

IN CONCLUSION

In the record of this case there is ample evidence of the greatest ignorance, ineffeciency, and extravagance upon the part of the Board of County Commissioners of Minnehaha county in the construction of the spillway, retaining walls, dams, and other works under the organization known as Drainage Ditch No. 1 and 2. Plans for the work were adopted and then the adoption rescinded. Plans and specifications for the construction of a spillway were obtained and bids advertised for and received for the construction in accordance with the plans. The bids were rejected upon the ground that they were too high, the plans were then thrown into the waste basket and contractors were employed to construct a spillway upon

the cost-plus plan, the contractors to receive compensation for the material and labor used and, in addition, a profit of nine per cent. The construction of the spillway was entered upon without any plans therefor being made, and the plans were drawn after the spillway had been completed, or practically completed. The cost of the spillway so constructed was approximately $150,000, or more than three hundred per cent of the amount of the bids which were rejected by the Board as being too high. The spillway and other works, when completed, have failed to accomplish successfully the drainage of the flats north of the city of Sioux Falls. The property owners in the flats are in practically the same, or possibly in a worse condition, than they were prior to the original construction of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The works constructed, under the organization of Drainage Ditch No. 1 and 2, simply operate to retain the surface water upon the flats and not to drain it off. They are successful in preventing the diversion of the channel of the Big Sioux river and in preventing the draining of the gravel bed from which the city of Sioux Falls obtains its water supply. Those two objects have successfully been accomplished but the same results could have been attained by placing, at a trifling expense, earthwork dams in proper places along the course of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The spillway and other works, as completed in Drainage Ditch No. 1 and 2, have operated to destroy the efficiency of the original ditches as drainage propositions, but have accomplished nothing that could not have been accomplished at a trifling expense by simply abandoning the old ditches and preventing the flow of water through the bluff and into the Big Sioux river below the falls.

The Board of County Commissioners of Minnehaha county, in the work done by them on Drainage Ditch No. 1 and 2, seem to have acted at haphazard and without any well defined plan of procedure. The one thing which they have accomplished successfully has been to expend upwards of $250,000 upon works which are useless as a drainage proposition, and, with interest, the entire indebtedness which has now accumulated is in excess of $300,000. The intervening Appellants, who hold

the drainage ditch warrants issued by the Board of County Commissioners of Minnehaha county upon Drainage Ditch No. 1 and 2, are certainly in an unfortunate position. That they are in a fair way to lose their investment is, however, no reason why Appellee, an "innocent bystander," should be "made the goat" and forced to pay for the errors, mistakes, and wild extravagances of the Board of County Commissioners of Minnehaha county. It was not through any fault of Appellee that Drainage Ditch No. 1 and 2 was organized and the spillway and other works constructed. It is in no manner responsible for the acts of the Board of County Commissioners or for the mistakes of judgment of the intervening Appellants, in investing in the warrants.

In conclusion, we submit, that for the reasons which we have hereinbefore set forth, the South Dakota drainage law is unconstitutional under both the federal and the state constitutions; that the proceedings under which Drainage Ditch No. 1 and 2 was organized were illegal and void; that the work done under such organization was without authority of law; that the attempted assessment upon the property of Appellee is founded upon a fanciful, arbitrary, and illegal basis; that the District Court possessed jurisdiction to hear and determine this suit; and that, for these and the other reasons hereinbefore set forth, the decree of the District Court and the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

PROVISIONS OF SOUTH DAKOTA CONSTITUTION

SECTION 2 OF ARTICLE VI.

§ 2. No person shall be deprived of life, liberty or property without due process of law.

SECTION 13 OF ARTICLE VI

§ 13. Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained, and before possession is taken. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.

SECTION 6 OF ARTICLE XXI

§ 6. The drainage of agricultural lands is hereby declared to be a public purpose and the legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest the corporate authorities thereof, and the corporate authorities of counties, townships and municipalities, with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby, according to benefits received.

APPENDIX B

SOUTH DAKOTA DRAINAGE STATUTES

(NOTE: The section numbers at the beginning of each paragraph are those of the South Dakota Revised Code of 1919. The references at the end of each paragraph are to the Session Laws of the various years. The paragraphs as printed constitute the law as it stood at the time of the transactions involved in this suit.)

§ 8458. POWER OF COUNTY COMMISSIONERS. The Board of County Commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural land. (§ 1, ch. 98, 1905; § 1, ch. 134, 1907).

§ 8459. PETITION. Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in whole or in part, and a general statement of the territory likely to be affected thereby. The petition shall be accompanied by a bond with sufficient sureties to be approved by the county auditor, conditioned to pay all expenses incurred in case the board does not grant the petition or the same is denied on appeal. Such petition may be presented at any regular or special meeting of the board, and, if sufficient in form, shall be ordered filed with the county auditor. (§ 2, ch. 98, 1905; § 2, ch. 134, 1907).

§ 8460. INSPECTION OF PROPOSED ROUTE. It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together with the board of county commissioners shall as soon as practicable, inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such survey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage, but may be a complete survey such as will be required for the construction of the proposed drainage and

assessment of its cost, or as much less as the board may require. Such survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. For the purpose of inspection or surveys, the county commissioners, surveyors or their employes may enter upon any lands traversed by the proposed drainage or in their judgment likely to be affected thereby. The county auditor shall promptly furnish the state engineer with a copy of the surveyor's report mentioned in the succeeding section and of all maps and plans filed by such surveyor and also with a copy of such further files as the state engineer may ask for. In case the drainage is established the preparation of plans and specifications upon which the contract of construction is to be awarded and also the work of construction, shall be under the supervision of the state engineer. It shall be the duty of the state engineer to render such assistance and advice to the board of county commissioners in regard to such drainage as the duties of his office will permit and he shall be reimbursed by such board for his expenses incident thereto; provided, that in case of minor ditches the state engineer shall not be required to attend with the board of county commissioners at the first inspection, nor to perform subsequent services if in his judgment it shall not be necessary for him so to do. (§ 3, ch. 98, 1905; § 3, ch. 134, 1907; § 1, ch. 102, 1909).

§ 8461. SURVEYOR'S REPORT — NOTICE OF HEARING. The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall de termine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route

of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceedings for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing. (§ 4, ch. 98, 1905; § 4, ch. 134, 1907; § 2, ch. 102, 1909).

§ 8462. HEARING ON PETITION. At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. After full hearing the drainage may be established along the line set forth in the petition or in the finding of the board prior to the hearing, or the board may vary the route thereof, or its width, as deemed practicable or necessary. If the board deems it best to vary the route, or to materially change the initial or terminal points of such proposed drainage so that it will pass through other lands than those described in the notice of hearing, or to increase the width of lands to be taken for the proposed drainage, the board shall adjourn the hearing and give the owners of such lands notice as in case of the original hearing. No open ditch shall be constructed within the limits of any public highway except where the topography of the country makes such construction advisable and in such case the ditch shall be located at a sufficient distance from the center of such highway to permit a roadway of standard width being constructed. If the proposed drainage does not give sufficient fall to drain the lands sought to be drained or will not properly take care of the waters collected by

such drainage, the same shall be extended so as to secure the drainage or properly dispose of the water. The hearing in any such case shall be adjourned and notice given to all parties newly affected as in case of the original hearing. When the board of county commissioners shall have fully heard and considered such petition, and all matters in opposition to or in support of the same, it shall, if it finds the proposed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition, the petitioners to be jointly and severally liable for the costs of the proceeding, the same to be recovered in a civil action. If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property through which the same shall pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimants right to have the same assessed by the jury. Such drain shall be given a name and the proceeding thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office. (§ 5, ch. 98, 1905; § 5, ch. 134, 1907; § 3, ch. 102, 1908; § 1, ch. 205, 1917).

§ 8463. EQUALIZATION OF BENEFITS. After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the

board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds at the date of the filing of the petition and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed. (§ 6, ch. 98, 1905; § 6, ch. 134, 1907; § 4, ch. 102, 1909).

§ 8464. ASSESSMENTS. After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. The cost of establishment shall include the costs of the service of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all other expenses incurred or to be incurred that in any way contributed or will contribute to the establishment or construction of the drainage. At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same

will be so filed, by publication at least once each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due and payable and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the state and the United States and, if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest from the date of the order of the assessment at a rate not to exceed eight per cent per annum payable annually. Such assessment shall be paid to and received by the county treasurer and paid over to the holders of the assessment certificates or upon the order of the board of county commissioners. The board of county commissioners may issue separate assessment certificates against each tract assessed for the amount of the assessment thereon, and may sell the same at not less than par value with all accrued interest, or may contract to pay for the construction of such drainage with such assessment certificates or with warrants. Such assessment certificates shall refer to the record in the office of the county auditor of the order of assessment and of the filing of a copy thereof in the county treasurer's office, shall transfer to the holder all interest, claim, or right in or to such assessment, bear the same rate of interest, carry the lien of such assessment and be enforcible as provided by law. Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale, provided that no such assessment or installment thereof shall be included in the sale of any

given year unless the same shall have been delinquent on or before August first of each year. The provisions of Chapters 7, 8, 9, Part 9 of this title shall apply to the enforcement of the lien or drainage assessments so far as such provisions are applicable, except that a treasurer's deed issued upon a delinquent drainage assessment shall recite the fact that the title conveyed is subject to all the claims which the state or any political subdivision thereof may have thereon for annual taxes.

Whenever an assessmnet for drainage or an installment thereof has been made against any county, city, town or township, as provided in this chapter, the officers of such county, city, town or township, whose duty it is under the law to make the levy of taxes, shall at the time of the next annual tax levy after the making of such assessment make a levy for drainage purposes of such an amount as shall be necessary to pay such assessment, and return the same to the proper officers as provided by for the other taxes, and such levy and tax shall be enforced and collected in all respects as provided by law for other taxes; provided, that any surplus remaining in any fund at the close of any year may be used by any township to pay and apply on any drainage assessment, as provided herein; provided, further, that in unorganized townships the county commissioners shall be authorized to pay for drainage as provided herein out of any money belonging to such unorganized township, and each succeeding year a like levy shall be made by such authorities until the whole of such assessment for drainage is paid. Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at a rate not to exceed eight per cent per annum payable annually, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any damages allowed and cost of establishment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage. (§ 7, ch. 98, 1905; § 7, ch. 134, 1907; § 5, ch. 102, 1909;

ch. 130, 1911, and as amended by § 1, ch. 46, Laws of Second Special Session of the Sixteenth Session of the Legislature of South Dakota 1920).

§ 8465. BIDS—SPECIFICATIONS—CONTRACTS. Whenever sufficient money shall have been collected the damages occasioned by the construction of such drainage and fixed as herein provided shall be paid and thereupon the board of county commissioners shall proceed to construct such drainage and shall let contracts for the construction of the same. Such contracts may require the contractors to take their pay in assessment certificates or in warrants to be thereafter issued. The contract may be for the construction of the entire drainage or for any portion thereof, and shall be let upon competitive bids, the board reserving the right to reject any and all bids. The lowest responsible and capable bidder shall be accepted but if any landowner affected be an equally low, capable and responsible bidder with a nonowner of the lands affected the former shall be preferred. When any contract shall be let the contractor shall give a bond in such sum as shall be approved by the board of county commissioners, conditioned for the faithful performance of his work and full completion of his contract to the satisfaction of such board. For the information of the contractors in bidding upon the proposed drainage, full plans and specifications shall be filed in the office of the county auditor. If in the judgment of the board of county commissioners the entire drainage or any part thereof can be constructed for less money than the amount of any bid submitted therefor, the board may cause such drainage to be constructed, hire the necessary labor and purchase all necessary material for such construction, without letting contracts therefor. Contracts for building bridges or culverts rendered necessary by the construction of such drainage may be let separately and after the drainage is completed. The cost of constructing such bridges or culverts shall be charged in the first instance as part of the cost of drainage and thereafter such bridges and culverts shall be maintained as part of the highway; provided, that the cost of removing, repairing, enlarging or replacing bridges and culverts already existing across the line of a proposed drainage ditch shall

not be charged as a part of the drainage. (§ 8, ch. 98, 1905; § 8, ch. 134, 1907; § 6, ch. 102, 1909; ch. 206, 1917).

§ 8466. BOARD MAY EXTEND TIME FOR COMPLETION OF CONTRACT. The board of county commissioners shall have power to grant a reasonable extension of time for the completion of any contract. When any contract shall not be finished within the time specified or to which it may be extended, such board may in its discretion at any time thereafter relet such unfinished portion of any part thereof after not less than five days' notice thereof to the lowest responsible bidder and shall take security as for the original contract. The cost of completing such parts, over and above the original contract price and the expense of notices and reletting, shall be collected by the board from the first contractor; provided, that in no case shall the board forfeit and annul a contract without five days' notice to the contractor, if found, and if not found then by written notice left at his last known place of residence in the county. (§ 9, ch. 98, 1905; § 9, ch. 134, 1907).

§ 8467. ASSESSMENTS FOR FURTHER COSTS. At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction, including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessments and certificates. The board of county commissioners may sell such assessment certificates at not

less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants only one assessment need be made. In any case, in the discretion of the board, several assessments may be made as the work progresses. Assessments shall be paid to the county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners for the purpose of the particular drainage. (§ 10, ch. 98, 1905; § 10, ch. 134, 1907; § 7, ch. 102, 1909).

§ 8468. ACCEPTANCE OF DRAINAGE BY BOARD. After the work of construction shall have been fully completed and approved by the state engineer, the drainage may be accepted by the board of county commissioners, by order duly made, and payment shall be made therefor unless in the discretion of the board of county commissioners agreement be made for the partial payments; provided, that final payment shall not be made until the expiration of thirty days after the acceptance of the work and in case an appeal has been taken from the order accepting such work final payment shall not be made until the determination of such appeal; provided, further, that no payment shall be made to any engineer whose employment has not been approved by the state engineer, and no payment shall be made upon any contract for the construction of any such drainage project, unless the same shall have been constructed under the supervision of the state engineer; and provided further, that nothing in this section shall apply to minor drainage projects. All claims for compensation or expenses for publishing legal notices or supervising the construction of any such drainage project including the per diem and the mileage of the county commissioners, shall be paid from the general fund of the county, and for all such payments the county treasurer shall reimburse the general fund from the assessments herein provided for. (§ 11, ch. 98, 1905; § 11, ch. 134, 1907; § 8, ch. 102, 1909; ch. 207, 1917).

§ 8469. APPEALS. An appeal shall lie for any final order or determination of the board of county com-

missioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage to the circuit court of the county in which such drainage is located by any one deeming himself aggrieved by any such order or determination. Written notice of such appeal shall be served upon the board of county commissioners and a bond conditioned to pay all the costs of such appeal, in case the contention of appellant be not sustained in some respect, shall be filed in the office of the clerk of courts, to be approved by him in such amount and with such sureties as he deems necessary. Upon the service of such notice and the filing of such bond, the county auditor shall transmit to the clerk of courts the petition and all other papers and records in the matter or certified copies thereof, when the convenience of the auditor's office would be seriously impaired by the transmission of the original records, and such matter shall be heard as an original action in the circuit court. No appeal shall operate as a stay of proceedings by the board of county commissioners, but the court may upon the taking of an appeal, for good cause shown issue an order staying the further proceedings by the board of county commissioners until the hearing and determination of such appeal. Before granting such stay, the court shall require an undertaking in sufficient amount and with sufficient surety to the effect that if the order appealed from be sustained the person upon whose motion the stay is granted shall pay all damages caused by the issuance of such order of stay. Any number of persons interested may join in the same appeal. Appeals shall be in all cases taken within thirty days from the making of the order or determination appealed from. If, on the trial of such action, it be determined that the drainage as petitioned for and established by order of the board is not conducive to the public health, convenience or welfare or is not necessary or practicable for the purpose of draining agricultural lands, the petitioners shall be jointly and severally liable for all the costs thus far incurred. If the contention of the appellant as to the amount of damages or proportion of benefits, the acceptance of the drain-

age, of the practicability of the drainage when the route thereof is varied by the county commissioners over the protest and objection of the petitioners, be sustained in whole or in part, the costs of such trial shall be part of the cost of the drainage. Upon an appeal from an assessment of benefits, the court of jury shall consider not only the relative benefits, to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not; if benefited, to what extent. (§ 12, ch. 98, 1905; § 12, ch. 134, 1907; § 9, ch. 102, 1909).

§ 8470. ASSESSMENTS FOR MAINTENANCE. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportion determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance or may be collected directly by the board of county commissioners. (§ 13, ch. 98, 1905; § 13, ch. 134, 1907).

§ 8471. ASSESSMENTS PAID IN INSTALLMENTS. The owner of any tract of land against which an assessment for drainage is made, who shall, within thirty days after the making of such assessment, file with the county auditor an agreement in writing that in consideration of the right to pay his assessment in installments he will not make any objections to the illegality or irregularity of his assessment, if any there be, and will pay the same with interest as fixed by the board of county commissioners, shall have the privilege of paying such assessment in ten annual installments, interest payable annually. Assessment certificates shall not issue until after the expiration of the period of filing such agree-

ments with the county auditor, and when issued for assessments to be payable in installments may be issued in coupon form. The first installment shall be payable within ten days after a certified copy of the assessment has been filed, in the office of the county treasurer, and subsequent installments shall be payable one, two, three, four, five, six, seven, eight and nine years from the date of such assessment, respectively, with interest on the whole sum unpaid payable annually at maturity of the several installments. Such subsequent installments shall become delinquent after the expiration of thirty days from the time the same are payable and thereupon a penalty of five per cent shall attach thereto. Provided, that where bonds shall have been issued for the construction of such drainage, as provided in Section 8472, such assessments shall be made payable in installments sufficient to meet the payment on the bonds, as the same shall become due. Payments of assessments may at any time be received and full discharge thereof given by the county treasurer to any property holder, but after issue of bonds, such payment of assessments can be received only according to the terms of such bonds. (§ 14, ch. 98, 1905; § 14, ch. 134, 1907; § 10, ch. 102, 1909).

§ 8472. BOARD MAY ISSUE BONDS. The board of county commissioners, whenever it has ordered the establishment of any drainage, shall have authority by resolution to be spread upon its records, to provide for the issuance of bonds in such sums as may be necessary for the purpose of defraying the expenses incurred or to be incurred in obtaining the right of way or in locating or constructing any such drainage. Such word "expenses" shall be construed to mean and cover every item of cost of such drainage from its inception to its completion, such bonds to be payable only out of the funds to be derived from special assessments upon the lands benefited thereby. Such bonds shall bear interest at a rate not exceeding 7% per annum, payable annually and be payable not exceeding twenty years from issue. Such bonds shall be signed by the chairman of the board of county commissioners and countersigned by the auditor, who shall keep a record of all such bonds. Such bonds shall be issued for the benefit of the particular drainage,

numbered, recorded and indexed in the office of the county auditor, and shall in no case be issued for a sum exceeding the benefits to the lands affected by such drainage. The board of county commissioners shall have the power to negotiate such bonds at not less than par value, as it may deem best for the interest of all persons affected by such drainage, any premium received on such bonds to be credited to the fund of the particular drainage. Such bonds shall contain a recital that the same are issued pursuant to the authority of this article and that they are to be paid out of the funds to be obtained as herein provided. Assessments shall be made upon all of the lands benefited by such drainage for the payment of the principal and interest of such bonds when the same shall become due. Such assessments may be made by separate assessments for installments of interest and principal or in one proceeding with but one set of notices. When the assessments are finally fixed the same shall be certified to the county treasurer by the county auditor, and the money paid in thereon shall be received by the county treasurer and paid over to the holders of such bonds. Separate funds shall be kept by the treasurer for each drainage project, and no funds for one drainage project shall be applied to any other drainage. No county shall be liable for the payment of any bonds issued under this article, but such bonds shall be paid only out of the funds derived from the special assessments herein provided for. Such bonds may be made payable at such times as the board of county commissioners shall find for the best interests of the persons benefited by the drainage, and may be issued for all or any portion of the expenses of such drainage. (§ 15, ch. 98, 1905; § 15, ch. 134, 1907).

§ 8474. FURTHER POWERS OF BOARD. Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as in all

lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly. (§ 17, ch. 98, 1905; § 17, ch. 134, 1907).

§ 8475. DITCH OR DRAIN MAY BE DECLARED NUISANCE. Any ditch, drain or watercourse, which is now or may hereafter be constructed so as to prevent the sufrace and overflow water from adjacent lands from entering the same is hereby declared a nuisance and may be abated as such. (§ 18, ch. 98, 1905; § 18, ch. 134, 1907).

§ 8476. POWERS DEFINED. The powers conferred by this article for establishing and constructing drains shall also extend to and include the deepening and widening of any drains which have heretofore been or may hereafter be constructed, also to straightening, cleaning out and deepening the channels of creeks and streams and constructing, maintaining, remodeling and repairing levees, dykes and barriers for the purpose of drainage; and the board of county commissioners may relocate or extend the line of any drain if the same is necessary to provide a suitable outlet, and shall cause a survey thereof to be made, but no proceedings affecting the rights of persons or property shall be had under this section except upon notice and the other procedure prescribed herein for the construction of drains. (§ 19, ch. 98, 1905; § 19, ch. 134, 1907).

§ 8477. DRAINS UNDER CHARGE OF COUNTY COMMISSIONERS. All drains that have been constructed under any law of this state, or that may be constructed under the provisions of this article, shall, except as otherwise specifically provided, be under the charge of the board of county commissioners and be by it kept open and in repair. In all cases when any completed drain is or may be situated in more than one county, the care of the portion thereof lying within any county is assigned to the board of county commissioners of such county to be

kept open and in repair. The cost of such repairs shall in all cases be assessed, levied and collected in the same manner as provided in this article for the construction of drains originally and in all cases when no assessments of benefits shall have been made, the board of county commissioners having charge of such drain shall make such assessments. (§ 20, ch. 98, 1905; § 20, ch. 134, 1907).

§ 8478. BOARD MAY MAKE RULES AND REGULATIONS. The board of county commissioners may make such rules and regulations on the subject of drainage as it may deem proper, not inconsistent with the provisions of this article, and especially with regard to clearing out and keeping clear the channels of streams and the construction and maintenance of dams thereupon, with reference to their capacity for drainage. (§ 21, ch. 98, 1905; § 21, ch. 134, 1907).

§ 8482. DRAINS FOR TOWNS AND CITIES. The board of county commissioners shall have authority to establish drainage for or including the whole or any part of any city or incorporated town, including cities acting under special charter, as provided in this article, and it shall have the same authority with respect to the assessment of damages and benefits within such city or town as in other cases provided for in this article, and like notices to such city or town with respect to the establishment of such drainage and the apportionment and assessment of damages and benefits shall be given as is required by this article to be given to the owner of property damaged or benefited by the establishment or construction of such improvement. (§ 24, ch. 98, 1905; § 24, ch. 134, 1907).

§ 8485. COMPENSATION OF COUNTY COMMISSIONERS. The county commissioners shall receive for their services four dollars per day for the time actually spent by them in the performance of the duties of their offices under this chapter, publishers of newspapers shall receive for publishing legal notices the same fees as are allowed by law for publishing proceedings of the county commissioners; but the proceedings of the board of county commissioners when acting in any drainage matter under this article shall not be published as a part of its regular proceedings or at all. The county auditor shall charge a reasonable amount, to be fixed by the

board, for services, to be paid into the general fund of the county. Each county commissioner shall have power to administer any oath required in any drainage proceeding. (§ 27, ch. 98, 1905; § 27, ch. 134, 1907; § 11, ch. 102, 1909).

§ 8486. NOTICES, HOW SERVED. Notice by personal service, as of a summons in a civil action, may be given instead of by publication and posting in all cases where notice is provided for in this article. In any case where notice is required under the provisions of this article and any person affected by the drainage has not been notified, either by publication or personally, and a hearing has been had or determination made, such person may be notified personally or by publication and posting, to show cause at a time and place to be fixed by the board of county commissioners, and to make return or claim damages as in case of the original hearing. Any such omitted person may be brought in on such due notice at any stage of the proceeding, or after it has been otherwise concluded. The enforcement of any assessment shall not be enjoined for want of the notice provided for in this article, except pending an application to the board of county commissioners for the determination of such matters as to which any person deems himself not bound because of want of notice. (§ 28, ch. 134, 1907).

§ 8488. DEFECTS IN PROCEEDINGS DISREGARDED. Any defect or irregularity not affecting the substantial rights of parties interested, occurring in any drainage proceeding, shall be disregarded in any action seeking to avoid an assessment or cancel, annul or declare void any such proceeding. And in case the defect is substantial the court shall of its own motion determine the rights of the parties, validate the proceedings and assess the costs as justice may require, if the court shall find cause for such validation or such action should have been taken in the first instance and all parties interested are before the court. (§ 29, ch. 98, 1905; § 30, ch. 134, 1907).

§ 8489. INVALID OR ABANDONED PROCEEDINGS. If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned,

or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate thereform, but the board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by the board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons. (§ 33, ch. 134, 1907).

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 456.

A. G. RISTY, ET AL., AS COUNTY COMMISSIONERS, ETC., ET AL., PETITIONERS

vs.

GREAT NORTHERN RAILWAY COMPANY, RESPONDENT.

STATEMENT AND BRIEF IN RESISTANCE OF PETITION FOR CERTIORARI

Believing that if the court is fully and correctly informed with reference to the questions involved in this case it will not deem such questions of sufficient importance or of such nature as to induce it to exercise its power in certiorari, we respectfully ask consideration of the following in resistance of the petition for certiorari filed therein.

STATEMENT OF CASE

The Big Sioux River flows from the north in a southerly direction west of the city of Sioux Falls to a point southwest of the city, thence easterly and thence northerly through the city to a point where it is intersected by the outlet of the drainage ditch or ditches in controversy.

Respondent owns and operates a line of railroad which enters the city of Sioux Falls from a northeasterly direction, extends south through the city, and runs thence southwesterly to the city of Yankton. The point on its line nearest to the drainage ditches hereinafter referred to is about one and one-

half miles south of their outlet, and south of what is hereinafter referred to as the spillway.

In or about the years 1907 to 1909, petitioners caused to be constructed what was then known as Drainage Ditch No. 1, having its origin at a point about three and one-half to four miles north of the city of Sioux Falls, and emptying into the Big Sioux River at a point one and one-half miles north of respondent's railroad.

While the proceedings for the construction of Drainage Ditch No. 1 were pending a petition was filed for the construction of what was first known as Ditch No. 2. Subsequently another petition was filed, seeking the extension of proposed Ditch No. 2, and praying that it be made a part of Ditch No. 1. Petitioners finally, by resolution, established and caused to be constructed Drainage Ditch No. 2, having its origin at a point approximately fifteen miles north of the outlet of Ditch No. 1 on the east side of the Big Sioux River, and running thence in a southerly direction, intersecting the Big Sioux River at one point, and so close to the river at other points that the river subsequently cut into the ditch, and connecting with and emptying into Ditch No. 1 at its point of origin.

Petitioners, by resolution, determined that all of the property theretofore included within what they had determined to be the area of Drainage Ditch No. 1 was also benefited by Drainage Ditch No. 2; that the two ditches were mutually interdependent and should virtually be considered as one drainage system, and they assessed all of said property for the construction of both ditches. The system of drainage thus established was completed and paid for by assessment upon the property then deemed to be benefited which did not include any property lying south of the outlet of Ditch No. 1. No part of respondent's property was included within the drainage area thus established; it was given no notice of any kind of the establishment of such drainage and no attempt was made to include its property within the drainage area or assess it for any part of the cost of the drainage.

As originally constructed, and after the connection of Drainage Ditches No. 1 and 2, the outlet of Drainage Ditch No. 1 consisted merely of a concrete apron hereinafter referred to as "spillway," extending from the lower terminus of Drainage Ditch No. 1 down over an abrupt slope to the Big Sioux River at a point below the falls of the river and as heretofore stated north of respondent's line of railroad. In the year 1916, the volume of water passing through Ditches No. 1 and No. 2 washed out a portion of this concrete work with the result that the waters in the spillway were at that point uncontrolled and serious damage was threatened by the continued maintenance of the ditches in the absence of properly constructed works for the purpose of controlling and confining the waters at their outlet. It is conceded that with the ditches

in the condition in which they were after the washing out of the spillway there was great danger that the Big Sioux River would be diverted from its course around the city of Sioux Falls and caused to flow through the ditches from the point of intersection some miles north of the city returning to the river at the point where the old spillway was located below the falls, thus threatening to destroy the water power of the Northern States Power Company, the water supply of the city of Sioux Falls, and seriously damage many other properties and rights.

It appears from the answer and the undisputed evidence that petitioners started work of some character to attempt to control the waters at the spillway and to prevent the threatened damage; that certain property owners within the area theretofore determined to be benefited by the drainage objected to this work and instituted suit in the state court to restrain the same; that thereafter a petition was filed with petitioners seeking a change of the outlet of the Drainage Ditches No. 1 and No. 2 in such manner as to discharge the water from said ditches into what is known as Covell's Lake, situated in the northwesterly part of the city of Sioux Falls; that thereafter the owners of property within the drainage area as theretofore determined and the parties interested in the Covell's Lake project had numerous conferences with reference to the matter; that as a result of such conferences and as a compromise between said parties (there being no contention or proof that respondent was a party thereto) the proceedings held under the petition last referred to were abandoned and a petition know as the petition of F. L. Blackman and others was filed, which petition is entitled "Petition to Reconstruct and improve Drainage Ditches No. 1 and 2 in Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by an assessment upon the property, persons and corporations benefited thereby." Upon this petition, confessedly filed and acted upon by petitioners as a compromise between the owners of property within the drainage area and the promoters of the so-called Covell's Lake project, and not including respondent, petitioners adopted a resolution providing for its hearing and caused notice of said hearing to be published. Respondent was not named in said notice; its right of way, tracks, embankments and bridges were not referred to, and no part of its property was described. It contained nothing which could be construed as giving any notice whatever to it that any claim would be made of benefit to its property or that any attempt would be made to assess its property in such proceeding.

Upon the return day of such notice, petitioners adopted a resolution purporting to re-establish Drainage Ditches No. 1 and No. 2 under the name of Drainage Ditch No. 1 and 2,

along the exact course of their previous construction and for the re-construction of the outlet or spillway.

Purporting to act under this resolution, petitioners caused Ditches No. 1 and No. 2 to be cleaned and otherwise repaired and caused the outlet or spillway thereof to be re-constructed, and pursuant to a resolution or resolutions thereafter adopted, without any notice to respondent, caused certain portions of the Big Sioux River to be straightened. The spillway was re-constructed under the cost plus plan without advertising for bids for its re-construction in accordance with the plans finally adopted, and warrants were issued for the cost of such work amounting, with interest, to approximately $300,000.00.

The first intimation contained in the record of any thought of assessment of or attempt to assess any part of respondent's property appears in a notice published in April, 1919, said notice being of a hearing upon the matter of equalization of benefits resulting from said Drainage Ditch No. 1 and 2 and in which certain depot grounds owned by respondent were described and attempted to be apportioned benefits to the extent of a very few units. Petitioners did not at that time, however, attempt to assess the right of way, tracks, embankments and bridges of respondent and such right and property were not referred to in the April, 1919, notice. Proceedings under this notice were abandoned.

Subsequently and in or about the month of July, 1921, petitioners adopted a resolution apportioning the benefits derived from said Drainage Ditch No. 1 and 2 and apportioned to respondent and to its right of way, tracks, embankments and bridges benefits to the extent of 613.85 units, amounting, as will appear from a mathematical calculation, to approximately $5,800.00. This suit was instituted for the purpose of restraining petitioners from proceeding further with the equalization of said purported benefits and from spreading an assessment upon respondent's property therefor.

The district court acquired jurisdiction both by virtue of well pleaded federal questions and because of diversity of citizenship.

Respondent predicated its claim that the entire proceedings of petitioner commissioners were void upon the following contentions:

1. That the South Dakota drainage ditch statutes were violative of the Fourteenth Amendment to the Federal Constitution;

2. That the acts of the petitioners were so arbitrary and discriminatory as to deprive it of the equal protection of the laws, and that such acts were, therefore, in violation of the Federal Constitution;

3. That the acts of the petitioners in attempting to increase the drainage area of Drainage Ditches No. 1 and No. 2, and to assess respondent's property, not included in such area as originally established, were void because not done pursu-

ant to or authorized by any statutes of the state of South Dakota;

4. That the proceedings of petitioners in attempting to create a new drainage proposition and a new drainage area were a mere subterfuge resorted to by them pursuant to agreement between them and the owners of property in the original drainage area for the purpose of enabling them to assess respondent's property for the cost of such repair and maintenance of the original ditches as was necessary in order to enable them to function without damage to or destruction of the property and rights of respondent and others.

The district court decided that the South Dakota drainage statutes were not violative of the Fourteenth Amendment to the Federal Constitution, but found, in substance, as follows:

1. That the forming of the so-called new ditch was simply a pretense and subterfuge resorted to by petitioners for the sole purpose of attempting to burden respondent and others with the cost of the maintenance of the ditches theretofore constructed;

2. That the South Dakota statutes did not authorize the assessment of property not included within the drainage area of the ditches in question, as originally determined, for the maintenance of such ditches after they had been constructed and the benefits therefor had been assessed, and that the proceedings of the petitioners in so far as they purported to affect the property and rights of respondent were, therefore, void;

3. That the statutes of the state of South Dakota in so far as they purport to authorize drainage proceedings for any purpose other than the drainage of agricultural lands were in conflict with the constitutional provision of the state of South Dakota requiring the corporate organization of drainage districts as a condition precedent to drainage proceedings for any such other purpose, and further found that the proceedings in question, if treated as new proceedings resulting in the establishment of a new ditch, were void because the work done pursuant to such proceedings was not done for the purpose of draining agricultural lands, and that such proceedings were, therefore, not authorized by the state statutes or Constitution; and

4. That regardless of whether or not the alleged new drainage district had been legally constituted, respondent was entitled to the relief asked because of the arbitrary and discriminatory acts of petitioners, bringing respondent within the rule expressed in the case of *Thomas, et al. v. Kansas City Southern R. R. Co.*, 67 L. ed. 758.

C. R. I. & P. Ry. Co. v. Risty et al. 282 Fed. 364.

The Circuit Court of Appeals did not pass upon the Federal constitutional questions involved because, although finding them "grave, serious and doubtful," it deemed their determination not necessary "to the solution of the case," but in other respects it approved the decision of the district court,

and affirmed the decree restraining assessment of respondent's property lying outside the drainage area as originally established.

Risty et al. v. C. R. I. & P. Ry. Co. 297 Fed. 710.

BRIEF

We believe the foregoing statement, which in all respects is sustained by the record, is all that is necessary to present to the court in support of our suggestion that the importance and nature of the questions involved are not such as to demand the exercise of its power in certiorari. We desire, however, to briefly consider the proposition, apparently chiefly relied upon by petitioners, that the decision of the Circuit Court of Appeals has created a conflict between itself and the decisions of the Supreme Court of the State of South Dakota.

We assume that this court will not find that such conflict exists as to demand the exercise by it of the extraordinary power under consideration unless it clearly and conclusively appears: first, that the nature of the questions involved in this case is such that the decisions of the highest court of this state with reference to them will be regarded as authoritative by this court, and second, that such questions have been so decided by the state court as necessarily to foreclose respondent of such rights and remedies as the Federal courts have held it entitled to.

We shall not discuss the first of these two essentials because one of the questions involved, to-wit: as to whether or not the drainage statutes in so far as they purport to authorize drainage for a purpose other than the drainage of agricultural lands, are in conflict with the state Constitution, is of such nature, while the others are as clearly not. None of such questions, however, has been so passed upon by the Supreme Court of the state as to create any conflict.

The state court has never had before it for determination the question as to whether or not the drainage statutes, in so far as they purport to authorize drainage proceedings for any purpose other than that of draining agricultural lands, are violative of the state Constitution. In all cases in which the constitutionality of the statutes has been passed upon by that court the only questions involved were those with reference to the drainage of agricultural lands, and the court very correctly held that such drainage might be provided for without the incorporation of drainage districts.

The case of *Gilseth v. Risty*, 193 N. W. 132, decided after the decision of the district court in this case, is chiefly relied upon by petitioners as establishing the alleged conflict between the state and Federal courts. The opinion in that case discloses the following situation: plaintiff was the owner of agricultural land within the drainage area of Drainage Ditches No. 1 and No. 2 as originally constructed; he was a party to the conferences alleged by respondent in this case to have taken place between the parties interested in the original

ditch proceedings, which conferences resulted in the filing of the petition "for the re-establishment of Drainage Ditches No. 1 and 2;" he was present at the hearing upon that petition and took no appeal from the order of the county commissioners purporting to establish the new drainage; his property, as we have said, was in the drainage area as originally established and he was one of the parties responsible for the original construction of the ditches in question and for their proper maintenance, and one of the parties for whose benefit petitioners are attempting to assess respondent's property and that of others outside the original drainage area.

The court simply held that as to him, a party to the proceeding, the order establishing the drainage and subsequent orders from which he did not appeal, became final. A careful analysis of the opinion discloses that the court finally based its conclusion upon questions of estoppel and lack of equity in favor of plaintiff. After reciting the situation practically as above stated, it said: "Appellant having stood by and seen all the work performed without protest, and having received all the benefits that could result therefrom, should not now be permitted to escape payment for the same. The relief asked by appellant is equitable in its nature, but because of the circumstances above shown, all the equities of the case are against appellant and in favor of the board."

We submit that nothing that was actually decided in the *Gilseth* case is in conflict with the decision of the Circuit Court of Appeals with reference to the rights of respondent here. There is nothing in the *Gilseth* case which would preclude any able lawyer from conscientiously advising respondent that the questions upon which its rights depend have not been passed upon by the state court.

Respondent had no property within the original drainage area; it was not a party to the original proceedings; it was not named nor any of its property described or referred to in the proceedings resorted to for the purpose of enlarging the drainage area.

No constitutional question or question of the power to assess property outside the original drainage area was involved in the *Gilseth* case, and there could not have been a decision in that case, based upon the facts as disclosed by the opinion, that would even furnish any assistance to another court in determining respondent's rights here. The Federal courts, in seeking to avoid conflict, are certainly not obliged to follow the dicta of state courts or give any effect to unnecessary or unessential statements in their opinions.

We respectfully submit that the writ of certiorari should not be granted.

F. G. DORETY,
St. Paul, Minnesota.

HAROLD E. JUDGE,
Sioux Falls, South Dakota.

Solicitors for Respondent.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 100

A. G. RISTY, ET AL., AS COUNTY COMMISSIONERS, ET AL., APPELLANTS

VS.

GREAT NORTHERN RAILWAY COMPANY, APPELLEE

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF APPELLEE

Great Northern Railway Company, plaintiff and appellee, filed its bill in the district court of the district of South Dakota, praying for an injunction. From a decree granting an injunction defendants and appellants appealed to the Circuit Court of Appeals of the Eighth Circuit, in which court the decree was affirmed. From the decision of the Circuit Court of Appeals defendants have appealed to this court.

This suit involves the constitutionality of the drainage ditch statutes of the state of South Dakota under both the federal and state constitutions, and also involves the regularity and validity of proceedings taken under the statutes. The facts out of which the suit arises are as follows:

STATEMENT OF THE CASE

The Big Sioux River flows from the north in a southerly direction west of the city of Sioux Falls to a point southwest of the city, thence easterly and thence northerly through the city to a point where it is intersected by the outlet of the drainage ditch or ditches in controversy.

Appellee owns and operates a line of railroad which enters the city of Sioux Falls from a northeasterly direction, extends south through the city, and runs thence southwesterly to the city of Yankton. The point on its line nearest to the drainage ditches hereinafter referred to is about one and one-half miles south of their outlet, and south of what is hereinafter referred to as the spillway. Exhibit 1, appearing on pages 222-223 of the record, is a plat showing the location of its railroad over the area here in question; the location of its two bridges (numbered respectively 150.7 and 146.0) referred to in the record, and also the location of a portion of said drainage ditch or ditches including the spillway. (R., 220-225.)

In or about the years 1907 to 1909, appellant county commissioners caused to be constructed what was then known as Drainage Ditch No. 1, having its origin at a point about three and one-half to four miles north of the city of Sioux Falls, and emptying into the Big Sioux River at a point one and one-half miles north of appellee's railroad. (R., 124-129, 220-223.)

While the proceedings for the construction of Drainage Ditch No. 1 were pending a petition was filed for the construction of what was first known as Ditch No. 2. Subsequently another petition was filed, seeking the extension of proposed Ditch No. 2, and praying that it be made a part of Ditch No. 1. Appellant county commissioners finally, by resolution, established and caused to be constructed Drainage Ditch No. 2, having its origin at a point approximately fifteen miles north of the outlet of Ditch No. 1 on the east side of the Big Sioux River, and running thence in a southerly direction, intersecting the Big Sioux River at one point and so close to the river at other points that the river subsequently cut into the ditch, and connecting with and emptying into Ditch No. 1 at its point of origin. (R., 135, 136, 242.)

Appellant county commissioners, by resolution, determined that all of the property theretofore included within what they had determined to be the area of Drainage Ditch No. 1 was also benefited by Drainage Ditch No. 2; that the two ditches were mutually interdependent and should virtually be considered as one drainage system, and

they assessed all of said property for the construction of both ditches. The system of drainage thus established was completed and paid for by assessment upon the property then deemed to be benefited which did not include any property lying south of the outlet of Ditch No. 1. No part of appellee's property was included within the drainage area thus established; appellee was given no notice of any kind of the establishment of such drainage and no attempt was made to include its property within the drainage area or to assess it for any part of the cost of the drainage. (R., 127, 136-138.)

As originally constructed and after the connection of Drainage Ditches No. 1 and 2 the outlet of Drainage Ditch No. 1 consisted merely of a concrete apron hereinafter referred to as "spillway," extending from the lower terminus of Drainage Ditch No. 1 down over an abrupt slope to the Big Sioux River at a point below the falls of the river and as heretofore stated north of appellee's line of railroad. In the year 1916, the volume of water passing through Ditches No. 1 and No. 2 washed out a portion of this concrete work with the result that the waters in the spillway were at that point uncontrolled and serious damage was threatened by the continued maintenance of the ditches in the absence of properly constructed works for the purpose of controlling and confining the waters at their outlet, it being conceded that with the ditches in the condition in which they were after the washing out of the spillway there was great danger that the Big Sioux River would be diverted from its course around the city of Sioux Falls and caused to flow through the ditches from the point of intersection some miles north of the city returning to the river at the point where the old spillway was located below the falls, thus threatening to destroy the water power of the Northern States Power Company, the water supply of the city of Sioux Falls, and seriously damage many other properties and rights. (R., 28-32.)

It appears from the answer and the undisputed evidence that the appellant county commissioners started work of some character to attempt to control the waters at the spillway and to prevent the threatened damage; that certain property owners within the area theretofore determined to be benefited by the drainage objected to this work and instituted suit in the state court to restrain the same; that thereafter a petition was filed with the appellant county commissioners seeking a change of the outlet of the Drainage Ditches No. 1 and No. 2 in such manner as to discharge the water from said ditches into what is known as Covell's Lake, situated in the northwesterly

part of the city of Sioux Falls; that thereafter the owners of property within the drainage area as theretofore determined and parties interested in the Covell's Lake project had numerous conferences with reference to the matter; that as result of such conferences and as a compromise between said parties (there being no contention or proof that appellee was a party thereto) the proceedings held under the petition last referred to were abandoned and a petition know as the petition of F. L. Blackman and others was filed, which petition is entitled "Petition to Reconstruct and Improve Drainage Ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by an assessment upon the property, persons and corporations benefited thereby." Upon this petition confessedly filed and acted upon by the appellant commissioners as a compromise between the owners of property within the drainage area and the promoters of the so-called Covell's Lake project, and not including appellee, the appellant commissioners adopted a resolution providing for its hearing and caused notice of said hearing to be published. Appellee was not named in said notice; its right of way, tracks, embankments and bridges were not referred to, and no part of its property was described. It contained nothing which could be construed as giving any notice whatever to it that any claim would be made of benefit to its property or that any attempt would be made to assess its property in such proceeding. (R., 28-32, 38, 42-64.)

Upon the return day of such notice, appellant commissioners adopted a resolution purporting to re-establish Drainage Ditches No. 1 and No. 2 under the name of Drainage Ditch No. 1 and 2, along the exact course of their previous construction and for the re-construction of the outlet or spillway. (R., 32, 51-54, 260-264.)

Purporting to act under this resolution, appellant commissioners caused Ditches No. 1 and No. 2 to be cleaned and otherwise repaired and caused the outlet or spillway thereof to be re-constructed, and pursuant to a resolution or resolutions thereafter adopted, without any notice to appellee, caused certain portions of the Big Sioux River to be straightened. The spillway was re-constructed under the cost plus plan without advertising for bids for its reconstruction in accordance with the plans finally adopted, and warrants were issued for the cost of such work, amounting, with interest, to approximately $300,000.00. (R., 33-36.)

The first intimation contained in the record of any thought of assessment of or attempt to assess any part of

appellee's property appears in a notice published in April, 1919 (Plaintiff's Exhibit A, R., 141-192) said notice being of a hearing upon the matter of equalization of benefits resulting from said Drainage Ditch No. 1 and 2 and in which certain depot grounds owned by the appellee were referred to and attempted to be apportioned benefits to the extent of a very few units. Appellant commissioners did not at that time, however, attempt to assess the right of way, tracks, embankments and bridges of appellee and such right and property were not referred to in the April, 1919, notice. Proceedings under this notice were abandoned by the appellant commissioners. (R., 192, 201.)

Subsequently and in or about the month of June, 1921, appellant commissioners adopted a resolution apportioning the benefits derived from said Drainage Ditch No. 1 and 2 and apportioned to appellee and to its right of way, tracks, embankments and bridges benefits to the extent of 613.85 units amounting, as will appear from a mathematical calculation, to approximately $5,800.00. This suit was instituted for the purpose of restraining appellants from proceeding further with the equalization of said purported benefits and from spreading an assessment upon appellee's property therefor. (R., 16-19, 36, 37, 192, 206.)

DISTRICT COURT'S DECISION (R., 79-99)

The District Court did not agree with appellee's contention that the drainage statutes of the state of South Dakota were violative of the Fourteenth Amendment to the Constitution of the United States in that they do not provide for proper notice to, and right to be heard of, property owners, and deprive them of their rights and property without due process of law, but properly held that it acquired jurisdiction not only by virtue of diversity of citizenship but because the bill involved a real and substantial question under the Constitution of the United States, and therefore proceeded to determine all the questions; (*Davis, Director General v. Wallace*, 257 U. S. 478, 66 L. ed. 325) and found, in substance, as follows:

(1) That the situation disclosed by the evidence "presented no question of the drainage of agricultural lands" but rather that of maintenance of Ditches No. 1 and No. 2 "and the prevention of the dangers threatened by the water that they were conducting down through these ditches, through this hill, into the river;" that the drainage of the agricultural lands would not have been interfered with if the spillway had not been re-constructed; that the people who constructed Ditches No. 1 and No. 2 originally were responsible for the threatened damage, and it was their

duty to maintain the ditch, "and to stop the ravages of the water cutting into it and through it;" that what was done under the pretense of proceeding under the so-called Blackman petition was merely to maintain the ditch or ditches originally constructed and that in the attempt to include additional lands in the drainage area and assess them any portion of the cost of such maintenance, appellant commissioners were acting entirely without authority of law, there being no provision in the statutes of the state of South Dakota "for the taking in of any other lands and assessing them for the maintaining of a ditch after it had been constructed and the benefits of its building have been assessed."

(2) That the forming of the so-called new ditch was simply a pretense and a subterfuge "resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed."

(3) That § 8489 of the South Dakota Revised Code, 1919, with reference to invalid and abandoned proceedings had no application, the proceedings for the construction of old Ditches No. 1 and No. 2 never having been held void, set aside or abandoned; and

(4) That the proceedings of the appellant commissioners in "assuming the right to constitute a new drainage district, calling it district No. 1 and 2 and to assess benefits to the property of the plaintiffs in so far as they are located in the city of Sioux Falls" were void.

The trial court further found:

(5) That even if it had found that the alleged new drainage district had been legally constituted and that the appellant commissioners had the right to extend the benefits to property outside the drainage area as originally established, appellee would still have been entitled to relief sought because "the proofs overwhelmingly bring the plaintiffs within the rule recently expressed *In re Thomas, et al v. Kansas City Southern Railway Co., et al.*" (277 Fed. 708, affirmed by this Court, 261 U. S. 481, 67 L. ed. 758) "in that the taxation that is imposed upon each of the plaintiffs is a much higher rate and upon a different basis than the tax upon land lying within the district," stating:

> "As a matter of fact no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiff's property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. * * * Take the railroads, different plaintiffs, there is no pretense

that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for the ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all. * * * Even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands."

(6) That the re-construction of the spillway without change of location and the repair of the ditch, etc., "could not be viewed in the same light or as serving the same purpose as the construction of the original ditches" because the object and purpose of such work was not to drain agricultural lands but to prevent the damage threatened because of the original imperfect construction of the ditches and spillway; in other words, to prevent the destruction of the water supply of the city of Sioux Falls, the water power of the Northern States Power Company, etc., by means of the agency set in motion by the original construction, and that although such object and purpose might have constituted a public use the appellant commissioners were acting without authority of law because the applicable state constitutional provision was not self-executing and the acts of appellants lacked the necessary legislative authority.

DECISION OF CIRCUIT COURT OF APPEALS

(292 Fed. 710)

The Circuit Court of Appeals did not pass upon the Federal constitutional questions involved because, although finding them "grave, serious and doubtful," it deemed their determination not necessary "to the solution of the case," but in other respects it approved the decision of the district court and affirmed the decree restraining the assessment of appellee's property lying outside the drainage area as originally established.

SUMMARY OF ARGUMENT

PROPOSITIONS RELIED UPON BY APPELLEE AS SUSTAINING THE JUDGMENT APPEALED FROM

1. The South Dakota drainage ditch statutes are violative of the Fourteenth Amendment to the Constitution of of the United States and deprive one of rights and property without due process of law in that they provide for the taxation of property without giving the owner thereof proper notice and the right to be heard upon the question as to the validity and amount of the tax and as to whether or not such tax is in excess of the benefits.

2. Such statutes do not provide for or require the giving of any notice whatsoever to railroad companies of hearing even upon the question of equalization of benefits nor afford them any opportunity to be heard upon the question of the amount or validity of the tax upon their properties.

3. Such statutes are likewise violative of the Fourteenth Amendment to the Constitution of the United States because they do not afford to all persons the equal protection of the laws and deprive persons of their rights and property without due process of law, in that they prescribe no definite standard for determining benefits and are "of such a character that there is no reasonable presumption that substantial justice generally will be done but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred." (*Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 5*, 256 U. S. 658, 65 L. ed. 1151.)

4. In this instance the application and administration of the laws in question by appellant commissioners have been so arbitrary, discriminatory, and extensively oppressive as to result, if not restrained, in depriving appellee of its property without due process of law, and in depriving it of the equal protection of the laws in violation of the Fourteenth Amendment.

5. Appellant commissioners in attempting to include appellee's property within the drainage area and assess it, acted without any authority of law and attempted in excess of their powers to create a burden upon appellee and a cloud upon the title to its property, and proceeded without right to do something not authorized by the law under which they purported to act, this being true for the following reasons:

(a) Because what they did constituted merely maintenance and repair of the ditches as originally constructed, and the statutes do not purport to give them any power

or authority to enlarge the drainage district and assess for that purpose property not originally assessed, the maintenance statute clearly providing that assessments for maintenance and repairs shall be made upon the property and in the proportions originally assessed.

(b) Because the purported establishment of a new drainage ditch in the exact location of the old ditches and construction of a new spillway in the location of the old spillway was confessedly a mere scheme or subterfuge resorted to by appellant commissioners for the purpose of enabling them to lessen the burden upon the property owners in the original drainage area, and to cast the greater part of it upon property owners not included within the drainage area or benefited by the drainage.

(c) Because it clearly appears from the record that the work for which the assessment is sought to be made, unless it be treated as the repair and maintenance of the original ditches, was done, not for the purpose of draining agricultural lands, but for the purpose of preventing damage to property that was threatened by the existence of the drainage theretofore established, and appellant commissioners were not authorized by any law of the state of South Dakota to establish a drainage district or assess property for the cost of the accomplishment of any such object or purpose.

6. It clearly appears from the record that appellee's property has derived no benefit whatever from the so-called drainage, the benefits sought to be charged to it being purely fanciful, speculative, arbitrary and out of all proportion to those sought to be charged to other properties, and not being benefits directly or indirectly derived from the drainage of agricultural lands.

ARGUMENT

I.

THE SOUTH DAKOTA DRAINAGE LAWS ARE VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Appellee contended in the lower courts and still contends that the statutes under which appellant commissioners claim to have proceeded are in conflict with the Fourteenth Amendment to the Constitution of the United States and therefore void in that their enforcement will deprive persons of property without due process of law and deny to them the equal protection of the laws.

This is true because: the statutes provide no proper method for the organization of a drainage district; they

do not provide for any determination that the cost of the proposed drainage will not exceed the benefit to be derived; they do not afford property owners the right to be heard at any time or place before any tribunal upon the questions as to whether or not such cost will exceed the benefit, as to whether or not their lands and property shall be included within the drainage district, and as to the amount and validity of the tax to be assessed against their property.

This is especially true with reference to railroad companies because the statutes *provide for assessment of their property without notice to them and a right to be heard even upon the question of the equalization or apportionment of benefits.*

It must be conceded that when a legislature, for any purpose within its powers, creates a taxing district and provides that the property in such district under certain designated rules of procedure shall be assessed for the cost of the benefit of certain public work, such legislative determination is conclusive upon the question as to whether or not the property included within such district will be benefited by the improvement provided for and, with certain modifications hereinafter referred to, as to whether or not such benefits will be less than the cost, and upon such questions property owners would have no right to be heard, but the rule is different when such determination is delegated by the legislature to a subordinate body. In that event property owners are entitled to notice and hearing upon those questions.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763-768.
Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. ed. 369-394;
Road Improvement District No. 2 v. Missouri Pacific R. Co., 275 Fed. 600.

The conclusion reached by the District Court that due process of law is afforded, provided an opportunity to be heard with reference to the amount of the tax is given the land owner before the assessment becomes a lien upon his property, is not applicable to the situation presented by this record, because in the state of South Dakota there has been no legislative declaration or finding as to the limits of the districts to be taxed for the purpose of, or with reference to the benefits to be derived by any property or district from, drainage.

This court in *Fallbrook Irrigation District v. Bradley, supra*, stated the correct applicability of the rule laid down in *Paulson v. Portland*, 149 U. S. 30-41, 37 L. ed. 637-641,

cited by the District Court in support of its conclusion, saying:

> "It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits for the purpose of assessing upon the lands within the district the cost of a local public improvement. The legislature when it fixes the district itself is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the land included in the district and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e. the amount of the tax which he is to pay. *Paulson v. Portland*, 149 U. S. 30-41 (37: 637-641). But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited and the decision of that question is submitted to some tribunal (the board of supervisors in this case) the parties whose lands are those included in the petition are entitled to a hearing upon the question of benefits and to have the land excluded if the judgment of the board be against their being benefited. *Unless the legislature decide the question of benefits itself the land owner has the right to be heard upon that question before his property can be taken.*" (Italics are ours.)

It also recognized the distinction sought to be made in *Spencer v. Merchant, supra*, saying:

> "When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

In *Road Improvement District No. 2 v. Missouri Pacific R. Co., supra*, the Circuit Court of Appeals for the Eighth Circuit said:

"But in the case in hand the legislature did not undertake itself to make the assessment on the property in this district, but it delegated that power to and imposed that duty upon the board of the district. And when the legislature delegates to a board or to commissioners the determination of the question what lands will be benefited, or what the amount of benefits to such lands will be, the inquiry becomes in its nature judicial, in such a sense that property owners are entitled to a hearing, or an opportunity to be heard, after notice, before these questions are determined."

It is, therefore, only when there has been legislative determination as to benefits, in which the determination that the benefits equal or exceed the cost is necessarily involved, that the property owner's right to be heard is limited to the question as to the proportional amount and validity of his tax. In all cases where the authority to determine such questions is delegated by the legislature to another body, jurisdiction cannot attach in such subordinate body unless the property owner, by requirement of the delegating statute, is given notice of and an opportunity to be heard upon the question of whether or not his property is or can be benefited by the improvement to an extent *equal* to or exceeding the cost thereof. A statute without such a provision fails to afford due process of law and is void.

As stated by the District Court, the South Dakota drainage statutes differ from those of most other states in that they make no provision "for the organization, at the inception of the proceeding, of a drainage district with boundaries defined, organized after notice to all property owners within the district, and endowed by statute with certain powers, consistent with the purpose for which the district is organized," and that no opportunity is given the property owner to be heard upon the question as to whether or not the benefits will equal the cost and as to whether or not the particular lands of the owner shall be included within the drainage district. It is because of the omission of these essential requirements that the statutes are unconstitutional.

By a constitutional provision of the state of South Dakota hereinafter more specifically referred to the drainage of agricultural lands is declared to be a public purpose and the legislature is authorized to provide therefor and to vest the corporate authorities of counties with power to construct drains "by special assessments upon the property benefited thereby according to benefits received" (State Constitution §6, Article XXI.)

The legislature enacted certain drainage laws, those applicable to this proceeding being found in §§ 8458 to 8491 of the South Dakota Revised Code, 1919, but in so doing merely attempted to delegate some of its powers to the county commissioners, and established certain rules of procedure. The constitutionality of these laws must be determined by the following excerpts from them, which excerpts contain all the provisions applicable to the questions under discussion and are here set out for the convenience of the court.

§ 8458. *Power of County Commissioners.* The board of county commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural lands.

§ 8459. *Petition.* Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in whole or in part, and a general statement of the territory likely to be affected thereby. * * * Such petition may be presented at any regular or special meeting of the board and, if sufficient in form, shall be ordered filed with the county auditor.

§ 8460. *Inspection of Proposed Route.* It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together with the board of county commissioners, shall as soon as practicable inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such survey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage but may be a complete survey such as will be required for the construction of the proposed drainage and assessment of its cost, or as much less as the board may require. * * *

§ 8461. *Surveyor's Report—Notice of Hearing.* The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall determine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition, and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceeding for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing.

§ 8462. *Hearing on Petition.* At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. * * * * * * * * * When the board of county commissioners shall have fully heard and considered such petition and all matters in opposition to or in support of the same, it shall, if it finds the proposed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition. * * * * * * If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property through which the same shall

pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimant's right to have the same assessed by a jury. Such drain shall be given a name and the proceedings thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office.

§ 8463. *Equalization of Benefits.* After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once in each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds, at the date of the filing of the petition, and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proporiton of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being

an outlet for connection drains that may be subsequently constructed.

§ 8464. *Assessments.* After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. * * * At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same will be so filed, by publication at least once in each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due and payable and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the state and the United States and, if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest from the date of the order of the assessment at six per cent per annum payable annually. * * * * * * * * * Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale. * * * Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at six per cent per annum, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any damages allowed and costs of establish-

ment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage.

§ 8467. *Assessments for Further Costs.* At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction, including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain, and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessment and certificates. The board of county commissioners may sell such assessment certificates at not less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants, only one assessment need be made. In any case, in the discretion of the board, several assessments may be made as the work progresses. Assessments shall be paid to the county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners for the purpose of the particular drainage.

§ 8469. *Appeals.* An appeal shall lie from any final order or determination of the board of county commissioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage, to the circuit court of the county in which such drainage is located, by any one deeming himself aggrieved by any such order or determination. * * * Upon an appeal from an assessment of benefits, the court or jury shall consider not only the rela-

tive benefits to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not and, if benefited, to what extent.

§ 8474. *Further Powers of Board.* Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as to all lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly."

It is clearly apparent from the foregoing statutes that the legislature has attempted to vest in the county commissioners the power to establish and construct a system of drainage without first doing any of the following things: creating and defining the boundaries of a drainage district: determining the approximate probable cost of the work, or determining that the benefit to the property to be included within the district and assessed for the cost of the work will equal or exceed such cost. The only finding the commissioners are required to make before proceeding with the work is that "the drainage proposed or any variation thereof" is "conducive to the public health, convenience or welfare or necessary or practicable for draining agricultural lands" (§ 8462 South Dakota Revised Code). Upon such determination alone they are authorized to proceed, *without limit as to cost,* and fully complete the work without any notice whatever to property owners or any right given to property owners to be heard at any stage of the proceedings thereafter until the hearing provided for by § 8463, South Dakota Revised Code, upon the equalization of benefits. *There is no requirement that railroad companies be given notice even of this hearing.*

Certainly such a proceeding cannot be held to constitute due process of law. A fundamental prerequisite necessary to the validity of a special assessment for bene-

fits must be the determination that such benefits will equal the cost.

Village of Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443.

Such question not having been determined by the legislature, the subordinate body to whom the matter was attempted to be delegated, in order to afford due process of law, should have been required to determine it and such determination could be properly made only after due notice and an opportunity to be heard given to all property owners whose property would eventually be subject to assessment. There is certainly as much reason for this as for the requirement that a property owner be heard upon the question as to whether or not his property was actually benefited.

It cannot be contended that it was the legislative intent that the commissioners in determining whether or not the proposed drainage would be "practicable" should base such determination upon the relation of cost to benefit because § 8460, *supra*, authorizes them to act upon a preliminary survey made merely for the purpose of aiding the board in determining the necessity of the proposed drainage, leaving it discretionary with them as to whether or not "a complete survey such as will be required for the construction of the proposed drainage and *assessment of its cost" shall be made.* (Italics are ours.)

It will be observed that the statutes provide for but two notices of hearing, that of hearing upon the original petition and surveyor's report in § 8461, and that upon the equalization of benefits in § 8463, the hearing provided for by § 8461 being merely, as we have stated, upon the sole question (exclusive of the question of damage, in which we are not interested) as to whether or not the proposed drainage will be conducive to the public health, convenience or welfare or necessary or practicable for draining agricultural lands.

The jurisdiction of the county commissioners over any particular piece of property, if acquired at all, must be acquired by virtue of the notice provided for in § 8461. The pertinent requirements of that notice are that it "shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass, and give the names of the owners thereof * * *. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established or constructed."

In the instant case, pursuant to this statute, a notice

appearing in the printed record on pages 54-64, inclusive, was published. Appellee was not named in said notice nor its property described, nor was anything contained in the notice from which it might possibly infer that it was in any manner affected by the proceeding. On the contrary from the terms of the notice itself it was justified in assuming that it was not and would not be affected.

The notice after describing the "tract of country likely to be affected" and the separate tracts of land through which the proposed ditch would pass and stating the owners thereof, contained the following:

> "In addition to the above, notice is also given to Minnehaha County, Townships of Sioux Falls, Mapleton, Sverdrup, and Dell Rapids in said County and the City of Sioux Falls in said County on account of benefits to highways, bridges, parks and city waterworks plant in the said drainage area *and notice is also given to the Chicago, Milwaukee & St. Paul Railway Company, also to the Watertown & Sioux Falls Railway Company on account of the benefits to their rights of way within said drainage area.*"

The only railroad companies then thought by the appellant commissioners to be affected by the proceeding, being companies owning property included within the area of Drainage Ditches No. 1 and No. 2 as originally determined, were named in the notice. Certainly appellee had the right to assume that they were the only railroad companies in any manner sought to be affected.

In this connection it is interesting to note that there is no evidence "that the tract of country likely to be affected by the establishment and construction of the said proposed drainage" described in general terms in the notice was selected or determined upon by any action of the board of commissioners. The resolution providing for the hearing (R., 50) merely provides that notice be given "in accordance with" the statutes. This is followed by a purported resolution establishing the drainage (R., 51-54) and the only record we find having any reference to the tract of country "likely to be affected" is in the notice itself which never appears to have been acted upon by the board.

As to persons claiming damages to their property or compensation for the taking of it, the notice is sufficient as it describes the land through which the drainage is to pass and names the owners thereof. It may be fair to assume that all persons to whom such notice is given know whether or not they have a claim for damages but as to persons whose property is not so described and who may be affected by the proposed drainage, we contend that no

adequate notice—no notice that would constitute due process of law—is given.

How can persons owning land some miles removed from the drainage ditch or a party such as appellee owning and operating a line of railroad, no part of which is upon or in proximity to any of the land sought to be drained, know that in the judgment of the board their properties were or would be affected by the drainage? The statute does not require the naming of such persons but in general terms requires the notice to be addressed to all persons affected. Such notice assumes that the persons affected either have been determined by the board or else it places upon such persons the making of that determination at their peril. (In this instance, as hereinbefore stated, the board did determine and name in the notice the railroad companies affected, without including appellee. It is thus clearly apparent that the attempt to assess it, as stated by the District Court, was an "afterthought.")

But for what purpose are they summoned before the board? Not that they may show that their property is not affected but that they may show cause why the drainage should not be established and constructed. They are not by this language given the opportunity to show cause why their property should not be included in the drainage area. If such persons are directed to show that their property is not benefited at all, the statute gives such permission to the persons affected only for the purpose of opposing the establishment and construction of the ditch.

If one owned a piece of land not agricultural in character, with no possibility of its being made agricultural land, not subject to overflow, and of such character that it would be impossible for water to collect or stand thereon, and such land were located on the river bank and some miles away from the drainage project, it would seem to be utterly absurd that a notice in the words of the statute should be binding on him so that if he failed to appear and contest the establishment and construction of the ditch his land would be subject to an assessment for benefits therefrom. If he did appear and contest the establishment of the ditch, he would be told, in all probability, that his objection went only to the amount of benefits to be assessed against his property and would have to be urged at a subsequent hearing. But he would be in the drainage area and the ditch would be established as to him and as to his property. We do not believe that jurisdiction for such a purpose could be obtained in that manner.

The only further notice provided for is that of hearing upon equalization of benefits (§ 8463). This hearing may

be had at any time after the establishment of the drainage and the fixing of the damages and either before or after the completion of the work. In the instant case no notice of it was given until the work was completed. At this hearing nothing is determined except the proper apportionment of the benefits as between the various parties claimed to have been benefited. The question as to the amount of the tax and its validity is not involved. Whether or not the total cost of the work is in excess of the total benefits is not a relevant question and is not determined. The only question at issue is whether or not the proportion of benefits theretofore fixed by the commissioners constitutes a fair distribution of the cost of the improvement as between the various properties.

Under this statute the commissioners proceed to determine what they think is the actual benefit to a tract of land, calling such tract a unit. They then proceed to determine what they think is the actual benefit to all other tracts. Each of the amounts so arrived at is divided by the amount of benefit to the unit and each tract is assessed the number of units ascertained as the quotient. It is readily apparent that in this proceeding the cost and therefore the actual amount of the assessment is not involved. The cost per unit may be many times the benefit per unit. Upon that question there is no hearing at any stage of the drainage proceedings. If this constitutes due process of law we submit that the term has become meaningless and that the constitution has lost its power to protect.

In *Martin v. District of Columbia*, 205 U. S. 135; 51 L ed. 743, the statute under consideration required a jury to apportion the cost of a local improvement "according as each lot or part of land in such square may be benefited by the opening, widening, extending, or straightening of such alley." The court sustained the constitutionality of the act but sustained it only because it permitted "the interpretation that in any event the apportionment is to be limited to the benefit." The court said: "We think it apparent as was assumed by the court of appeals that the jury understood their duty to be to divide the whole cost among the landowners whether the benefit was equal to their share of the cost or not. It must be admitted that the language of the statute more or less lent itself to that understanding. * * * For this reason, the assessment must be quashed." The language of the South Dakota statute is quite different. It (§8464) provides that "after the equalization of the proportion of benefits the board may make an assessment against each tract or property affected *in proportion to the benefits as equalized*, for the pur-

pose of paying the damages and the cost of establishment."

This language admits of but one interpretation when it is considered in connection with the provisions of § 8463. It clearly requires the board of county commissioners to first determine the proportion of actual benefits and then to assess the entire cost in such proportion. The question of whether or not the cost exceeds the benefits is never determined and has no effect whatever upon the assessment under the South Dakota statutes.

THE STATUTES PROVIDE FOR THE ASSESSMENT OF RAILROAD PROPERTY WITHOUT ANY PROVISION FOR NOTICE TO ITS OWNERS AND A RIGHT TO BE HEARD EVEN UPON THE QUESTION OF THE EQUALIZATION OR APPORTIONMENT OF BENEFITS.

In this connection we ask the court to carefully consider and analyze § 8463 of the Revised Code of 1919, hereinbefore quoted. It requires the county commissioners to proceed as follows:

(a) After the establishment of the drainage and fixing of damages, to "fix the proportion of benefits of the proposed drainage *among the lands affected*, and to appoint a time and place for equalizing the same;"

(b) To give notice of such proportion of benefits and equalization of benefits by publication and posting;

(c) To state in the notice the route and width of the drainage, "a description *of each tract of land affected*," and the names of the owners of the "several tracts of land," and the proportion of benefits "*for each tract of property*," and to notify "all such owners" to show cause why the proportion of benefits shall not be fixed. (Italics are ours.)

The foregoing is all that this section requires the county commissioners to do with reference to the question of equalization of benefits prior to the hearing, and with reference to notice.

The section then further provides that upon the hearing, without any provision whatever for notice, the benefits (not the proportion of benefits) "which any railroad company may obtain for its property by such construction" and the proportion of benefits which any county, city, town or township may so obtain "shall be fixed and equalized *together with the proportion of benefits to tracts of land*." (Italics are ours.)

It will be observed that notice is required to be given only to the owners of the "several tracts of land." This is so plain as to scarcely admit of argument. That the right of way, embankments, bridges, and other property (not agricultural land) of railroad companies were not deemed to have been included within the term "tract of land" or

"tract of property" is clearly evidenced by the fact that the legislature found it necessary to make and made in the latter part of § 8463 special provision for ascertaining "the benefits which any railroad company may obtain for its property by such construction," and for equalizing the same "together with the *proportion of benefits to tracts of land.*" This provision is entirely superfluous if such property should be held to be included within the meaning of "a tract of land" as such term is used in the preceding portion of the statute providing for the fixing of proportion of benefits and giving of notice and in fact is inconsistent with such interpretation.

It is therefore clearly apparent that the statute purports to authorize the commissioners to determine the benefit to railroad property and assess the same without any notice or the giving of any opportunity to be heard.

The further points relied upon in questioning the Federal constitutionality of the South Dakota drainage laws and the constitutionality of the proceedings in this case are:

The statutes prescribe "no definite standard for determining benefits;"

They are "of such a character that there is no reasonable presumption that substantial justice generally will be done but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred," and

That their application and administration in this case have been so arbitrary, discriminatory and extensively oppressive as to result, if not restrained, in depriving appellee of its property without due process of law and in depriving it of the equal protection of the laws.

These propositions, which may be considered together, are supported by the following Federal decisions:

Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55, 60 L. ed, 523.

Kansas City Southern Ry. Co. v. Road Improvement District Number 6, 256 U. S. 658, 65 L. ed. 1151.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220;

Road Improvement District No. 2 v. Missouri Pacific Railroad Co. (C. C. A.) 275 Fed. 600, 604.

Village of Norwood v. Baker, 172 U. S. 269; 43 L. ed. 443.

Myles Salt Co. v. Iberia Drainage District, 239 U. S. 478, 60 L. ed. 392.

Abernathy v. Fidelity Nat. Bank & Trust Co. (D. C.) 274 Fed. 801.

Thomas v. Kansas City Southern Railway (C. C. A.) 277 Fed. 708 (affirmed by the Supreme Court, 261 U. S. 481, 67 L. ed 758.

Board of Directors v. Pipe Line Co., 292 Fed. 474.

Thornton v. Road Imp. Dist. No. 1 (C. C. A.) 291 Fed. 518.

We deem it unnecessary to discuss the principles stated or quote further from the authorities cited in their support.

The important question is that of the application of these authorities to the South Dakota statutes and the acts of the commissioners as shown by this record.

So far as the statutes are concerned they prescribe absolutely no standard or rule for determining benefits. The county commissioners are simply told by the legislature to fix the proportion of benefits among the lands affected and that "benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed." (§ 8463, South Dakota Revised Code, 1919).

The statute of itself, however, is discriminatory in that it requires the county commissioners to fix with reference to "lands affected" the "proportion of benefits" and with reference to the property of railroad companies "the benefits." In the one case thus requiring the determination of a relative benefit and in the other of an actual benefit. If the benefits should materially exceed the cost, the result of the discrimination would be most obvious.

It is our contention that the law is unconstitutional because it fixes no standard or method for the determination of benefits; that its operation naturally results in the use of arbitrary and discriminatory measures, and that "there is no reasonable presumption that substantial justice generally will be done."

This contention is sustained by the conduct of the appellant commissioners in this case. It clearly appears from the record that Drainage Ditches No. 1 and No. 2 were completely established, put in operation, and paid for several years prior to the institution of the proceedings here complained of, by assessment of the property then deemed to be benefited thereby and thus included within their drainage area, *no part of appellee's property being then thought to be affected;* that after all this had been done and while these ditches were presumably performing the function for which they had been constructed they became out of repair, the spillway or outlet washed out, and because the Big Sioux River forms what might be called a horse-shoe

bend around the city of Sioux Falls, the opening end of the horse-shoe being connected by the drainage ditches, there was great danger, after the washing out of the spillway, that the entire course of the river would be diverted from its channel through the cut-off of the ditch, thus destroying the water supply of the city of Sioux Falls, and the water power of the Northern States Power Co., and causing much other great damage; and the appellant commissioners were naturally forced to the conclusion that something must be done—not to take care of the drainage, there being no evidence that it was being interfered with—but to prevent the machinery which they had set in motion for drainage purposes from destroying the rights and property of those not responsible for its existence. It likewise conclusively appears from the answer of the appellant commissioners that the owners of property within the drainage area became much exercised, that various meetings were held, and that finally, pursuant to an agreement among such property owners and as a compromise measure, proceedings were started which resulted in the pretended establishment over exactly the same lines as the ditches then constructed of a new ditch to be known as Drainage Ditch No. 1 and 2. It is apparent that this aptly termed "subterfuge" was resorted to for the sole and only purpose of attempting to lay a foundation which would permit appellant commissioners to assess the owners of the property and rights the destruction of which was threatened by the existence of the then drainage project, and the owners of other property outside the drainage area, as originally established, a great proportion of the cost of the work necessary to be done in order to avoid the threatened injury, and thus lessen the burden upon the property owners responsible in the first instance for the drainage and who confessedly planned the scheme which the appellant commissioners adopted "as a compromise."

It is evident that the entire proceeding was in bad faith, possibly not intentionally so upon the part of the commissioners but so in fact. The proceedings of the commissioners were purely arbitrary and discriminatory.

All this of course has nothing to do with the method of assessment of proportion of benefits, but the appellant commissioners proceeded to attempt to perform their alleged duties in that respect in the same arbitrary and discriminatory manner.

Appellee owns no agricultural land which is sought to be assessed. Its property in question consists of its station grounds in the city of Sioux Falls and a portion of its right of way, embankment, and bridges, all confessedly out-

side the drainage area as originally established. (R., 18, 19, 224.)

Appellant commissioners in determining the proportion of benefits to the various tracts of land and the alleged benefit to the property of appellee proceeded as follows. They employed an engineer, one Herman Rettinghouse, to make a topographical survey of the district he thought might be included within the drainage area for the purpose of preparing a map and furnishing data to the board that would enable it to fix the benefits. (R., 281-282.) This engineer selected one acre of agricultural land as a unit. Appellant commissioners decided that the acre so selected was worth $25.00 more after than it was before the construction of the drainage, thus determining that the value of the benefit to the unit was $25.00. All the agricultural land was assessed in relation to the unit and in the same manner (R., 278, 284, 285). In determining the alleged benefit to the railroad and other property not agricultural lands, an entirely different method was used. We quote from the testimony of the engineer, Rettinghouse:

"I am familiar with the cost of construction and upkeep of highways. In arriving at the benefit to the highways within this drainage area, we estimated the benefits in this way. There is a certain amount of annual maintenance necessary for any road and there is more than that amount necessary under flood conditions. That is to say, a road that is periodically flooded as against a road that never is flooded. The difference in the estimated cost of maintenance was capitalized, or represented the interest on a certain sum of money, and we considered the capitalized portion as a real benefit. * * * We divided the amount arrived at by the value of the unit of $25.00, thereby obtaining the number of units as a proportional benefit for these roads. The sum we divided by the unit represented the capitalized value to that part of the highway; we applied the same method to the streets and highways of the city of Sioux Falls. We did not apply the acreage basis to the city property, excepting possibly the grounds where the water works are located. In applying the benefit to the unit and what the board took into consideration as elements of benefit to the Milwaukee Railway Company, we took into consideration the fact that in the first place there were practically three elements. First was the right-of-way on the acreage basis, which was estimated in proportion to the adjacent lands; second, that it was possible to shorten or abandon certain bridges. In order to determine the bene-

fits derived therefrom is simply a mathematical proposition. It costs a certain amount of money each year in order to maintain a bridge, whether it is a pile bridge or steel bridge. We know how long these structures will last. We figure the cost of a bridge and divide it by the number of years in order to get the amount that is necessary to be extended each year. Taking the amount in dollars and cents multiplied by the length of the bridge and divide that and capitalize that at seven per cent, which is the usual rate of interest, and that determines the amount of benefit. This was the second element. The third element is the fact that by reason of the flooding of the territory in which railroads are located, washouts often occur. We obtained data and from my personal knowledge and experience I have a very good idea of what it costs to repair washouts periodically appearing and we estimated as close as possible how much it would amount to every year and capitalized that amount again. Again as an additional element, a roadbed is solidified or made stronger by not being subject to floods. A roadbed that is constantly or for great lengths of time subjected to submersion is certainly weakened, and again, so far as humanly possible we figured the amount of benefits in dollars and cents and after getting all of these results or capitalized amounts, we divided that by 25 as our measure and determined the number of units of benefit. That system and general method and plan was used to determine the amount of benefits that each railroad received from these separate elements." (R., 285-286.)

He further testified that appellee had 2.4 acres of right-of-way considered benefited; also "one-fifth of a mile of track, two bridges protected, and 315 feet approximately of bridge that might be abandoned," and that these items were benefited because the drainage ditch in his opinion diverted a certain estimated amount of the flood waters of the Big Sioux River from the river (R., 286-288).

C. T. Charnock, appellant commissioner, testified:

"In assessing the railroads, we took the land that the railroad companies owned into consideration first, then the railroad itself, and then the culverts and bridges. The acreage that the railroad companies owned was only one element taken into consideration, and it was all assessed upon the unit plan. We took in the mileage but mileage was not the only element taken into consideration. We did not use the valuation of the railroads but we used the valuation of the benefits that

we thought the railroads would receive from it. The board went over the proposition with the engineer and he figured out the method to use and it was approved by the board. *We accepted his figures.* The engineer figured the proportion of bridges that could be saved by diverting the water through the spillway, and that was computed in dollars and cents, and divided by 25, which made so many units. The whole system was figured on that plan. All of the different elements of benefit were figured up and added together. The engineer showed us what benefits this would be, what it would amount to, and that is the way we handled it, by the $25.00 unit, the same as we did the farms. It was all figured out for us on paper." (R., 279-280.)

It appears from the evidence of C. M. Bassett (R., 224-226) that the engineer, Rettinghouse, based his estimate of benefits to appellee upon the conclusion that because of the existence of the drainage appellee could shorten one of its bridges approximately 323 feet and he apparently attempted to figure and capitalize the saving in maintenance.

It is quite apparent that no uniformity of assessment could possibly result from the use of the methods resorted to. The proportion of benefit if any sustained by the railroad companies to that sustained by the agricultural lands could not possibly be ascertained. The method resorted to was so lacking in foundation, so vague, indefinite, speculative, arbitrary, and discriminatory as certainly not to afford due process of law.

This is especially true in view of the fact that the record contains not a word of evidence tending to show that the property of appellee is or was affected in the slightest degree by the existence of the drainage system. The engineer, Rettinghouse, based his opinion as to benefits upon the assumption that the ditch, acting as a flood water by-pass, would divert a certain estimated amount of the flood waters of the river and prevent them from being carried by the river past the city of Sioux Falls and down to appellee's right-of-way and bridges in question, but he admitted, upon cross-examination, that he was not a hydro-electric engineer; that he did not know the capacity of the ditch except that he assumed that its capacity was some 2600 to 3000 cubic feet per second; that he did not know its capacity at the point where it was taking the waters out of the river; that he did not know how much of the water discharged by the ditch at the outlet was flood water or how much was water drained from adjacent lands. (R., 289-290.) In short, he admitted that he knew no facts whatever upon which to base his opinion with reference

to the amount of the benefits. Such opinion was based entirely upon the unwarranted and unsupported assumption that the ditch would carry 2600 to 3000 cubic feet per second of the flood waters of the Big Sioux River.

The record, however, furnishes further conclusive proof that the appellant commissioners in these proceedings were not acting pursuant to any definite standard for determining benefits. In March, 1919, they passed a resolution attempting to fix the proportion of benefits from the same work now under consideration and published a notice (Plaintiff's Exhibit A, R., 141-192). This proceeding was subsequently abandoned because of certain defects but it is of value in comparison with the proportion of benefits made in 1921 for approximately the same work as illustrating the manner in which the law was attempted to be applied and as throwing light upon the query as to whether or not the attempted application of the law was arbitrary and discriminatory.

The chairman of the appellant board of county commissioners testified that the commissioners adopted the same method of determining the benefits in 1919 that they did in 1921 (R., 196). He further testified that he was not certain whether the approximate cost of each unit used in 1919 was $80.00 to $85.00 or $7.50 to $8.00 per acre, although in fairness to him as well as to the court we state that it appears from the record that the then unit was a ten-acre tract and as then used probably represented, as may be determined by a mathematical calculation, an approximate cost of about $80.00.

A comparison of the two resolutions without other evidence furnishes, as we have said, conclusive proof of the speculative and arbitrary application of the law. The proportion of benefits assessed to each of the railroad companies mentioned in the 1919 apportionment was several times less than its apportionment for the same benefit in 1921. In 1919 it appears from the notice in evidence (Plaintiff's Exhibit A, R., 141-192) that the assessment of the various railway companies then considered to be benefited was made purely upon a mileage basis; the mileage of each company is given in the notice and the several proportions of benefits assessed bear the same proportion to each other as the mileage of each company bears to that of the other. In arriving at the proportion of benefits for the same work two years later, it conclusively appears that the mileage was given very little consideration. In the proportion of benefits attempted to be made in 1919, the track, right-of-way, and bridges of the Great Northern Railway Company and the hydro-electric plant and the water rights of the

Northern States Power Company were given no consideration whatsoever, although now an attempt is made to proportion benefits to the Northern States Power Company to the amount of approximately $50,000.00, and, as we have said, to the Great Northern Railway Company to the amount of approximately $5,800.00.

If substantial justice was done in 1919, it certainly was not done in 1921, and if done in 1921, it was not done under the law as applied in 1919. The conclusion must necessarily follow and scarcely bears stating that the method employed for ascertaining the benefits was so speculative and arbitrary as, if not restrained, to deprive appellee of its property without due process of law and deny it the equal protection of the laws. The District Court was fully justified in reaching the following conclusion:

> "As a matter of fact no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiff's property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. * * * Take the railroads, different plaintiffs, there is no pretense that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all. Referring to the testimony showing the manner of making assessments and the amount in a general way: I think it fairly appears from the record in the case that the contention of the plaintiffs that the attempt to assess the property of these plaintiffs was an afterthought. It, in my judgment, is established that they could not be benefited, even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands."

II.

THE PROCEEDINGS OF APPELLANT COMMISSIONERS COMPLAINED OF AND SOUGHT TO BE RESTRAINED WERE NOT AUTHORIZED BY THE STATE LAW AND CONSTITUTED THE EXERCISE BY THEM OF PRETENDED AUTHORITY AND POWERS NOT VESTED IN THEM BY ANY STATUTE OF THE STATE.

This involves the consideration of the following questions: whether such proceedings were not a mere subterfuge for the purpose of attempting to force appellee and others whose property was not within the original drainage area to bear a large portion of the expense of maintaining and repairing the ditches already constructed; whether such proceedings were valid proceedings resulting in the establishment of new drainage; whether the work done under them was but the necessary work for the repair and maintenance of the ditches already constructed; and whether if the proceedings were in good faith for the purpose of establishing a new ditch the actual purpose was drainage or some other public use. These various propositions are somewhat interwoven and will be treated together.

There is ample ground for the finding of the District Court that the situation existing in 1916 presented no question of the drainage of agricultural lands; that it presented no question other than the duty of the appellant commissioners to maintain and repair the ditches theretofore constructed; that the attempted formation of the new ditch "was simply a pretense and that the plaintiff's pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed."

It is not necessary even to resort to the evidence to sustain these findings. The answer of appellant commissioners is sufficient of itself. We refer particularly to paragraphs Ninth and Tenth (R., 28-32) and to the following allegation contained in paragraph VIII, of the so-called affirmative defense "and (defendants) further allege that the original petition for said drainage ditch, river cut-offs and spillway hereinbefore mentioned was a compromise between said petitioners therefor and others affected thereby as hereinbefore set forth" (R., 38).

The pleading that the proceedings were had "with the consent and acquiescence of this plaintiff" is not supported by any evidence.

The answer shows the situation to be exactly what

we claim. The ditches had been constructed; they had become filled with mud and sand; the spillway had proven imperfect and inadequate; it had washed out with the result that there was imminent danger of the waters in the ditch, unless the spillway should be repaired and the waters properly controlled, causing great damage to property and rights outside the drainage area; appellant commissioners at once commenced to work to control the waters; certain property owners within the drainage area instituted an action to restrain them; these property owners conferred and as a result of such conferences a proceeding was commenced for the purpose of abandoning the spillway and establishing a new outlet connecting with what is known as Covell's Lake; further conferences were held resulting in an agreement that the Covell's Lake proceeding should be abandoned (and, as admitted by appellants in their answer *"the same were abandoned accordingly"*) and resulting in the further agreement "that a new petition should be filed and new proceedings instituted *for the re-establishment of said Drainage Ditches No. 1 and No. 2 and the reconstruction and improvement thereof* and the re-establishment and the re-construction of the outlet to said ditches and for the establishment and construction of a new spillway to *properly control and take care of the waters flowing through said drainage ditches and for the enlargement of said drainage district*," and that thereafter "*and in accordance with said agreement*" the petition, which is the alleged foundation for the proceedings in question, was filed as a "compromise between the said petitioners therefor and others affected thereby."

In view of the situation thus pleaded and also clearly shown by the evidence, the commissioners had but one duty. That duty was to proceed to repair and maintain the ditches already constructed, so that they might continue to perform their functions without danger to property outside the area. They should have proceeded under § 8470, South Dakota Revised Code, 1919, which is as follows:

> "For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the land owners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original as-

sessments and may be sold at not less than par by the board of county Commissioners, turned over to persons contracting for such cleaning and maintenance, or may be collected directly by the board of county commissioners."

Under this section the cost should have been assessed and assessments made "upon the landowners affected in the proportion determined for such drainage." This was the only power the commissioners had.

There is no provision in the South Dakota statutes for extending the boundaries of a drainage area once determined and assessed, but it is contended that the proceedings were pursuant to the provisions of § 8489, South Dakota Revised Code, 1919, having reference to "Invalid or Abandoned Proceedings." Such contention is not tenable because the evidence clearly shows that the original proceedings had not been "enjoined, vacated, set aside, declared void, dismissed, or voluntarily abandoned." There was no pretense of abandoning the old ditches. It is claimed that the spillway was abandoned by the resolution adopted in the so-called "Covell's Lake" proceeding. Even if this were true it did not operate as an abandonment of the ditches and appellants allege in their answer that the entire Covell's Lake proceeding was agreed to be abandoned and *was abandoned.* The withdrawal of the Covell's Lake proposition left the original ditches in existence, unaffected by these abandoned proceedings.

The District Court was fully justified in its conclusion as follows:

"When this river cut through into the ditch, when the ditch became clogged in places and was not wide enough in others, when the spillway washed out by the force of the water they were conducting down the ditch, and the cutting of the bluff began and large areas of land were being washed away, and the other dangers were threatened, there was only one proposition presented to the commissioners, and that was one of maintenance; was one of taking care of the water that they were conducting down these two ditches, No. 1 and No. 2.

"Instead of proceeding frankly to maintain the ditches they had established in the manner provided by statute; instead of carrying out the obligations they had assumed when they brought the water down through these ditches, and attempted to deliver it through this bluff into the river; instead of proceeding regularly under this statute to do that which it was their duty to do; instead of performing the obligation that they had as-

sumed when they established the ditches, that of maintaining them, they proceeded to act upon the assumption that because they had conducted the water down into these ditches, and because of the inefficient manner in which they had constructed the ditches and built the spillway, and all of these dangers were threatened, therefore, the plaintiffs, and others in Sioux Falls, were necessarily to be damaged. And, although a proper maintenance of these two ditches No. 1 and No. 2, would stop the damage, would prevent any danger, the Commissioners evidently reasoned that because the plaintiffs and others in Sioux Falls were in danger, they must pay for the repair of these ditches. That could not be done by simply saying the ditches shall be repaired and the City of Sioux Falls, the plaintiffs, and others, shall pay for it, or pay a part of it, and therefore, they proceeded to do indirectly what it was conceded they could not do directly. In other words they then began to look around and see what they would do in the way of taking care of the water and stopping these dangers.

"At first it was proposed to change the spillway and conduct the water down in a southerly direction, through a slough or lake, into the river west of the City, and save the great fall that is involved at the point where the water enters the river from the spillway northeast of the city.

"This was abandoned and they finally then pretended to act under a statute authorizing the abandonment of ditches. As a matter of fact there was no abandonment in good faith. No attempt to abandon the ditches. In fact, the reading of the resolution shows it was simply that they abandoned the spillway. That they filed a petition which was headed, 'To reconstruct and improve Drainage Ditches No. 1 and No. 2, Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by assessment upon the property, persons and corporations benefited thereby.'

"This petition was filed in July, 1916, with the Board of County Commissioners. There had never been an abandonment of Ditch No. 1 and Ditch No. 2. There had been a pretended abandonment of the spillway. But the Commissioners proceeded then to construct a proper spillway on the identical location of the old one. In other words, no change whatever was made in the two ditches, No. 1 and No. 2, except to properly construct an efficient, adequate, substantial spillway, and

prevent the river cutting from its bed into the ditch, cleaning out the ditch and repairing it, changing the gates at the head of the ditch where the flood waters were taken from the river.

"Upon this petition, for this purpose, the Board of Commissioners assumed authority and power to re-christen this Ditch No. 1 and Ditch No. 2, and call it Ditch No. 1 and 2, and for the purpose of making these repairs and maintaining the old ditches under the new name, proceeded as if no ditch had been established, and as if the Ditches No. 1 and No. 2 were not in existence, and as if no obligation had been assumed by the drainage districts when they diverted the water down through the bluffs to the river, and proceeded to make the repairs and to reach out and say that the various plaintiffs were benefited. Instead of charging the repairs and maintenance of the ditches to those who were responsible for their construction under the provisions of the statutes above referred to, the Commissioners proceeded to assume the right and authority to constitute a new drainage ditch without any abandonment of the old ditches, with no thought of using new or different drainage in any way, except to maintain them and to perfect that which had been inefficiently constructed, with no thought or purpose except to repair the damage that had already been done, and prevent future damage.

"Under these circumstances, I am of the opinion that the Commissioners were acting entirely without authority of law. There is no provision in the statutes of the State of South Dakota for the taking in of any other lands and assessing them, for the maintaining of a ditch after it has been constructed, and the benefits of its building have been assessed.

"I am of the opinion that the forming of this new ditch was simply a pretense, and that the plaintiff's pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed.

"I am of the opinion that Section 8489 of said Revised Statutes, in regard to invalid and abandoned proceedings is not applicable to any situation such as existed here. That section has reference to the abandonment of a ditch that has been enjoined, vacated, set aside or declared void, and specifically provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expenses paid on

the old ditch, and give credit for any payment made upon the old ditch by people benefited. No such proceeding was attempted to be followed in this case. The proceedings establishing old ditches No. 1 and No. 2 have never been held void, never been set aside, never been abandoned. They are in force today and are responsible for the manner in which the ditches were constructed and for any damages that result from their negligence.

"Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and maintenance of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage Ditch No. 1 and 2 was ever established and has no existence.

"I am of the opinion that the proceedings of the Board of Commissioners in the repair and maintenance of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the city of Sioux Falls, are void."

The Circuit Court of Appeals, in its opinion in this case, quoted with distinct and emphatic approval the last two preceding paragraphs. (*Risty v. C. R. I. & P. Ry Co.*, 297 Fed. 710.)

If it be contended that the new proceedings constituted anything more than the necessary maintenance and repair of the ditches then it must conclusively appear that such purpose or purposes consisted of the by-passing of the flood waters of the Big Sioux River through the cut-off created by the ditch properly repaired and maintained and of preventing the threatened damage to the water supply of the city of Sioux Falls, the water power of the Northern States Power Company, etc., and if this be true appellant commissioners acted without authority or color of right because § 6 of Article XXI of the South Dakota State Constitution authorizing the drainage of lands "for any public use" has never been made effective by appropriate legislation.

This section is as follows:

"The drainage of agricultural lands is hereby declared to be a public purpose and the legislature may provide therefor, and *may provide for the organization of drainage districts for the drainage of lands for any public*

use, and may vest the corporate authorities thereof, and the corporate authorities of counties, townships and municipalities, with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby according to benefits received." (Italics are ours.)

The dual nature of this constitutional provision should be carefully observed. It first declares the drainage of agricultural lands to be a public purpose and that the legislature may provide therefor, and then declares that the legislature may also "provide *for the organization of drainage districts* for the drainage of lands for any public use." It is clear that the term "drainage districts" as so used contemplates a drainage district so organized as to constitute a corporate entity because the constitutional provision under consideration further provides for the vesting of certain powers in "the corporate authorities thereof."

It may be that the constitution authorizes provision to be made for the drainage of agricultural lands without the establishment of corporate drainage districts but it must be conceded that for the drainage of land for any other purpose or use the lgeislature must first provide for drainage districts in such manner as to constitute such districts corporate entities, having corporate authorities who might be vested with the power to construct the drainage. There having been no such legislation, the only provision of the constitution that the legislature has attempted to make operative is that referring to the drainage of agricultural lands, and insofar as the ditches and spillway under consideration were constructed or purported to have been constructed for any purpose other than the drainage of agricultural lands, they were so constructed without any warrant of law whatsoever, and the entire proceeding is void under the state constitution.

In construing this section of the state constitution, the Circuit Court of Appeals said: "We are satisfied that under the South Dakota constitution § 6, Article XXI., the drainage of agricultural lands must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Whichever way, therefore, the matter is viewed, the Board was acting without legal authority in its proportionment of benefits and threatened assessment of taxes." (*Risty v. C. R. I. & P. Ry. Co.*, 297 Fed. 710, 717.)

It should be borne in mind in this connection that appellants claim no possibility of any benefit to appellee's prop-

erty other than that they say will be derived because of the by-passing of the flood waters of the river through the ditch cut-off. The origin of the ditch is approximately fifteen miles north of the city of Sioux Falls. Its outlet is approximately one and one-half miles north of any point upon appellee's railroad. The situation will be readily ascertained by reference to Great Northern Exhibit 1 (R., 222). The tract of country originally included within the area and drained by the ditch lies entirely north of any part of appellee's property and, as has been suggested, the claim of benefit to the property not in the original area and lying south of the ditch is based solely upon the alleged diversion of the water from the river at a point or points north of Sioux Falls and carrying it through the ditch and emptying it into the river through the spillway, thus preventing a certain amount of the waters of the river from being carried by the river around the city and back to the outlet of the spillway. As stated before, the record contains no foundation in fact for this theory, and if such is the purpose of the ditch that purpose is not the drainage of agricultural land.

III.

APPELLEE'S PROPERTY HAS RECEIVED NO BENEFIT EITHER DIRECT OR INDIRECT FROM THE SO-CALLED DRAINAGE

The arbitrary, fanciful and speculative method resorted to by appellant commissioners in determining that appellee's property was benefited has been discussed. The trial court's conclusion that it was not benefited at all is fully sustained by the record—particularly by the undisputed evidence of the witnesses C. M. Bassett and Thomas Simpson.

Mr. Bassett testified:

"I have been a civil engineer 24 years; I am assistant engineer of the Great Northern Railway Company; I have been in its engineering department 9 years; at the present time I have jurisdiction of the entire Sioux City Division, including all of Minnehaha County, South Dakota; I have been in charge of that Division since the spring of 1916; during that period of time I have made frequent trips to Sioux Falls, and over the lines throughout Minnehaha County; for two years 1916-17 I was in Sioux Falls practically all the time; since then I have been here practically every week. I am familiar with what is known as drainage ditch Number 1 and 2, and the spillway; I am also assistant engineer of the Watertown and Sioux Falls Railroad company; its line is located along the ditch for about 3½ miles; every spring

I have been to the spillway; then I have been over the entire line of the ditch and looked at the various headworks and retaining dams; the line of the Great Northern enters the city of Sioux Falls from a northeasterly direction at a point about a mile and a half from the mouth of the spillway; that is the nearest point on the line of the Great Northern to the mouth of the spillway; the course of the line of the Great Northern as it goes through the city of Sioux Falls and around south of the city and down through Section 31 is as follows:
We enter in a northeasterly direction and then through town we go practically north and south and then we swing southeasterly (southwesterly) towards Yankton. * * * I am familiar in a general way with the channel and banks of the Big Sioux River from a point near our bridge in the City of Sioux Falls; the North bridge down to and through Section 31; to the south of town the banks of the river are well defined; there is a deep channel there and the river is confined to that channel, through town there is a greater chance; the channel is wider and the banks are not so steep; as you go further north the channel again deepens and it is confined, the valley is narrowed considerably south of town. * * * Basing my answer upon my knowledge of drainage ditch No. 1 and 2, the spillway, the location and construction of the tracks, bridges and embankments of the Great Northern Railroad Company, and my knowledge of the waters in the Big Sioux River, in my opinion no benefit results to such right-of-way, tracks, bridges, embankments or station grounds from drainage ditch No. 1 and 2 including the spillway; no part of the right-of-way, tracks or bridges within the area in question to my knowledge have ever been flooded by the waters of the Big Sioux River; we have a plan drawn up for a new steel bridge at bridge 146 which provides for shortening of fifty feet of that bridge and putting in deck girders which are much lower and nearer the water; we considered that owing to the fact that we are lowering the steel we would have to provide practically the same opening we have there now; in planning to shorten the bridge fifty feet we did not take into consideration the existence of the drainage ditch; the present height of the track on this bridge above what I understand to be the high water mark of the Big Sioux River, according to our best record is eleven feet; if I were planning to construct new bridges in question on the Great Northern, or to rebuild them, in determining the sizes of the openings from an engineer-

ing standpoint, I would not take into consideration the existence of drainage ditch No. 1 and 2, because my observation has been that before when the spillway went out in 1916, and the water conditions have been just the same; I consider there is great danger as the spillway constructed now of its going out, and there is danger that they will have to close the ditch and turn the water back into the original channel; I would not take it into consideration even if the ditch and spillway were working at capacity; I don't think it takes enough water out of the river to make any material difference; I would plan new openings without considering the ditch and considering the highest possible water in the river; I would consider it bad engineering to plan otherwise. * * * Along the right of way south of town we have an embankment about 1800 feet long; bridge 150-7; it is about 16 feet deep; side slopes approximately one and one-half to one, approximately fifteen feet high; the toe is protected in some places with rip rap, and it is now overgrown with grass and weeds; that embankment is so constructed as to withstand any possible flood conditions in this neighborhood." (R., 220-228.)

Mr. Simpson testified:

"I have lived in Sioux Falls twenty-seven years; I am general agent of the Great Northern Railway Company at Sioux Falls, and have been its agent for twenty-seven years; I am familiar with the line of the Great northern included within the area in question here in Section 16, 27, and 31; during such twenty-seven year period no part of the tracks, bridges or right-of-way of the Great Northern Railway within that area has been flooded; we have had no trouble during that period of time from high water; the station of the Great Northern is east of the river; I have lived on the west side of the river twenty-seven years; the depot has been located where it is now approximately fifteen years; during that time I have crossed the Big Sioux River several times a day and I have not observed any appreciable difference in the flow of the Big Sioux River before and after the construction of the spillway." (R., 228-229.)

Under the title "As to Benefits" on pages 47 and 48 of Appellants' Brief, we find the following statement: "Mr. Bassett testified for plaintiff that on the Watertown & Sioux Falls line, a part of the Great Northern system, they are flooded just south of the city pumping plant and at the top of the hill, that there the water comes out of the ditch

and comes over the track and has done so every year since witness has been in Sioux Falls. This water gets to be probably six inches over the top of the track and stands in there sometimes for probably ten days."

"At times water has been high enough around the penitentiary where the Great Northern track runs to flood its track some inches of water every year."

There is no evidence in the record to support the conclusion that the Watertown & Sioux Falls line was a part of the Great Northern system, nor is there any evidence that there is a Great Northern track running around the penitentiary. The evidence counsel evidently had in mind in making the statements referred to appears on pages 220 to 228 of the record. The witness Bassett testified that he was assistant engineer of the Great Northern Railway Company and also assistant engineer of the Watertown & Sioux Falls Railroad Company (R. 220-221); also that the water had been high enough "up around the penitentiary where the *Watertown* track goes to flood its tracks some inches of water every year."

The Watertown & Sioux Falls Railroad Company is not a party to this suit and there is no question of benefit or damage to its property involved herein. The testimony referred to, as to the flooded condition of its property, is not relevant to the issue as to whether or not the property of the Great Northern Railway Company sought to be assessed has received benefit.

IV.

THE AUTHORITIES CITED BY APPELLANTS AND THE ARGUMENT MADE BY THEM IN SUPPORT OF THEIR CONTENTION THAT THE TRIAL COURT WAS WITHOUT JURISDICTION AND THAT THIS ACTION WAS PREMATURELY BROUGHT ARE NOT APPLICABLE TO THIS CASE.

If this action were one merely to restrain the enforcement and collection of a tax or special assessment, levied by a tribunal having power and jurisdiction to make such levy, and based upon some irregularity in the proceedings of such tribunal or involving only a dispute as to the amount of the tax many of appellants contentions would be well founded.

But such is not the situation. A tribunal claimed to be acting beyond its jurisdiction and therefore without power passed a resolution attempting to proportion benefits to appellee which as will appear from a mere mathematical computation would result in the levying of taxes upon appellee's property to the amount of approximately

$5,800.00; appellee was ordered to show cause before this tribunal why such tax should not be spread upon its property; appellee was not only threatened with the levying of such a tax but with further and possibly more dangerous situation—that of having its property included within a drainage district, resulting in the extreme probability of its becoming involved in a project threatening to cause great and irreparable damage to property interests. The suggestion that under such circumstances it must first submit itself for a final determination of the questions involved to the tribunal having no jurisdiction, acting as it claims arbitrarily and without due process of law, we think has never received and never will receive the sanction of any court.

It has uniformly been held that courts of equity will intervene to prevent damage threatened by the acts of public tribunals beyond their jurisdiction and in excess of their powers. Mr. Justice Field recognized this in *Crampton v. Zabriskie*, II Otto 601, 25 L. ed. 1070, saying:

> "And from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the tax payers of a county to prevent the consummation of a wrong when the officers of those corporations assume in excess of their powers to create burdens upon property holders. * * The courts may be safely trusted to prevent the abuse of process in such cases."

The court acquired jurisdiction by virtue of both diversity of citizenship and the constitutional question involved. The amount in controversy cannot be questioned. Appellee is threatened with an assessment amounting to approximately $5,800.00, and its property will be so assessed upon its failure to show cause, before a tribunal having no power or jurisdiction, why a levy of that amount should not be spread. In addition to this is the great and irreparable damage that appellee is threatened with by having its property included within the drainage area. The action was not prematurely brought because appellee had the right at the time it instituted this action to have determined by a court of equity the question as to whether or not the appellant commissioners were acting beyond their jurisdiction and without power, and whether their proceedings would result in depriving appellee of its property without due process of law.

It is asserted that appellee had a complete and adequate remedy at law but the remedy suggested is that appellee appear before the Board of County Commissioners

and if dissatisfied appeal to the state courts. Such is not an adequate remedy. "The remedy at law must be a remedy on the law side of the Federal court, not a remedy in the state courts of South Dakota."

Chapter 3, Simkins "A Federal Equity Suit."

United States Life Insurance Co. v. Cable, 39 C. C. A. 264.

We quote from the case last cited:

"It must, we think be conceded that the bill in this case alleges facts constituting a good cause of action in equity for the cancellation of the policy, unless the plaintiff has a full and adequate remedy at law for the same cause. A suit at law has been commenced in the state court of Illinois to recover upon the policy, and, if it be an adequate remedy at law to turn the plaintiff over for litigation of its rights in the state court under the circumstances set out in the bill, then the United States Circuit Court in equity should disclaim jurisdiction. But there are two reasons why we think the remedy thus open to the plaintiff, of having its rights determined in an action at law, does not meet the requirements of the rule: The first is that the plaintiff being a citizen of New York, and the defendant a citizen of Illinois, the plaintiff, under the constitution, has the right to come to the Federal court for an adjudication. For a person entitled to litigate in the Federal court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights. * * * The remedy at law, in order to defeat the right to proceed in equity, should be full and adequate. It should be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. * * * In the federal courts it is well settled that the court will not turn a suitor in equity over to a remedy at law in the state courts, but only to the law side of the federal court."

The authorities cited in support of the contention that this suit was prematurely brought are easily distinguishable and their non-applicability is apparent. We find it difficult, in the manner in which the brief of appellants is prepared, to locate all the authorities on which they rely as to any particular point, and particularly as to the one now under consideration, but we call attention to the following cases cited by them which are typical and which clearly demonstrate the falsity of their position.

In *Western Union Telegraph Company v. Howe* (C. C. A.) 180 Fed. 44, there was no question of the jurisdiction of the taxing tribunal, and the court said: "The effect of

an injunction would be to take away from the tax commission all powers of discretion and judgment in arriving at a fixed and proper valuation.

The contention here and the question that this court must decide is whether or not the tribunal assuming to levy the tax has any power whatsoever.

In *Keokuk & Hamilton Bridge Company v. Salm*, 258 U. S. 122, 66 L. ed. 496, there was again no question as to the jurisdiction or power of the taxing tribunal, and the court said:

> *"Before the suit was begun it had been decided that the taxing statute was valid; that the property was subject to taxation;* that it was assessable as real estate, and that the assessment should be made as was done by the county assessor and not by the state board of equalization. *The amount of the tax was, therefore, the only matter in controversy."* (Italics are ours.)

In *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710, 67 L. ed. 1194, chiefly relied upon by appellants, there was again no question of jurisdiction of the taxing body. Plaintiff's property there in question was included within a taxing district by the state legislature. The court said:

> "It is well settled, however, that if a proposed improvement is one which the state has authority to make and pay for by assessments on property benefited, the legislature in the exercise of the taxing power has authority to determine by the statute imposing the tax what lands may be and are in fact benefited by the improvement; and if it does so, its determination is conclusive upon the owners and the courts and cannot be assailed under the Fourteenth Amendment *unless it is wholly unwarranted and a flagrant abuse and by its arbitrary character is mere confiscation of the particular property. * * * The legislature not only provided for the assessment of the lands within the district but specifically declared that the tunnel established was of especial benefit to such lands, and that the special benefits accruing to them are in excess of the cost of the tunnel and of the assessments provided for against them."* (Italics are ours.)

Again we find no question as to the jurisdiction or power of the taxing body.

Although appellee bases its contention that this suit was not prematurely brought principally upon the claim that appellant commissioners acted entirely without jurisdiction, we believe, even if we should concede for the sake of argument that the law is constitutional; that appellant

commissioners acted pursuant to its provisions up to the time of adopting the resolution fixing the apportionment of benefits; that jurisdiction was obtained to form the so-called drainage district, and that appellee's property if benefited might be included within the boundaries thereof, it would still follow that the commissioners did not in fact acquire jurisdiction over appellee and its property because the basis upon which they acted in attempting to affect appellee's property was so arbitrary, speculative and discriminatory as to deny due process of law.

The record in this case clearly discloses that appellant commissioners never at any time had before them any evidence showing or tending to show that appellee's property would be benefited at all by the construction of the so-called Drainage Ditch No. 1 and 2. This being true it must follow that their action in adopting the resolution apportioning the benefits, so far as appellee is concerned, was based upon no foundation in fact and was therefore merely arbitrary and furnishes no jurisdictional basis for requiring appellee to appear before the appellant board and show cause why such tentative assessment should not be made permanent.

IN CONCLUSION

Appellants rely chiefly upon the decision of the state court in the case of *Gilseth v. Risty*, 46 S. D. 374, 193 N. W. 132. The opinion in that case discloses the following situation: The constitutionality of the drainage laws was not in question; plaintiff was the owner of agricultural land within the drainage area of Drainage Ditches No. 1 and No. 2 as originally constructed; he was a party to the conferences alleged in this case to have taken place between the parties interested in the original ditch proceedings and which resulted in the filing of the petition "For the Re-establishment of Drainage Ditches No. 1 and 2;" he was present at the hearing upon that petition and took no appeal from the order of the commissioners purporting to establish the new drainage; his property, as we have said, was in the drainage area as originally established; he was one of the parties responsible for the original construction of the ditches in question and for their proper maintenance, and one of the parties for whose benefit appellant commissioners are attempting to assess appellee's property and that of others outside the original drainage area.

The court simply held that as to him, a party to the proceeding, the order establishing the drainage and subsequent orders from which he did not appeal became final. A careful analysis of the opinion discloses that the court finally based its conclusion upon questions of estoppel and

lack of equity in favor of plaintiff. After reciting the situation practically as above stated, it said: "Appellant having stood by and seen all the work performed without protest, and having received all the benefits that could result therefrom, should not now be permitted to escape payment for the same. The relief asked by the appellant is equitable in its nature but, because of the circumstances above shown, all the equities of the case are against appellant and in favor of the Board."

The situation in the instant case is obviously vastly different. No part of appellee's property was within the drainage area of Ditches No. 1 and No. 2, as originally established; appellee took no part in the proceedings here in question; it owns no agricultural land and has received and will receive no benefits from the work no matter what the purpose of it may have been. The plaintiff in the *Gilseth* case was one of the persons responsible for the existence of the ditches in the first instance, and, as the facts are disclosed by the state court's opinion, his property should have been assessed for the cost of the work done for the purpose of preventing the threatened damage, regardless of whether or not such work was done under the guise of a new drainage proceeding.

The state court has never had before it for determination the question as to whether or not the drainage statutes, in so far as they purport to authorize drainage proceeding for any purpose other than draining agricultural lands, are violative of the state constitution. In all cases in which the constitutionality of the statutes has been passed upon by that court, the only questions involved are those with reference to the drainage of agricultural lands, and the court very correctly held that such drainage might be provided for without the incorporation of drainage districts.

We confidently maintain not only that the conclusions of the district court upon which its judgment was based and those of the Circuit Court of Appeals expressed in affirmance thereof are fully sustained by the record but that the judgment appealed from is also sustained because the South Dakota drainage statutes are violative of the Fourteenth Amendment to the Constitution of the United States in the particulars hereinbefore urged.

Respectfully submitted,

F. G. DORETY,
St. Paul, Minnesota.

HAROLD E. JUDGE,
Sioux Falls, South Dakota.
Solicitors for Appellee.

SUPREME COURT OF THE UNITED STATES.

Nos. 95 to 100.—October Term, 1925.

95	A. G. Risty et al., as County Commissioners et al., Appellants, *vs.* Chicago, Rock Island & Pacific Railway Company.	Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.
96	A. G. Risty et al., as County Commissioners et al., Appellants, *vs.* Chicago, Milwaukee & St. Paul Railway Company.	
97	A. G. Risty et al., as County Commissioners et al., Appellants, *vs.* Chicago, St. Paul, Minneapolis & Omaha Railway Company.	
98	A. G. Risty et al., as County Commissioners et al., Appellants, *vs.* Northern States Power Company.	
99	A. G. Risty et al., as County Commissioners et al., Appellants, *vs.* City of Sioux Falls.	
100	A. G. Risty et al., as County Commissioners et al., Appellants, *vs.* Great Northern Railway Company.	

[March 1, 1926.]

Mr. Justice Stone delivered the opinion of the Court.

Separate suits were brought by the several appellees, in the United States District Court for South Dakota, to enjoin the County Commissioners, the Auditor and the Treasurer of Minnehaha County, South Dakota, from making any apportionment of benefits or assessments of costs affecting the property of the several appellees, for the construction or repair of a drainage system in the area within the county embraced in a project known as "Drainage Ditch No. 1 and 2".

In all of the suits, except No. 99, there was diversity of citizenship. In each it was alleged that an amount in excess of the jurisdictional requirement was in controversy, and in each it was alleged that proceedings purporting to be had under the South Dakota drainage statutes, with respect to the lands of the appellees, were unauthorized and void, and that those statutes and proceedings denied to appellees due process of law and the equal protection of the laws, in contravention of the Constitution of the United States. The suits were tried together and a decree was given for the plaintiffs by the District Court. 282 Fed. 364. The Circuit Court of Appeals for the Eighth Circuit, on appeal, affirmed the decree, 297 Fed. 710, and the cases are brought here on appeal. Jud. Code, §§ 128, 241, before Act of February 13, 1925. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508. Petition for certiorari was denied, 268 U. S. —.

The two courts below agree as to all material facts. We accordingly consider them here only so far as is needful to pass on questions of law. *United States* v. *State Investment Co.*, 264 U. S. 206, 211.

In 1907 the Board of County Commissioners of Minnehaha County, acting under the constitution and laws of the state, established "Drainage Ditch No. 1," extending from a point north of the city of Sioux Falls, thence south, and then to the east of Sioux Falls, three miles in all, to the Big Sioux River, into which it emptied. From the main ditch, a spur ditch was extended northwest to a point near the Big Sioux River, which from that point passes to the southwest and thence flows east, forming a loop about the principal part of the city of Sioux Falls, and finally flows through the city on its easterly side in a northeasterly direction.

In 1910 the Board of County Commissioners established drainage ditch No. 2, extending northerly from the north terminus of ditch No. 1 for a distance of twelve miles. The two ditches thus formed one continuous ditch, draining agricultural lands lying to the north of the city. Both ditches, and the assessment districts in connection with them, are conceded to have been lawfully established.

In 1916 the river broke through its banks into the area drained by the spur ditch, and uniting with the flood water flowing from the river through ditch No. 2, flooded the main ditch, No. 1, washed out and destroyed a spillway on ditch No. 1, and in its uncontrolled flow to the river caused extensive damage. There was danger that the river by its flow through the ditch would be diverted from its natural course, cutting off the city's water supply and causing other damage to the city and to individuals.

In August, 1916 a proceeding was instituted by petition to the Board of County Commissioners, purporting to be pursuant to statute, "to reconstruct and improve drainage ditches numbers one and two . . . and to pay therefor by an assessment upon the property, persons and corporations benefitted." This proceeding resulted in resolutions of the Commissioners purporting to establish "Drainage District No. 1 and 2" and providing for the construction of the proposed ditch. The location fixed for it however, was identical with that of the old ditches No. 1 and No. 2. The County Commissioners then caused the previously established ditch No. 1 and ditch No. 2 to be diked, cleaned out, and widened and deepened at certain points; the river to be straightened, and the spillway to be reconstructed so as to continue and safeguard the flow of water through ditch No. 1 and ditch No. 2. The cost was approximately $255,000.

Proceedings were then had by the County Commissioners for the assessment of benefits to defray the expenses thus incurred. The assessments of benefits were extended to areas not embraced in the assessment districts of ditch No. 1 and ditch No. 2, as previously established, and resulted in the assessment of benefits now complained of, made against all the appellees, some of whom did and some of whom did not own land within the area originally assessed for the establishment of ditch No. 1 and ditch No. 2. When the present suits were commenced, notice had been given to the appellees of a tentative assessment of benefits to their land, and of a proceeding to be had to equalize benefits before final assessments for the cost of construction.

Both courts below found that the drainage ditch No. 1 and 2 was not a new project, but was in fact identical with the previously established ditches No. 1 and No. 2; that no new or additional drainage was established, and that the only purpose of the proceedings was to provide for the maintenance and repair of the previously established ditches by assessing the cost on tracts not included within the area originally assessed for their construction. For these reasons, among others, both courts held that the proceedings had by the Board of County Commissioners to apportion and assess benefits on land outside the original drainage districts were unauthorized and void under the statutes of South Dakota. In this we think they were right.

Section 8458 of the South Dakota Revised Code of 1919 provides that the Board of County Commissioners "may establish and cause to be constructed any ditch or drain; may provide for the

straightening or enlargement of any water course or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse . . ."

Section 8476 provides that the powers conferred for establishing and constructing drains "shall also extend to and include the deepening and widening of any drains which have heretofore been or may hereafter be constructed", and that no proceedings shall be had under this section "except upon notice and the other procedure prescribed herein for the construction of drains."

The procedure prescribed by the South Dakota statutes embraces two distinct schemes or methods for carrying into effect the authority of the Board of County Commissioners. The one relates exclusively to the establishment and construction of proposed drainage; the other to assessments for further costs and maintenance of drainage already established. With reference to the establishment of proposed drainage, it is provided that the Board shall act only on petition of a landowner affected by the "proposed drainage" (§ 8459) and upon the filing of the petition the Board shall cause the "proposed route" of the drainage to be inspected and, if necessary, surveyed. (§ 8460.) It is required to hold a hearing on notice describing the proposed drainage (§ 8461), and after hearing the drainage "may be established" in accordance with the petition or the findings of the Board (§ 8462). After the establishment of the drainage, the Board is required to determine "the proportion of benefits of the proposed drainage", and to fix a time and place for equalization of benefits, on notice describing the land affected by the "proposed drainage"; and to state the proportion of benefits fixed for each tract, benefits being considered "such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains which may be subsequently constructed." (§ 8463.) Following equalization of benefits as prescribed, the Board is authorized to make an assessment against each tract, "in proportion to benefits as equalized", for the purpose of paying damages and the cost of establishment, which are stated to include all the expenses "incurred or to be incurred that in any way contributed or will contribute to the establishment or construction of the drainage." All assessments are made perpetual liens upon the tracts assessed. (§ 8464.)

The only provisions contained in the statutes for equalization of benefits are those found in the sections referred to, which have to do with the establishment of proposed drainage. By § 8477 all

drains, when constructed, are in charge of the Board of County Commissioners, who are made responsible for keeping them open and in repair. The statutory provisions which deal with assessments for further costs of construction and for maintenance are found in §§ 8467 and 8470, the material portions of which are printed in the margin.* It will be observed that there is no provision for the assessment or equalization of benefits in connection with the procedure provided in those sections for assessing for further costs of construction and maintenance. No such provision is required; for by the express terms of § 8467 the procedure for making assessments for the additional cost of construction is like that provided for the first assessment for construction (§ 8464) after the equalization of benefits has been had under § 8463; and by § 8470 assessments for maintenance are to be made "upon the land owners affected in the proportions determined for such drainage." Both sections clearly contemplate that assessments for additional construction and for maintenance are to be made upon those lands which are already embraced within the drainage project, and on which the proportion of benefits has been determined by equalization proceedings had after the establishment of the original project.

The statutes of South Dakota contain no provision for assessing the cost of reconstruction or maintenance of an existing drainage project except in the two sections last referred to, and they make

*§ 8467. Assessments for Further Costs. At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction . . . and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessment and certificates. . . . In any case, in the discretion of the board, several assessments may be made as the work progresses. . . .

§ 8470 For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof. . . . Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens . . . in all respects as original assessments. . . .

no provision for assessing such costs upon lands not embraced within or assessed in connection with the drainage as originally established. Whether the cost of construction work actually done on ditch No. 1 and ditch No. 2 and involved in this litigation be regarded as additional costs of construction or as cost of maintenance, or partly one and partly the other, there is no statutory authority for assessing that cost on lands not included in the original drainage district.

By § 8489 it is provided that "If any proceeding for the location, establishment or construction of any drain . . . has been . . . voluntarily abandoned . . . for any cause, the board of county commissioners may nevertheless . . . locate a drain . . . under the same or different names and in the same or different locations from those described in the . . . abandoned proceeding under the provisions of this article." But the original proceedings for the establishment and construction of ditch No. 1 and ditch No. 2 were not abandoned, and the proceedings had for levying the assessments now in question were not framed or conducted on that theory. They were consequently without authority in law and could not affect the rights of appellees.

While there are expressions in the opinion in *Gilseth* v. *Risty*, 46 S. D. 374, decided after these suits were begun, which, standing by themselves, might be regarded as supporting the view that the proceedings now in question were authorized by the statutes of South Dakota, the court clearly rested its decision upon other grounds. It is the duty of the federal courts, in suits brought in or removed to the districts courts, to decide for themselves all relevant questions of state law, and while they will follow the decisions of state courts as to the interpretation of a state statute, we do not think that the case of *Gilseth* v. *Risty, supra,* so clearly or decisively passed upon the question here involved as to control our decision. *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349; *Barber* v. *Pittsburgh, &c. Railway,* 166 U. S. 83, 99; and see *Edward Hines Yellow Pine Trustees* v. *Martin,* 268 U. S. —.

As our decision in these cases turns on the construction and application of the state law, we do not pass upon the constitutional questions raised. See *Bohler* v. *Calloway,* 267 U. S. 479, 489; *Chicago, G. W. Ry.* v. *Kendall,* 266 U. S. 94, 97-98. They are, however, questions of substance and sufficient to give the court juris-

diction to pass on the whole case. *Greene* v. *Louisville & Interurban R. R. Co., supra; Chicago, G. W. Ry.* v. *Kendall, supra; Bohler* v. *Calloway, supra.*

The objections to the exercise of equity jurisdiction in these cases require no extended comment. When the appellees filed their bills, the drainage project had been completed and construction warrants had been issued for the work done; benefits apportioned to the lands of the appellee had been tentatively fixed and notice of a hearing for the equalization of benefits had been given. The steps next in order after the hearing would have been the assessment of costs of construction and the filing of copies of the assessment with the County Treasurer, which would have established a lien on the property assessed. (§ 8464.) As the principal ground for appellees' suits was the invalidity of the whole proceeding and not merely inequality in apportionment of benefits, and as the effect of the proposed equalization would have been to bring the lands of appellees into the newly established drainage district and subject them to future assessments for construction costs and for maintenance, the threatened injury was imminent and the suits were not premature. The assessment, if made, would have established a lien on the appellees' property which would be a cloud on title—to say nothing of the fact that the effect of the pending proceeding would have been to subject their property to future assessments; hence the case was one for equitable relief unless there was a plain and adequate remedy at law. *Ohio Tax Cases*, 232 U. S. 576; *Shaffer* v. *Carter*, 252 U. S. 37, 46; *Chicago, B. & Q. R. R.* v. *Osborne*, 265 U. S. 14. The remedy by appeal to the state court under § 8469 does not appear to be co-extensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. *Smyth* v. *Ames*, 169 U. S. 466; *Chicago, B. & Q. R. R. Co.* v. *Osborne, supra.*

It does not appear that the state law affords a remedy by payment of the assessment and suit to recover it back, which, if it exists, can be availed of in the federal courts, *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, 486, or that such remedy, if available, would not entail a multiplicity of suits. It is not suggested that § 6826 of the state code, which permits suits to recover taxes and forbids injunctions to restrain their collection, has any application

to assessments for drainage. In *Gilseth* v. *Risty, supra,* the Supreme Court of the state evidently did not deem that section applicable as it did not rely upon it in denying relief. The legal remedy under the state law being uncertain, the federal court has jurisdiction in equity to enjoin the assessment. *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288.

The objection that it was not shown that these cases involve the jurisdictional amount is unsubstantial. The court below found that the amount due on outstanding construction warrants was approximately $300,000 and that the tentative apportionment of benefits, if undisturbed, would result in assessments for amounts ranging from $6,000 to $50,000 against the lands of the appellees. As the substantial basis of the suits was want of jurisdiction in the Board of County Commissioners to make the apportionment and assessment, we think the jurisdictional amount was necessarily involved.

Appellees are not estopped to seek the relief which was granted because of any relations which they may have had to the proceedings or to the construction work which had been carried on before notice of the tentative apportionment of benefits. The decrees of the District Court, which remain undisturbed, enjoin the assessments and further proceedings only so far as they affect lands lying outside of the original assessment areas of ditch No. 1 and ditch No. 2. As none of the appellees could have had any notice of the proposal to assess lands lying outside of these areas, until the published notice of the apportionment of benefits, their previous conduct cannot estop them from seeking the relief granted. Other objections were made to the decrees below, but they are not of sufficient gravity to require notice here.

There is no diversity of citizenship in No. 99, the appellee in that case being the city of Sioux Falls, a South Dakota municipal corporation. Nor was any substantial federal question raised by the bill of complaint in that suit. The power of the state and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment. *Trenton* v. *New Jersey,* 262 U. S. 182; and see *Pawhuska* v. *Pawhuska Oil Co.,* 250 U. S. 394. The decree in that case must therefore be reversed, and the cause remanded with directions to dismiss the plaintiff's bill.

No. 99 reversed and remanded.
Nos. 95, 96, 97, 98 and 100 affirmed.